MITCHELL | HAMLINE School of Law

Mitchell Hamline Law Journal of Public Policy and Practice

Volume 42 | Issue 1 Article 2

2021

Social Justice and the Supreme Court: Lessons from the Past

Vicki Lens

SOCIAL JUSTICE AND THE SUPREME COURT: LESSONS FROM THE PAST

Vicki Lens

TABLE OF CONTENTS

INTRODUCTION 49

PART I: THE EARLY YEARS 52

A. Expanding Educational Opportunity: The Quest to End Segregation 53

B. "Right to Live": Advocating for the Economic Security of the Poor 57

C. Policing the Police: A Step Back 66

PART II. THE LONG SLIDE DOWN 70

A. Integration and the Era of Retrenchment 71

B. Ignoring the Poor 76

C. The Road to Racial Profiling 77

PART III. LESSONS FROM THE PAST 82

PART IV. STRATEGIES FOR A TUMULTUOUS TIME 87

ABSTRACT

This article revisits over sixty years of Supreme Court decisions that have affected the poor and racial minorities, using a novel approach that considers the synergistic relationship between different doctrinal areas rather than focusing on one area. Specifically, I appraise the Supreme Court's doctrinal contributions from 1953 to the present across three foundational elements of social justice on behalf of the poor and people of color: the school integration cases under the Equal Protection Clause, a series of cases under the Fourth Amendment which sanctioned the police tactic of stop-and-frisk, and attempts to secure economic security for the poor through the Constitution under the Due Process and Equal Protection Clauses.

I find that the Warren Court, which is widely considered the most progressive court in U.S. history, failed in several respects. It damaged, rather than abetted, the cause of economic justice. And what it gave to Black children in terms of educational opportunity, it took away from their future selves, their adult community members, and their caretakers by facilitating the mass incarceration of Black men through the practice of stop- and-frisk. I also show how the conservative Courts that followed diluted any gains from this era. I conclude that the Supreme Court has been more foe than friend, and has abandoned, rather than protected, the poor and racial minorities. I draw from this history lessons for the present, including strategies for advancing social justice in the current political and legal environment.

INTRODUCTION

U.S. Supreme Court decisions permeate virtually every aspect of social welfare policy. Because many policy disputes become legal questions, the Court has an inescapable and crucial role in making social policy.[1] Social, political, and economic questions, such as how society should distribute resources, what the state owes its citizens and what citizens owe each other, and how far the state can intervene in citizens' lives are grist for the Court. Historically, social movements campaigning for civil rights, gender equality, or economic security have viewed the judiciary, and especially the Supreme Court, as a potential and essential ally.[2] Under the Trump Administration, where long-standing governing norms and practices have been upended,[3] the

[1] For a discussion and examples of the Supreme Court's policy making role, *see* ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS (1989); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN THE COURTS BRING ABOUT SOCIAL CHANGE? (1991); LAWRENCE BAUM, THE SUPREME COURT (9th ed. 2007); ROBERT G. MCCLOSKEY & SANFORD LEVINSON, THE AMERICAN SUPREME COURT (2016).
[2] ROSENBERG, *supra* note 1.
[3] *See* STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE (2018); CASS R. SUNSTEIN, CAN IT HAPPEN HERE? AUTHORITARIANISM IN AMERICA (2018).

judiciary is often viewed as a bulwark against discriminatory executive actions and against a rollback of rights.

This, then, is an opportune time to revisit and assess whether the Supreme Court has been a force for social justice, or an obstacle to it. The most common method of conducting this analysis typically focuses on a specific social movement or cause, such as civil rights or women's rights, analyzing seminal cases, usually Supreme Court cases, and the real-world effects of the cases over time.[4] Disenfranchised groups, however, suffer from multiple intersecting disadvantages that cumulatively effect a community and people's well-being. The Court's concern is the case before it—not other ways in which citizens may be disadvantaged. Its allocation of rights can be episodic and irregular; rights granted by the Court in one area may be diminished by its erosion of rights elsewhere, creating a zero-sum game in the pursuit of social justice. Thus, rather than using the common method of analysis, I appraise the Supreme Court's doctrinal contributions across multiple social justice claims to attain a more complete picture of gains and losses.

I focus on three foundational elements of social justice on behalf of the poor and people of color that have been addressed by the Supreme Court: equal educational opportunities, intrusive policing practices that primarily target minority neighborhoods, and economic security. More specifically, I focus on the following distinct bodies of Supreme Court constitutional jurisprudence: the school integration cases, which expanded opportunities for people of color

[4] For the paradigmatic example of this approach *see* Rosenberg, *supra* note 1 (analyzing civil rights, abortion and women's rights as distinct case studies). For other examples, *see* ELIZABETH BUSSIERE, (DIS)ENTITLING THE POOR (1997) (analyzing the Warren Court's doctrinal approach to welfare benefits); MICHAEL KLARMAN, FROM JIM CROW TO CIVIL RIGHTS (2004) (examining the Supreme Court's decisions on racial equality); Lewis R. Katz, Terry v Ohio *at Thirty-Five: A Revisionist View*, 74 MISS. L.J. 423 (2004) (hereinafter Lewis R. Katz) (examining the Supreme Court's decisions on stop-and-frisk). For the long-running debate of the role of the Court as an instigator and driver of social change, *see* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (2004); Malcolm M. Feely, *Hollow Hopes, Flypaper, and Metaphors*, 17 L. & SOC. INQUIRY 745 (1992).

through the integration of public schools under the Equal Protection Clause;[5] a series of cases under the Fourth Amendment which sanctioned the police tactic of stop-and–frisk [6], thus contributing to the phenomenon of mass incarceration; and attempts to secure economic security for the poor through the Constitution, including the Due Process[7] and Equal Protection Clauses, which largely failed.

I chose these three areas, out of the many social justice issues addressed by the Court over the last half century, for several reasons. First, all three are entwined—racial equality requires both opportunities for an equal education and economic security, and mass incarceration within disadvantaged communities can interfere with the attainment of both. Thus, together they demonstrate the synergistic consequences of Supreme Court decisions. Second, two of these issues—education and economic security—were the specific focus of planned litigation campaigns connected to social movements. These movements, including the Civil Rights and Welfare Rights Movements, were aimed at the Warren Court, considered the most progressive court in U.S. history. Thus, they generated a body of precedential case law that has reverberated into the present and is key to understanding the Court's evolving response to social justice claims.

In Part I, I focus on the seminal and significant cases in each area. While these cases were decided over half a century ago, they laid the foundation for the decades—and disputes—to

[5] U.S. CONST. art. XIV. The Equal Protection Clause is from the text of the Fourteenth Amendment. This clause took effect in 1868, provides "nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."
[6] U.S. CONST. art IV. The Fourth Amendment protects people from unreasonable searches and seizures by the government.
[7] A Due Process Clause is found in both the Fifth and Fourteenth Amendments to the United States Constitution, which prohibits arbitrary deprivation of life, liberty, or property by the government except as authorized by law. U.S. CONST. arts V, XIV.

come. In Part II, I consider the durability of these decisions by examining how the Court interpreted its own precedents over time. I cross doctrinal boundaries throughout to illustrate the synergistic relationship between Court decisions. I conclude that over time, and across doctrinal areas, the Supreme Court has been more foe than friend, and has abandoned, rather than protected, the poor and racial minorities.

PART I: THE EARLY YEARS

Brown v. Board of Education, decided in 1954, ended over a hundred years of segregated public school in the United States.[8] It is regularly characterized as a landmark case that revolutionized race relations in the United States. It also marked the beginning of a new strategy for securing social justice—engaging the judiciary. Sensing that change was more likely in the courts than in Congress, the National Association for the Advancement of Colored People (NAACP) formulated a litigation strategy to overturn the legacy of Jim Crow.[9] The NAACP's strategy of planned litigation campaigns was emulated by other groups, including legal advocates for the poor, resulting in a plethora of cases during this era aimed at advancing social justice.[10]

The 1960s is thus often remembered as a singular time in America, and the Court that reigned then—the Warren Court, led by Chief Justice Earl Warren from 1953 to 1969—is widely considered an activist liberal court that expanded constitutional rights in unprecedented ways.[11] Its reign coincided with a particularly fervent decade for social movements, including the struggle for racial and gender equality, welfare rights, and opposition to the Vietnam War.[12]

[8] Brown v. Bd. of Educ., 347 U.S. 483 (1954).
[9] Mark Tushnet, *Some Legacies of* Brown v. Board of Education, 90 VA. L. REV. 1693 (2004).
[10] MARTHA DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT 1960–1973 (1993).
[11] William Eskridge, *Civil Rights Legislation in the 1990s: Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613 (1991).
[12] Mimi Abramovitz, *in* THE DYNAMICS OF SOCIAL WELFARE POLICY (Joel Blau ed., 2004); FELICIA KORNBLUH, THE BATTLE FOR WELFARE RIGHTS (2007).

Thus, the Warren Court left its imprint on many of the most controversial issues of the day, achieving a near mythic status in the annals of social change and the Court.[13] As discussed below, from a doctrinal perspective across the three areas studied, this view is less justified. While the Court's integration decisions worked in tandem with the goals of the Civil Rights Movement, it diluted the protections of the Fourth Amendment and exponentially increased the likelihood of the mass incarceration of people of color by sanctioning the police tactic of stop-and-frisk without probable cause. While Court decisions provided welfare recipients some protection from arbitrary and exclusionary government action in the implementation of welfare programs, the Court rebuffed attempts to secure a Constitutional right to welfare and economic security, thus abetting, rather than confronting, the problem of economic inequality.

A. Expanding Educational Opportunity: The Quest to End Segregation

The NAACP's strategy was to first whittle away at segregation in less visible educational locales, specifically graduate schools, and to render the legal doctrine of "separate but equal" too costly to enforce by requiring states to make Black educational institutions equal to white institutions. Thus, by the time *Brown v. Board of Education* appeared on the Supreme Court's docket, earlier Courts had already decided three cases that signaled the coming end of public school segregation. In *Gaines v. Canada*,[14] the Court upheld the separate but equal doctrine, but required a white law school to admit lack students because there was no comparable school for them. In *Sweatt v. Painter*,[15] the Court required states to spend equal sums of money on their

[13] While Chief Justice Warren retired in 1969, it was not until President Nixon's appointment of four new justices by 1972 that conservatives achieved a majority coalition of justices. Their power and influence can also take years to emerge in any one area, as the Court's docket is controlled by the cases that come before it. *See* Jack M. Balkin, *What* Brown *Teaches Us About Constitutional Theory*, 90 VA. L. REV. 1537 (2004). Thus, Part I includes this transitional period and ends in 1972.

[14] Gaines v. Canada, 305 U.S. 337 (1938).

[15] Sweatt v. Painter, 339 U.S. 629 (1950).

lack law schools and white law schools, making it prohibitively expensive to continue segregating the law schools. In *McLaurin v. Oklahoma State Regents*,[16] the Court prohibited the states from segregating lack doctoral students in the lunchrooms and classrooms of a previously all-white institution.

At the time *Brown* was decided, over half the states either prohibited segregation in public schools or did not address it, while twenty-one states, mostly in the South, either required or allowed it.[17] Unusual for the Court, *Brown* took two years to decide, and was argued twice. The delay was attributed to the issue at stake, and the appointment of new Chief Justice Earl Warren in the midst of the case, who delayed the decision until all nine Justices agreed to rule against segregation.[18]

Brown was a short decision—a mere 10 pages. It was also short on practicalities, telling states to end segregation, but not how to do it—a process which would take many years, and many more court decisions, to untangle. It read at times more like a sermon than a legal opinion. One of its most notable and memorable passages was its admonition that "To separate [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[19] It also included a paean to public education, declaring it as "perhaps the most important function of state and local governments," "the very foundation of good citizenship" and a "right which must be made available to all on equal terms."[20]

[16] McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950).
[17] ROSENBERG, *supra* note 1, at 42.
[18] *Id.* at 42–43.
[19] *Id.* at 494.
[20] *Id.* at 493.

A year later, the Court spoke again in *Brown II*, this time to the practicalities and speed of integration.[21] Its admonition that integration must take place "with all deliberate speed" became the watchword of integration efforts, an acknowledgment that it must happen, but not instantly.[22] The Court itself noted that schools needed time to revamp school districts, facilities, personnel, and transportation systems. By assigning the lower federal courts to oversee these efforts, the Court recognized the complexity of integration, while embroiling hundreds of courts in these decisions over the ensuing decades.[23]

Resistance to *Brown* by the states was swift, and came in different forms, from outright defiance to more insidious legislative and other maneuvers to avoid integration. The best-known example of the former was Arkansas's deployment of National Guard troops to physically block Black students from entering Central High School in Little Rock. Legislative fixes included varying degrees of subterfuge, such as shutting down public schools and paying for white students to attend private schools staffed by their former public school teachers,[24] or creating seemingly race-neutral "Freedom of Choice" plans which resulted in white students choosing only white schools, and most Black students remaining in Black schools.

The Warren Court spoke strongly, and with one voice, in response to these attempts. When the Little Rock School Board asked for a two and a half year delay in integration efforts because of the hostility, the Court in *Cooper v. Aaron* emphatically said no, convening a special summer session before the next school year, where it made clear that *Brown* was "the supreme law of the land"[25] and that it could not be "nullified openly and directly by state legislators or

[21] Brown v. Bd. of Educ. II, 349 U.S. 294 (1955).
[22] *Id.* at 301.
[23] For a critical view of the implementation of *Brown*, *see* KLARMAN, *supra* note 4.
[24] ROBERT R. SMITH, THEY CLOSED THEIR SCHOOLS (1965).
[25] Cooper v. Aaron, 358 U.S. 1, 18 (1958).

state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation."[26] In *Griffin v. County School Board*, decided ten years after *Brown*, the Court held that subsidizing white-only private schools after closing down public schools violated the Equal Protection Clause.[27] The Court also expressed its frustration at the slow pace of integration, admonishing that "the time for mere 'deliberate speed' has run out."[28] Four years later, in *Green v. County School Board*, the Court expanded *Brown* even further. It commanded schools to not only stop discriminating, but to actively take steps to integrate. It thus not only invalidated a school board's Freedom of Choice plan but ordered it to take affirmative steps "in which racial discrimination would be eliminated root and branch."[29]

In *Swann v. Charlotte-Mecklenburg Board of Education*, decided in 1971, the Court responded to the hundreds of cases flooding the courts by providing more specific guidance on achieving integration.[30] While rejecting racial balancing, which would require schools to reflect the overall racial composition of the system, it sanctioned the use of race-conscious remedies by allowing the use of "mathematical [racial] ratios" as a "starting point."[31] It also struck at the root cause of segregation—residential housing patterns—by sanctioning busing, and the gerrymandering of "administratively awkward, inconvenient, and even bizarre" school districts and attendance zones.[32]

In sum, the decade and a half after *Brown* saw a muscular and assertive Court determined to counter resistance and remove roadblocks to integration. *Brown* also galvanized the Civil

[26] *Id.* at 17.
[27] Griffin v. Cnty. Sch. Bd., 377 U.S. 218 (1964).
[28] *Id.* at 234.
[29] Green v. Cnty. Sch. Bd., 391 U.S. 430, 438 (1968).
[30] Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).
[31] *Id.* at 25.
[32] *Id.* at 28.

Rights movement. The Montgomery Bus Boycott began a year after the decision. Demonstrations and protests spread throughout the South, including in Birmingham and Selma.[33] In 1964 the Civil Rights Act and Voting Rights Act were passed, "plac[ing] Congress's seal of approval on *Brown* and the project of desegregation, and [making] civil rights a national commitment of the executive and legislative branches of the federal government."[34]

B. "Right to Live": Advocating for the Economic Security of the Poor

Civil Rights and economic security are inextricably linked, as disadvantaged groups not only vie for better educational opportunities as a route out of poverty, but also economic security in their everyday lives.[35] The decades before and after *Brown* was a precarious time for the poor and especially poor Blacks. Mechanization eliminated many agriculture jobs in the South, triggering the Great Migration as Blacks migrated to the North, and primarily urban areas, in search of jobs.[36] However, a shortage of jobs resulted in a simmering and increasingly more visible poor, and Black populations in the inner cities.[37]

While public assistance programs such as Aid to Dependent Children (ADC) could provide needed aid to poor Black women, historically, they were excluded from such programs.[38] When ADC was enacted, it was aimed at primarily white widows, second class citizens to male workers, but perceived to be more deserving than Black women.[39] Morality

[33] HENRY HAMPTON & STEVE FAYER, EDS., VOICES OF FREEDOM: AN ORAL HISTORY OF THE CIVIL RIGHTS MOVEMENT FROM THE 1950S THROUGH THE 1980S xix (1990).
[34] Balkin, *supra* note 13, at 1548.
[35] Davis, *supra* note 10, at 121.
[36] FRANCES FOX PIVEN & RICHARD CLOWARD, REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE (1993).
[37] *Id.*
[38] MIMI ABRAMOVITZ, REGULATING THE LIVES OF WOMEN: SOCIAL WELFARE POLICY FROM COLONIAL TIMES TO THE PRESENT (1996).
[39] *Id.*

tests, imposed through law and enforced by bureaucrats, had excluded many Black women through "suitable home provisions."[40] Their exclusion from ADC also ensured a steady stream of workers in exploitative and low-paying agriculture and domestic jobs, particularly in the South.[41]

This time, though, shifting attitudes towards the poor sparked a more receptive response. Books such as Michael Harrington's, *The Other America: Poverty in the United States*, highlighted a growing disparity between the "haves" and the "have-nots" and punctured societal assumptions about prosperity in America.[42] The existence of poverty amid so much affluence became less politically and socially acceptable, with the country awakening to the fact that the poor had not disappeared during the post-World War II economic boom.

As with racial inequality, the response came from below and above. In 1964 President Johnson launched his War on Poverty with a plethora of programs.[43] In 1966, the National Welfare Rights Organization (NWRO) was born, a grassroots organization consisting of mostly African American women advocating for increased and accessible welfare benefits and overall economic security.[44] As with the fight for racial equality, this movement had a legal avatar in the form of the Legal Services Program, one of the federally funded War on Poverty programs. In contrast to existing Legal Aid programs for the poor, Legal Services Programs thought bigger, seeking to change the system through high impact litigation.[45] Inspired by the NAACP's litigation campaign, Edward Sparer, first an attorney at the legal services program Mobilization for Youth and then the Director of Columbia University, laid out a strategy for using the courts

[40] LINDA GORDON, PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE (1994).
[41] Abramovitz, *supra*, note 38.
[42] MICHAEL HARRINGTON, THE OTHER AMERICA: POVERTY IN THE UNITED STATES (1962).
[43] Kornbluh, *supra* note 12.
[44] *Id.*
[45] Davis, *supra* note 10, at 33.

to create a "bill of rights" for welfare recipients. [46] This strategy was rooted in the Constitution and would establish a constitutional right to economic security, or as Sparer called it, a "right to live."[47] The legal campaign had both short- and long-term goals. The long-term goal was to transform welfare from a categorical entitlement to a universal and constitutional right.[48] The short-term goal was to end the exclusion of certain groups from Aid to Families with Dependent Children (AFDC).[49]

The campaign's first case—*King v. Smith*—was aimed at the categorical exclusions that hit Black women and their children the hardest—the "suitable home" provisions.[50] The plaintiff, Sylvester Smith, was a Black woman with four children living in Alabama on a waitress's salary and welfare aid.[51] Occasionally, a married man with nine children of his own would visit her on weekends and stay over.[52] She was cut off from aid under a state rule initiated by Governor George Wallace, which denied aid to women who "cohabitated" with a man, which meant having "frequent or continuing" sexual relations at the women's home, or elsewhere.[53] Alabama viewed these men as "substitute parents" whether or not they lived with or provided support for the children, or were legally obligated to do so.[54] Ninety percent of the children who were cut off

[46] Davis, *supra* note 10, at 36.
[47] *Id*. at 81.
[48] *Id.* at 104.
[49] William E. Forbath, *Constitutional Welfare Rights: A History, Critique and Reconstruction*, 69 FORDHAM L. REV. 1821 (2001). The ADC program became AFDC in 1950 when parents, and not just their children, were allowed to receive benefits. *Id.* at 1839.
[50] King v. Smith, 392 U.S. 309 (1968).
[51] *Id.* at 315
[52] *Id*.
[53] *Id.* at 314.
[54] *Id*. at 313–314.

from aid were Black.[55] Eighteen other states had similar rules, affecting about 500,000 children.[56]

The case was part of the Center on Social Welfare Policy and Law's Southern strategy for constitutionalizing welfare, which focused on the South because of its deep poverty, but also because Southern federal judges had been exposed to the use of the courts for social change through successful civil rights litigation.[57] It was also part of the Center's strategy to link poverty and civil rights together, much as Martin Luther King's Poor People's Campaign expanded civil rights to include "the right to a decent livelihood."[58]

While there was a constitutional argument to be made—that the rule resulted in a denial of equal protection—the winning argument was a statutory one, namely that the AFDC program was designed to help all eligible needy children, not just some of them. In a unanimous opinion, the Court invalidated the rule. As the Court summed it up, "destitute children who are legally fatherless cannot be flatly denied federally funded assistance on the transparent fiction that they have a substitute father."[59]

The Court also acknowledged the long history of "morality tests" from ADC's inception, including a preference for "the worthy poor" in public welfare programs, while "others were thought unworthy because of their supposed incapacity for 'moral regeneration.'"[60] It portrayed such views as both outdated and contrary to Congressional action, as expressed in the Fleming

[55] Forbath, *supra* note 49, at 1859.
[56] Davis, *supra* note 10, at 68.
[57] *Id.* at 60.
[58] Forbath, *supra* note 49, at 1842.
[59] King, 392 U.S. at 334.
[60] *Id*. at 320.

Rule, adopted in 1961, which prohibited the denial of aid to needy children based on the conditions of the home, and other legislation which provided funds for rehabilitating families rather than denying them aid.[61] This more enlightened view had its limits, though. While "rehabilitation" as an alternative to punishing children for the sins of the parent was, according to the Court, "more sophisticated and enlightened than the worthy person concept of earlier times,"[62] the Court and Congress's emphasis on rehabilitation suggested that such women still carried the taint of immorality. Nonetheless, *King* put 20,000 children back on the rolls in Alabama, and 500,000 more in the eighteen other states with similar rules.[63]

The next case—*Shapiro v. Thompson*—aimed to end another vestige of the Poor Laws: residency requirements for AFDC, which required newcomers to a state to wait at least one year before applying for benefits.[64] Such laws "carried forward a centuries-old tradition of localities 'warning out' wayfaring paupers."[65] Thirty-nine states and the District of Columbia had such residency laws, claiming that it preserved fiscal funds and deterred the poor from migrating to higher benefit states.[66]

The Court applied the strictest of constitutional standards under the Equal Protection Clause, requiring a compelling state interest because at stake was the fundamental constitutional right to travel "throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement."[67] It found no such compelling

[61] PIVEN & CLOWARD, *supra* note 36, at 140.
[62] *Id*. at 324–25.
[63] Davis, *supra* note 10, at 68.
[64] Shapiro v. Thompson, 394 U.S. 618 (1969).
[65] Forbath, *supra* note 49, at 1862.
[66] Davis, *supra* note 10, at 77.
[67] *Shapiro*, 394 U.S. at 629.

interest and to the contrary defended a welfare recipient's right to seek out higher benefits:

> [W]e do not perceive why a mother who is seeking to make a new life for herself and her children should be regarded as less deserving because she considers, among others factors, the level of a State's public assistance. Surely such a mother is no less deserving than a mother who moves into a particular State in order to take advantage of its better educational facilities.[68]

The practical reach of the decision was a redistribution to the poor of $125–$175 million a year, a significant sum.[69] The decision also raised advocates' hopes that the Court was inching towards the prize: a "constitutional right to live."[70]

The next case on the Supreme Court docket involving welfare rights was *Goldberg v. Kelly*, decided in 1970.[71] On its face, *Kelly* was about procedure, not substance; about the right to a fair process when aid was denied. The right to an administrative fair hearing to challenge a cut-off of aid was included in the implementing statute of AFDC in 1935.[72] Hearings, though, often came too late—after the termination of benefits—forcing participants to live without benefits for months at a time while waiting for the administrative machinery to correct a potentially erroneous denial. The question for the Court in *Kelly* was thus the timing of fair hearings, and whether the failure to provide a hearing before the termination of benefits violated the Due Process Clause of the Fourteenth Amendment.[73]

The path to finding a right to a pre-termination hearing was through a reconceptualization of welfare, from a "mere charity" to a protected entitlement.[74] At the time, welfare was viewed

[68] *Id.* at 632.
[69] Davis, *supra* note 10, at 80.
[70] *Id.*
[71] Goldberg v. Kelly, 397 U.S. 254 (1970).
[72] *Id.* at 256.
[73] *Id.* at 255.
[74] *Id.* at 265.

as the former, but the Court in *Kelly* altered that status, holding that AFDC was a statutory entitlement that required due process in the form of a pre-termination hearing before it could be discontinued.[75]

A more enlightened view of poverty was also on full display in *Kelly*, which mirrored the changing tenor toward poverty in the 1960s. The Court expressed sympathy for the poor, recognizing the "brutal need" of welfare recipients who were deprived of "the very means by which to live while he waits" and whose situation "becomes immediately desperate."[76] In a stirring passage, the Court also absolved the poor for their poverty, lauding welfare as a means for promoting American values of social inclusion and equality as embodied in the Constitution:

> From its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders. We have come to recognize that forces not within the control of the poor contribute to their poverty. . . . Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community. At the same time, welfare guards against the societal malaise that may flow from a widespread sense of unjustified frustration and insecurity. Public assistance, then, is not mere charity, but a means to "promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity."[77]

The hope that the procedural rights announced in *Kelly* would morph into a substantive constitutional right to welfare was dashed that same term in *Dandridge v. Williams*.[78] *Dandridge* involved Maryland's maximum grant regulation, which capped the amount of public assistance a family could receive based on the size of their family, leaving large families with less assistance per family member than smaller families. The plaintiffs argued that the regulation discriminated

[75] *Id.* at 264.
[76] *Id.*
[77] *Id.* at 264–65.
[78] Dandridge v. Williams, 397 U.S. 471 (1970).

against large families in violation of the Equal Protection Clause.

Under Equal Protection jurisprudence, it is crucial to know who is asking for protection. Certain groups are considered "suspect classes" because they have been historically discriminated against, are politically powerless, and possess immutable characteristics difficult or impossible to change.[79] Any laws affecting them are subject to the strictest of scrutiny. *Brown* and the integration cases succeeded in part because race and ethnicity fall within this category. Laws that involve fundamental rights are also subject to strict scrutiny. However, the promising language contained in *Shapiro*, and then *Kelly*, that raised hopes that the Court would "bring the nation's poor into the 'inner circle' of judicially protected classes," was dispelled in *Dandridge*.[80]

The Court refused to consider the poor as a suspect class, and hence applied the least stringent standard of scrutiny, rational basis, stating that:

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality."[81]

The Court readily accepted the state's rationales for the regulation, including that it helped preserve fiscal funds, acted as an incentive for work and a disincentive for childbearing, and helped distinguish between working families and the welfare poor, all of which played into stereotypes of the poor as lazy, promiscuous, and different than other Americans. Notably

[79] Brown v. Bd. of Educ., 347 U.S. 483 (1954).
[80] Forbath, *supra* note 49, at 1869.
[81] *Dandridge*, 397 U.S. at 485.

missing was the inclusive, empathetic, and aspirational language of *Kelly* that elevated rather than denigrated the poor.

In its closing language, the Court also made clear the limits of Constitutional protection for the poor, writing that "The Constitution may impose certain procedural safeguards upon systems of welfare administration . . . But the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients."[82] As the Court further explained, welfare programs "are not the business of this Court."[83] Advocates felt the loss sharply. As described by Sparer:

> A contrary result in *Dandridge* would have permitted wholesale challenges to the barriers created by state legislatures and Congress to deny welfare assistance to needy groups of people . . . . The Equal Protection Clause would have become the main vehicle for establishing a constitutional guarantee of human life. In these and other ways, affirmative judicial scrutiny to guarantee equal protection could have led to a different America.[84]

A subsequent attempt to link welfare more explicitly to race also fell flat. In *Jefferson v. Hackney*, decided in 1972, the plaintiffs argued that the lesser benefits given to AFDC recipients in Texas —who were comprised mostly of blacks and latinos—as compared to other "whiter" programs for the aged and blind, was evidence of racial discrimination.[85] The Court rejected this argument, saying the statistical evidence was insufficient to demonstrate discrimination and that based on *Dandridge*, all that was required was a rational basis for the distinction, which it easily

[82] *Id.* at 487.
[83] *Id.*
[84] As cited by Davis, *supra* note 10, at 133.
[85] Jefferson v. Hackney, 406 U.S. 535 (1972).

found by citing the difference between aged and disabled persons, and the poor in general.

In *Wyman v. James*, decided in 1971, the Court traveled full circle, taking away rather than expanding the rights of the poor.[86] It allowed the receipt of welfare benefits to be contingent upon a visit and search of a recipient's home, holding that the Fourth Amendment did not apply, thus treating the homes of welfare recipients different from other citizens whose homes could not be breached without a warrant.[87] The Court also returned to the language of charity rather than entitlements, comparing the receipt of benefits to the receipt of private charity, the givers of which "rightly expects" to know how their money is being spent.[88]

In short, over a space of only a few years, a welfare rights campaign that began with the promise of *King*, *Kelly* and *Shapiro* quickly fizzled, and advocates abandoned their long-term goal of establishing a constitutional right to live. Thus, while the Court spoke forcibly about education as an equalizing force for Black children, it failed to address the connection between race, education and poverty.[89] And while the Court was willing to impose wholesale changes on the public school system, it was not willing to do the same for the public welfare system. By refusing to recognize not only a right to education but a right to live, it read the poor out of the Constitution.

C. Policing the Police: A Step Back

While *Brown* and its early progeny represent one route out of poverty through educational opportunities, the criminal justice system represents a route into it. Initially, the

[86] Wyman v. James, 400 U.S. 309 (1971).
[87] *Id.* at 326.
[88] *Id.* at 319.
[89] *See* RISA GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS (2007) (Goluboff faults the NAACP at the time of the *Brown* litigation for failing to capture the simultaneous experience of racial discrimination and economic stress experienced by many Black families.).

Warren Court appeared on track to instituting major constitutional reforms of the criminal justice system, as evidenced by its 1961 decision in *Mapp v. Ohio* announcing the exclusionary rule and its 1966 *Miranda v. Arizona* ruling imposing the Miranda warning.[90] But it quickly reversed course, constitutionalizing a form of aggressive policing—stop-and-frisk—that over the ensuing decades helped pave the way for mass incarceration.[91]

During the 1960s the surge in crime in poor inner-city neighborhoods coupled with urban riots led to more aggressive police tactics. Field interrogations were a particular flash point, with several states, including New York, adopting more aggressive "stop-and-frisk" policies giving police enhanced authority to stop and question persons for investigative purposes, without probable cause.[92] The Kerner Commission Report, issued in 1967, documented the growing friction between police and "minority" communities, noting that "abusive treatment of minority groups and the poor continue to occur," and that "[m]any established police policies . . . alienate the community and have no legal basis."[93] It found that field interrogations in particular were "a principal problem in police community relations" "as more police departments adopt 'aggressive patrol' in which officers are encouraged routinely to stop and question persons on the street who are unknown to them, who are suspicious, or whose purpose for being abroad is not readily evident."[94]

[90] Mapp v. Ohio, 367 U.S. 643 (1961). The exclusionary rule provides that evidence obtained in violation of the Fourth Amendment cannot be admitted in a criminal trial. Miranda v. Arizona, 384 U.S. 436 (1966). The Miranda warning requires police to inform citizens of their right to remain silent and consult with an attorney when in police custody.
[91] Terry v. Ohio, 392 U.S. 1 (1968).
[92] Tracey Maclin, Terry v. Ohio's *Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN'S L. REV. 1271, 1279–80 (1998).
[93] PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 178 (1967).
[94] *Id*. at 184.

Unlike civil rights and welfare rights, challenging such tactics did not rely on the creation of new rights. It relied instead upon asserting long-standing rights under the Fourth Amendment, which requires probable cause before a person is seized and searched. While such cases were supported by social justice organizations, including the National Association for the Advancement of Colored People (NAACP) and the American Civil Liberties Union (ACLU), they were litigated on the defense, on behalf of individuals found guilty of a crime. By the time the seminal "stop-and-frisk" case, *Terry v. Ohio*,[95] reached the Supreme Court, the rightward shift in American politics had begun, as reflected in the "law and order" rhetoric of politicians such as Nixon and Goldwater.[96] *Brown* also put the Court at the epicenter of the civil rights backlash, and it became a lightning rod on the 1968 Presidential campaign trail, with "Impeach Earl Warren" signs littering highways across the country.[97] It was in this context that the Warren Court decided *Terry* in 1968.

The facts of *Terry* were a straightforward rendering of the practice, replete with Black citizens as its target. A veteran plain-clothes police detective observed two Black men walking up and down a block, talking and taking turns looking into a store window, and then talking to a third man. The officer believed they were casing the store for a robbery but did not have enough evidence to constitute probable cause that a crime was about to be committed. He stopped and frisked the men regardless, finding guns on two of them. John Terry, who was charged with carrying concealed weapons, sued to have his conviction overturned, alleging the stop and frisk violated the Fourth Amendment.[98]

[95] *Terry*, 392 U.S. 1.
[96] Bruce Western & Christopher Wildeman, *The Black Family and Mass Incarceration*, 621 ANNALS AM. ACAD. POL'Y. & SOC. SCI. 221 (2009).
[97] Lewis R. Katz, *supra* note 4.
[98] *Terry*, 392 U.S. at 7.

The Court recognized that a "stop-and-frisk" was indeed a search and seizure under the Fourth Amendment but noted that the Constitution only forbids *unreasonable* search and seizures. According to the Court, an investigatory stop, which it described as a crime-fighting tool that allowed police to investigate and prevent crimes, fell on the reasonable side of the line, and hence required less than probable cause. The more watered-down standard, which later came to be known as "reasonable suspicion," could not be based on mere hunches or good faith on the part of the arresting officer, but on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion."[99] Once a stop was allowed, where the officer had reason to suspect a weapon might be found, a frisk was allowed to protect the officer's and the public's safety. According to the Court, the detective met the new test because he reasonably suspected a burglary was about to be committed. The frisk, or pat-down to look for a gun, was constitutional because "stick-ups" involve guns, and the men may have been armed and dangerous.[100]

The Court did not ignore the effects of stop-and-frisks on minority communities, citing the Kerner Commission's description of the poor relations between minority communities and the police, and the use of stop-and-frisk as an instrument of humiliation to control the streets.[101] But in weighing that against the perceived needs of law enforcement, the latter won out. The lone dissenting justice recognized the implications. Allowing an officer to seize and search someone without probable cause, Justice Douglas argued, was a "long step down the totalitarian path" amounting to nothing less than a rewrite of the Constitution, with the court succumbing to

[99] *Id.* at 21.
[100] *Id.* at 6.
[101] *Id.*

"powerful hydraulic pressures" to "water down constitutional guarantees and give the police an upper hand."[102] The racial implications were also apparent: despite recognizing an extensive record of police abuses, the Court left the Black community without any safeguards against them. As Lewis Katz, a scholar of the Fourth Amendment, described the decision:

> The Court virtually obliterated the Fourth Amendment protections which it had imposed on the states, at least for inner city young black men, exposing them, without legal protection, to the same police harassment that black men had historically faced in their dealings with police dating to the time of slavery.[103]

In sum, while the Warren Court was responsible for one of the greatest leaps forward in America's race relations—the end of segregation—it also ensured that obstacles to equality would remain. It helped pave the way for the caracal state, rerouting many of the country's Black citizens to the criminal justice system and the long-term consequences of incarceration, including curtailed opportunities for work and education, and the disruption of families and communities.[104]

PART II. THE LONG SLIDE DOWN

In the decades following the Warren Court, subsequent Courts unraveled its biggest social justice advance from the 1960s—school integration.[105] It refused to recognize structural and societal barriers to full integration of the schools, and reinterpreted the Equal Protection Clause to protect white interests rather than ameliorating the long history of discrimination

[102] *Id.* at 38–39 (Douglas, J., dissenting).
[103] Lewis R. Katz, *supra* note 4, at 457.
[104] Western & Wildeman, *supra* note 96.
[105] Since the Warren Court, every subsequent Chief Justice has been a conservative as follows: the (Warren) Burger Court (1969–1986); the (William) Rehnquist Court (1986–2005), and the (John) Roberts Court (2005–present). For a discussion of the reasons for the conservative tilt to the Court, *see* Devins and Baum, n.173.

against Blacks.[106] The Court also continued to facilitate the phenomenon of mass incarceration by further diluting the protections of the Fourth Amendment. As to poverty and economic justice, the Court had little opportunity to rule on such issues because of a dearth of cases, as legal advocates did not perceive the Court as a receptive forum.[107]

A. Integration and the Era of Retrenchment

With the election of Nixon in 1968 the social justice fervor of the 1960s was broken, and the backlash began. Nixon's road to winning was through the South, and through "disaffected whites who disliked both the disorder of the 1960s and the loss of white privilege."[108] The Court, to these whites, was out of control, especially in its integration decisions, forcing the busing of white children, and otherwise quickening the pace of desegregation. The Court's response was swift and fractious. Nixon's appointment of four Supreme Court Justices between 1968 and 1971 destroyed the unanimity the Court had achieved on integration and ushered in a period retrenchment.[109]

The first sign of a fracturing Court came in *Milliken v. Bradley*, where the majority (by a 5–4 vote) overturned an integration plan by the city of Detroit that included the white suburban schools that surrounded the predominantly Black city school system.[110] The contrast with *Swann*—which recognized the causal link between societal discrimination, including housing segregation, and school segregation—could not have been starker, with the majority making a distinction between de jure discrimination (discriminatory acts that violate the law) and de facto

[106] An important exception occurred in higher education where the Court in *Grutter v. Bollinger*, 539 U.S. 306 (2003) recognized diversity as a compelling government interest and upheld the right of a law school to use race as a "plus" factor in an individualized admission process.
[107] Davis, *supra* note 10, at 135.
[108] Balkin, *supra* note 13, at 1555.
[109] These include Warren Burger (1969), Harry Blackmun & Lewis Powell (both in 1970), and William Rehnquist (1971).
[110] Milliken v. Bradley, 418 U.S. 717 (1974).

segregation (segregation caused by societal discrimination). It held that the latter could not serve as a basis for a remedy, and hence invalidated Detroit's plan even though including the suburban schools was the only way to achieve integration.[111] The dissent sounded the alarm, noting that:

> After [twenty] years of small, often difficult steps toward that great end [of integration], the Court today takes a giant step backwards . . . guaranteeing that Negro children in Detroit will receive the same separate and inherently unequal education in the future as they have been unconstitutionally afforded in the past.[112]

In another blow to integration, the Court held that affluent white districts did not have to share their wealth and resources with poorly funded, predominantly Black districts. In *San Antonio Independent School District v. Rodriguez*, the Court held that there was no constitutional right to education, and hence the Equal Protection Clause did not require schools that relied on property taxes to correct for inequities across geographic locations.[113] The Court's decision, in essence, severed the connection between poverty and equal educational opportunities. Had the plaintiffs prevailed, poor school districts across the Nation would have been transformed by the infusion of tax funds.

While the Court remained mostly silent on integration through the 1980s, in the 1990s it further denuded integration efforts by ending federal court supervision over school districts, even when integration had not been achieved. Thus, in *Board of Education of Oklahoma City Public Schools v. Dowell*, the Court refused to reopen a desegregation decree when the school board curtailed the busing of black students from inner city homes to outlying white areas, resulting in over half of the elementary schools reverting to either 90% black or white.[114] Similarly, in *Freeman v. Pitts*, the Court held that district courts had the authority to relinquish supervision

[111] *Id.*
[112] *Id.* at 782 (Marshall, J., with whom Douglas, J., Brennan, J., and White, J. join, dissenting).
[113] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).
[114] Bd. of Educ. of Oklahoma City Pub. Sch. v. Dowell, 498 US 237 (1991).

and control over school districts incrementally, and before full compliance was achieved in every area.[115]

Missouri v. Jenkins continued the Court's deceleration of integration by further narrowing the permissible remedies for improving the quality of schools for Black children.[116] *Jenkins* involved the Kansas City, Missouri, school district, which, like many urban areas, was surrounded by white suburban schools. Because *Milliken* prevented the school district from incorporating these schools in their integration plan, the District Court ordered an alternative remedy: make the inner-city schools better, and make them more attractive to white students. It ordered the conversion of every senior high and middle school, and one-half of the elementary schools into magnet schools that would provide greater educational opportunities to Black students, while also attracting white students from the surrounding areas, reversing "white flight" from the city to the suburbs.[117] The district court also ordered substantial financial investments, including capital improvements because school buildings had "literally rotted," salary increases for teachers and staff, and additional spending on remedial programs.[118]

The Court, in a 5–4 decision, rejected all these remedies, portraying the magnet schools as a subterfuge, or a way to "accomplish indirectly what it admittedly lacks the remedial authority to mandate directly: the inter district transfer of students."[119] Since the suburban schools had not engaged in de jure discrimination, consistent with *Milliken*, they could not be part of the remedy, even if that remedy left predominantly white schools undisturbed. Spending more money to improve Kansas City's schools was also verboten, because, according to the

[115] Freeman v. Pitts, 503 U.S. 467 (1992).
[116] Missouri v. Jenkins, 515 U.S. 70 (1995).
[117] Jenkins v. Missouri, 672 F. Supp. 400 (1987).
[118] *Id.* at 411.
[119] Jenkins, 515 U.S. at 92.

Court, like housing segregation, the low test scores of its students and generally inferior quality of its education were not related to segregation, and hence could not be remedied through an integration decree.[120]

Twelve years later, in *PICS v. Seattle* (2007), the Court solidified its transformation of the meaning of *Brown*, using it to protect white children affected by integration plans.[121] Past cases virtually always involved disputes between Black plaintiffs and school boards arguing over the extent of integration efforts. In contrast, *PICS* was brought by a group of white parents on behalf of their children, who were excluded from the schools of their choice. *PICS* involved two different school systems, Seattle and Louisville. Both had a long history of segregation, with Seattle entering into voluntary agreements to end segregation, and Louisville court-ordered to do so under a decree that had been dissolved years earlier. Both cities used a "racial tie-breaker" to integrate schools. Seattle, specifically, in the past had relied on mandatory busing and race-based student assignments. It had then refined its plan so that high school students would more likely get their first choice of school, but employed a racial tie-breaker for schools that were more popular than others, and hence were oversubscribed. Louisville's plan denied student transfer requests from their assigned schools if a request caused the school population to fall outside the racial guidelines, which was set at between 15% and 50% for all schools.[122]

The case revealed a still-fractured Supreme Court on integration, but with a conservative plurality prevailing. The plurality extended the distinction it made between de jure and de facto discrimination in *Milliken*, where predominantly white schools were excluded from integration remedies because any segregation was the result of unintentional societal discrimination. Since

[120] *Id.*
[121] Parents Involved in Cmty. Sch. v. Seattle, 551 U.S. 701 (2007).
[122] *Id.*

Seattle was never subjected to a desegregation order and Louisville's had been dissolved in 2000, the plurality contended that under *Brown* race conscious remedies could not be used to achieve integration. In other words, schools could not voluntarily choose to use race conscious remedies to achieve integration unless *at that moment* they were intentionally discriminating.[123] *Brown*, the plurality argued, mandated such a result because it prohibited discrimination based on race, which meant any race, or in the oft quoted words of Chief Justice Roberts: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[124]

The consequence of the plurality's holding was game-changing; as the dissent pointed out, there were hundreds of voluntary integration plans, and a myriad of state and federal laws and executive orders that relied on racial classifications. A "longstanding and unbroken line of legal authority," the dissent argued, allows schools to use race conscious remedies to achieve integration, even if they are not compelled to do so.[125] According to the dissenters, the very meaning and holding of *Brown* was being eviscerated and history revised:

> There is a cruel irony in the Chief Justice's reliance on our decision in *Brown* v. *Board of Education.* The first sentence in the concluding paragraph of his opinion states: "Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin." . . . The Chief Justice fails to note that it was only black schoolchildren who were so ordered; indeed, the history books do not tell stories of white children struggling to attend black schools. In this and other ways, the Chief Justice rewrites the history of one of this Court's most important decisions.[126]

> Segregation policies did not simply tell schoolchildren 'where they could and could not go to school based on the color of their skin,' they perpetuated a caste system rooted in the institutions of slavery and eighty years of legalized subordination. The lesson of history is not that efforts to continue racial segregation are constitutionally indistinguishable from efforts to achieve racial integration. Indeed, it is a cruel distortion of history to compare Topeka, Kansas, in the 1950's to Louisville and

[123] *Id.*
[124] *Id.* at 748.
[125] *Id.* at 823 (Breyer, J., dissenting).
[126] *Id.* 798–99 (Stevens, J., dissenting).

> Seattle in the modern day—to equate the plight of Linda Brown (who was ordered to attend a Jim Crow school) to the circumstances of Joshua McDonald (whose request to transfer to a school closer to home was initially declined).[127]

In sum, *PICS*, decided more than fifty years after *Brown*, signified its denouement. It was a decision with both practical and symbolic messages: that school boards no longer need to strive for integration, and that discrimination has no color despite the country's long and continuing history proving otherwise.

B. Ignoring the Poor

The short-lived resurrection of the poor that characterized the 1960s ended in the 1970s, with a languishing economy and a return to scapegoating rather than helping the poor.[128] The War on Poverty transformed into a War on Welfare, with welfare programs increasingly viewed as a cause for dependency rather its cure.[129] The Court's 1976 decision in *Matthews v. Eldridge*, which denied a pre-termination hearing to a father whose Social Security Disability benefits had been cut off, was emblematic of this trend.[130] On its face, there was little to distinguish *Kelly* from the plaintiff in *Eldridge*—an impoverished father in "brutal need" whose home was foreclosed, furniture repossessed and whose family of six was sleeping in one bed. The Court did though, claiming that because he had other resources to turn to (the welfare system), "the disabled worker's need is likely to be less than that of a welfare recipient." [131] The Court also cited the fiscal and administrative burden of imposing pre-termination hearings, in contrast to *Kelly*, where the needs of the poor were paramount.[132]

---

[127] *Id.* at 867–68 (Breyer, J., dissenting).
[128] Kornbluh, *supra* note 12.
[129] MICHAEL B. KATZ, IN THE SHADOW OF THE POORHOUSE (1996).
[130] Matthews v. Eldridge, 424 U.S. 319 (1976).
[131] *Id.* at 342.
[132] In response, Congress passed legislation providing for pre-termination hearings.

The ensuing decades bought little relief for the poor in the Court, which was no longer viewed by poverty lawyers and advocates as a potential ally.[133] Judicial activism was replaced with Congressional activism, not to protect the poor, but to dismantle the welfare system with the sixty-year-old AFDC program replaced in 1996 with Temporary Assistance for Needy Families (TANF) a time limited and work based welfare program.[134] The Court's rare contribution to the public debate over public assistance was to contribute to its demise. An example is its decision in 2012 in *National Federation of Independent Business v. Sebelius* which invalidated the expansion of Medicaid, a primary source of health insurance for the poor, under the Patient Protection and Affordable Care Act, also known as Obamacare.[135] Overall, the Court's record is perhaps most notable not only for how it failed the poor, but how it helped corporations and the wealthy, thus insuring the poor's continued economic insecurity.[136]

C. The Road to Racial Profiling

The Court's rightward turn in the decade after the 1960s was also reflected in its continued support for aggressive police tactics. Unlike *Brown*, the Warren Court's *Terry* decision represented a step backward, taking away rights. But it also left ample room for interpretation that could either expand or limit its reach. The "reasonable suspicion" standard, like many legal tests, is subjective and vague, and open to interpretation by subsequent court decisions and police officers on the beat. It also depends on a police officer's expertise and judgment, both of which may be affected by stereotypes and bias, especially in the precincts of minority neighborhoods.

[133] Davis, *supra* note 10.
[134] Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified as amended in scattered sections of 42 U.S.C).
[135] Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).
[136] For a more thorough accounting of this record, which is beyond the scope of this paper, *see* ERWIN CHEMERINSKY, THE CASE AGAINST THE SUPREME COURT (2014); and ADAM COHEN, SUPREME INEQUALITY: THE SUPREME COURT'S FIFTY-YEAR BATTLE FOR A MORE UNJUST AMERICA (2020).

In *Adams v. Williams* the Court, in essence, invited the use of such stereotypes, by allowing police officers to consider a "high-crime" neighborhood as a relevant factor under the "reasonable suspicion" test.[137] In short, it allowed location to serve as a "proxy for race or ethnicity", as poor Black neighborhoods are likely to have high crime rates.[138]

In *Williams*, the Court also allowed an informant's tip to substitute for an officer's personal observations. In *Williams,* an individual sitting in his car in a "high-crime area" at 2:15 a.m. was carrying narcotics and had a gun at his waist.[139] The police officer, acting solely on the informant's tip, tapped on the car window and asked Williams to open the door. When Williams rolled down the window the officer reached into the car and removed a gun from Williams' waistband. The officer did not ask Williams if he had a permit for the gun even though the state where the arrest occurred allowed persons to carry guns with a permit. He arrested Williams for unlawful possession of the pistol, and then conducted a search incident to the arrest, finding heroin and other weapons in the car.

The Court held that both the stop—based on what it described as a reliable tip—and the frisk were lawful, the latter because the officer "had ample reason to fear for his safety" given it was the middle of the night in a high-crime area.[140] By allowing an informant's tip—which alone would not suffice as probable cause—to serve as a basis for a stop and frisk, along with the locale, the Court widened its lacuna into the Fourth Amendment. By sanctioning the frisk, the Court also demonstrated how easy it was to transform a search for safety into a search for drugs.

[137] Adams v. Williams, 407 U.S. 143 (1972).
[138] Lewis R. Katz, *supra* note 4, at 493.
[139] *Adams*, 407 U.S. at 144–45.
[140] *Id.* at 148.

The dissent recognized the enormity and consequences of the decision. Justice Brennan expressed the "gravest hesitancy in extending [*Terry*] to crimes like the possession of narcotics" prophetically suggesting that frisks would become the object of any stop, rather than a safety measure.[141] In an unusual expression of public regret, Justice Marshall, who voted with the *Terry* majority, suggested he erred in thinking *Terry* was not tantamount to a "watering down of rights" and concluded with his own prescient observation, that "[t]oday's decision invokes the specter of a society in which innocent citizens may be stopped, searched, and arrested at the whim of police officers who have only the slightest suspicion of improper conduct."[142]

Over the next several decades, the Court's expansion of *Terry* continued, leaving increasing numbers of citizen and police encounters outside the protection of the Fourth Amendment by describing most such encounters as consensual, and hence not protected by the Fourth Amendment, and by expanding *Terry* to most venues where such encounters occur, including motor vehicle stops and public transportation.

Consensual encounters, according to the Court, must pass the "free to leave" test, or whether "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."[143] The Court's application of this standard, however, ignores how most people react to police encounters. Most citizens do not know they can refuse to talk to a police officer who approaches them on the street, and the police are not required to tell them. Police are also trained in "sweet talk," a psychological technique that

[141] *Id.* at 151 (Brennan, J., dissenting).
[142] *Id.* at 162 (Marshall, J., with whom Douglas, J. joins, dissenting).
[143] United States v. Mendenhall, 446 U.S. 544, 554 (1980).

begins with "innocuous sounding questions," escalates into more personal ones, and ends with a citizen willing to submit to police authority.[144]

The Court's decision in *Florida v. Bostic* illustrates the real-world flaws in the "free to leave" test.[145] In *Bostic* the Court held that a passenger in the close confines of a bus, with two police officers in bright green "raid" jackets with a sheriff's insignia and touting guns, was free to leave when being questioned. "Working the buses," as it was called, was a police tactic in the so-called War on Drugs where police boarded buses as they were about to leave and asking random passengers, without any reasonable or individualized suspicion, to inspect their tickets and permission to search their luggage.[146] Several lower courts had declared the tactic unconstitutional because passengers would not feel free to leave the bus, especially as a police officer stood over them, blocking the aisle. The Supreme Court disagreed, reasoning that buses were public venues where police officers were free to approach any citizens, and citizens were free to leave. Any passenger's "freedom of movement," the Court explained, "was restricted by a factor independent of police conduct—i.e. by his being a passenger on a bus."[147] The dissent had a more realistic appraisal of the circumstances. Refusing to answer questions as armed officers blocked the aisle would give any passenger pause.[148] Moreover, it "would only arouse the officers' suspicions and intensify their interrogation."[149] And getting off the bus would leave them stranded, mid-journey, in a bus terminal far from home.[150]

[144] David A. Harris, *"Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 574–75 (1997).
[145] Florida v. Bostick, 501 U.S. 429 (1991).
[146] *Id.* at 444.
[147] *Id.* at 436.
[148] *Id.*
[149] *Id.* at 447 (Marshall, J., dissenting).
[150] *Id.*

The Court's next stop was the highways and roads, where the vast majority of people are likely to interact with a police officer. Once again, the Court displayed a disregard for the real-life experiences of citizens, and the consequences of eroding Fourth Amendment protections, this time during routine traffic violation stops. Thus, in *Pennsylvania v. Mimms* the Court allowed the police to perform a frisk on a driver who was stopped for driving with an expired license plate.[151] The frisk occurred when the driver stepped out of the car at the officer's request, who then noticed a large bulge under his jacket, which a frisk revealed was a gun. According to the Court asking a driver to exit a car was a *de minimis* restriction of the driver's personal liberty, and hence a reasonable seizure under the Fourth Amendment. Once the bulge was observed, a search was warranted because of safety concerns.

In *Whren v. United States*, decided 20 years later in 1996, the Court held that traffic violations, despite their ubiquity and often triviality, provide the police with probable cause to detain a motorist—even if the violation was a deliberate pretext to stop drivers who the officer suspected were engaged in a drug-related crime for which the officer did not have probable cause, or even reasonable suspicion, that a crime was being committed.[152] A year later, in *Maryland v. Wilson*, the Court expanded the holding to passengers, who, like drivers, could be ordered out of the car, even though they did not commit a traffic violation.[153] Finally, in *Heien v. North Carolina*, the Court held that even when a police officer is mistaken that a traffic violation has occurred, reasonable suspicion still exists to support a stop-and-frisk.[154]

[151] Pennsylvania v. Mimms, 434 U.S. 106 (1977).
[152] Whren v. United States, 517 U.S. 806 (1996).
[153] Maryland v. Wilson, 519 U.S. 408 (1997).
[154] Heien v. North Carolina, 574 U.S. 54 (2014).

The cumulative effect of these cases provides police officers with an almost unfettered power to patrol streets, buses and highways—stopping and frisking pedestrians, bus riders, drivers and passengers, without the restraining force of the Fourth Amendment. The consequences fall most heavily on people of color, who are more likely to be stopped and frisked whether walking the streets or driving in cars, than their white counterparts.[155]

PART III. LESSONS FROM THE PAST

Historically, the judiciary, and especially the Supreme Court, has been viewed as a potential partner, if not an instigator, of social justice and social change. The Warren Court was regarded as an exemplar, as an era when the Constitution's foundational values were fulfilled, especially on behalf of the politically powerless. When viewed through the intersection of race, poverty, and criminal justice, the picture is murkier.

To be sure, decisions such as *Brown* and its immediate progeny were both groundbreaking and brave, with the Court "shift[ing] the terrain of discussion, placing the Constitution and the Supreme Court behind the cause of racial equality."[156] But what the Warren Court gave to Black children in terms of educational opportunity, it took away from their future selves, and their adult community members and caretakers, disproportionate numbers of which have been incarcerated. The United States has one of the largest prison populations in the world, with over two million people incarcerated,[157] and with Black males eight times more likely to be

[155] Harris, *supra* note 144; MATTHEW R. DUROSE ET AL., U.S. DEP'T OF JUST., CONTACTS BETWEEN THE POLICE AND THE PUBLIC (2005).
[156] Balkin, *supra* note 13, at 1544.
[157] DANIELLE KAEBLE & MARY COWHIG, U.S. DEP'T OF JUST., CORRECTIONAL POPULATIONS IN THE UNITED STATES 2016 1 (2018), https://www.bjs.gov/content/pub/pdf/cpus16.pdf.

incarcerated than white males.[158] While there are many reasons for the phenomenon of mass incarceration, *Terry* stops facilitated its growth.

The Court also harmed rather than abetted the cause of economic justice. Poverty and inequality are at the root of many social problems, and as the Court itself recognized in *Kelly*, it can result in social and civic exclusion.[159] But the Court refused to grant the poor the same protective status it granted racial minorities and women or to find a right to live under the Constitution. This failure reverberated down the decades; when Congress abolished AFDC in 1996, there was no constitutional basis for challenging it. Had *Dandridge* resulted in the highest level of scrutiny—strict scrutiny—for laws that affected the poor, TANF's harshest provisions, including time limits, work sanctions, and the unequal distribution of benefits across the country would have been susceptible to constitutional attack.[160]

How subsequent Courts interpreted the Warren Court precedents also exposed the fragility of that era's victories. As Balkin observes, "[c]ases like *Brown* get their meaning from how they are understood and used in the years after they are decided. . . . And the more important and iconic the case, the more it gets re-read and rewritten by events."[161] Later Supreme Court decisions turned *Brown* on its head, using it to thwart integration efforts and to protect white children, rather than Back children. Today white and Black children are less likely to sit together in a classroom than in the 1970s—a consequence, at least in part, of the Court's backtracking on remedies that addressed de facto discrimination, including housing segregation

[158] Western & Wildeman, *supra* note 96, at 228.
[159] Goldberg v. Kelly, 397 U.S. 254 (1970).
[160] COHEN, *supra* note 136, at 75.
[161] Balkin, *supra* note 13, at 1567.

patterns.[162]

The notion the Court does not regularly function as a stable force and facilitator of social justice is not surprising. As has often been observed, the Court reflects the dominant tenor and ideology of its time.[163] While regional elite views may vary, as a national institution, the Court ultimately reflects the views and ideologies of the national elites.[164] During the era of *Brown*, national elite opinion, in contrast to southern regional elites, supported integration and the ending of separate but equal.[165] Similarly, the 1960s saw a change in tone about the poor, which was reflected in the first trio of welfare-related decisions (*King*, *Shapiro* and *Kelly*).[166] Like the 1960s themselves, however, those sentiments did not endure. *Brown* was eviscerated by the more conservative courts to come, against a backdrop of a ruling conservative majority and a backlash against integration. And while the early welfare cases showed some promise, they never ripened into a full-blown right to welfare. Like the short-lived War on Poverty, the more radical changes a right to welfare would require—whether in labor markets or the meaning of the Constitution—were never embraced by the ruling national elite. The thwarting of stop-and-frisk appeared never to have a chance, with the Court embracing the ethos of "law and order" the same year Nixon was elected, and then never reversing course through the decades.

The lesson learned by critically appraising these cases is a lesson of caution when considering the usefulness of the Supreme Court for securing social justice. That the Warren Court—the most progressive Court of any era—was limited in the reach and durability of its

[162] *See* GARY ORFIELD & CHUNGMEI LEE, *BROWN* AT 50: KING'S DREAM OR *PLESSY'S* NIGHTMARE? (The Civ. Rts. Project: Harv. Univ., Jan. 2004), https://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/brown-at-50-king2019s-dream-or-plessy2019s-nightmare/orfield-brown-50-2004.pdf.
[163] *See* DAHL, *supra* note 1; MCCLOSKEY & LEVINSON, *supra* note 1.
[164] Balkin, *supra* note 13, at 1538.
[165] *Id.* at 1554.
[166] King v. Smith 392 U.S. 309 (1968); Shapiro v. Thompson, 394 U.S. 618 (1969); Goldberg v. Kelly, 397 U.S. 254 (1970).

decisions illustrates the constraints of judicial intervention. Similarly, that rights granted in one era were diminished or even reversed by the Court through later cases, as *Brown* was, demonstrates the impermanence of even groundbreaking decisions. Cases like *Brown*, and the welfare rights cases, also demonstrate the inadequacy of the Court as an arbiter of distributive justice or social rights. Unlike rights-based cases that simply strike down unconstitutional laws, integrating schools or insuring economic security and the fair distribution of government benefits and resources are complex and expensive endeavors that require the input of many state, federal, and local actors.[167] That the Court ultimately pulled back from *Brown* and applied only minimal scrutiny when determining the constitutionality of social welfare programs, suggests an unwillingness to insert itself in these battles.[168] Had it done so, inequality's harsh edges—while not ameliorated—may have been softened.

To be sure, there are causes and cases that suggest a more powerful role for the Court. A current example is the evolution of gay rights from *Bowers v. Hardwick*,[169] which upheld the right of states to prosecute gay individuals for engaging in sodomy, to *Lawrence v. Texas*,[170] which reversed *Bowers*, to *Obergefell v. Hodges*,[171] which held that same-sex couples have a right to marry under the Fourteenth Amendment Due Process and Equal Protection Clauses. But for every *Obergefell*, there may be a *Planned Parenthood v. Casey*, which set back the cause of

[167] Balkin, *supra* note 13 at 1569.
[168] *Id.*
[169] Bowers v. Hardwick, 478 U.S. 186 (1986).
[170] Lawrence v. Texas, 539 U.S. 558 (2003).
[171] Obergefell v. Hodges, 576 U.S. 644 (2015).

reproductive rights by limiting the reach of *Roe v. Wade*, much as *Milliken* did for *Brown* and the cause of integration.[172]

The current political climate suggests that such losses may increase. The hyperpolarization and partisanship that has infected the legislative branch has also infiltrated the Supreme Court through the selection and appointment of justices. As Devins and Baum found in their empirical study of the Court, the contemporary Court is the first Court to be divided sharply along partisan lines, reflecting the "polarization in government and in the broader political elite."[173] That polarization, though, is not equally divided between liberals and conservatives. Since the 1980s, the litmus test for Republican nominees has been considerably stronger than for Democratic nominees, with a conservative legal movement, the Federalist Society, providing an alternative forum for vetting and recommending nominees.[174] The result has been a sharp turn to the right for candidates nominated during a Republican administration, culminating in a more conservative court that is arguably no longer in sync with national majority views.[175]

[172] Planned Parenthood v. Casey, 505 U.S. 833 (1992) (heightening the state's role in regulating abortions by imposing the "substantial burden" rather than an unfettered right to an abortion during the first trimester under *Roe*); Roe v. Wade, 410 U.S. 113 (1973); Milliken v. Bradley, 418 U.S. 717 (1974); Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[173] Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 2016 SUP. CT. REV. 301, 308 (2017).

[174] The two Justices appointed by President Trump, Neal Gorsuch and Brett Kavanaugh, reflect this dynamic, with the latter appointment decisively changing the balance of the Court, as Kavanaugh replaced the more centrist Justice Kennedy. In contrast, Democratic Presidents chose more centrist nominees, who are no more liberal than nominees from decades past. For an extensive empirical analysis of this dynamic, and the different ways in which contemporary Democratic and Republican Presidents have chosen nominees, see *id*. While a similar dynamic is occurring in the appointment process for lower court federal judges, the effect is more diffused both because of the sheer number of justices and the higher rates of turn-over. However, this may change as the current Administration continues to fill vacancies.

[175] Devins & Baum, *supra* note 173. See also Lynn Adelman, *The Roberts Court's Assault on Democracy*, 14 HARV. L.& POL'Y REV. 131 (2019) for a discussion of the Roberts Court and its conservative bent.

PART IV. STRATEGIES FOR A TUMULTUOUS TIME

The current legal and political environment suggests several strategic paths for social justice advocates. In the past, when the Supreme Court failed to find a constitutional right to welfare, advocates chose other forums and less ambitious goals such as turning to state courts and state constitutions to obtain benefits for distinct groups. Thus, for example, in New York and elsewhere, advocates won a series of battles establishing a right to shelter and more generous housing allowances under state welfare programs.[176] Similarly, state courts were instrumental in reducing the use of stop-and-frisk practices based on racial profiling.[177] Thus, in the present political and legal environment, state (and local) forums, including state courts, should be leveraged.

Further, while the Supreme Court may not be receptive to social justice or rights-based claims in the current political environment,[178] the lower federal courts may. As Judge Gertner has observed, in the past the lower federal courts were more likely to "duck, avoid, or evade" politically tinged cases implicating civil rights and other contentious political issues, especially when "the system is working" and such disputes could be resolved through "the political

[176] VICKI LENS, POOR JUSTICE: HOW THE POOR FARE IN THE COURTS 112–28 (2016).
[177] *See, e.g.*, Floyd v. City of New York, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (holding New York City's stop-and-frisk practices violated the Equal Protection Clause in a class action lawsuit).
[178] While it is too early to write the history of the Court and the Trump Administration, the first case to be decided by the Supreme Court during Trump's tenure—the travel ban cases—suggests the Supreme Court may not serve as a guardian of rights during the current era. The travel ban cases challenged one of the first official acts of the Trump Administration, the issuance of an Executive Order banning nationals of seven Muslim Majority nations from entry into the United States in the name of national security. The Executive Order triggered a cascade of litigation, with legal advocates arguing that it violated both the First Amendment because it was motivated by religious animus against Muslims and the Immigration and Nationality Act, which prohibits discrimination in the issuance of visas. The Court upheld the ban, after eleven lower federal courts had stopped it. Vicki Lens, *The Travel Ban Cases: A Tale of Two Governments*, 29 B.U. PUB. INT. L.J. 67 (2019). Unlike the lower courts, the Supreme Court, in a 5–4 decision that split along partisan lines, failed to consider the religious animus underlying the ban, including the President's rhetoric, and its irregular and unconventional origin and implementation. *Trump v. Hawaii*, 138 S. Ct. 2392 (2018). Instead, the Court depicted the President's behavior and actions as well within the bounds of governing norms and procedures and a proper exercise of executive power.

process."[179] As this is no longer the case in the current political climate, the lower federal courts have become a key site for overturning many of the current Administration's actions in areas as diverse as immigration, voting rights, social welfare, and the environment.[180] Thus, litigation campaigns should be directed to these courts, but strategically targeted to those circuits receptive to rights-based claims in the past. To be sure, some of these cases will ultimately be decided, and perhaps reversed by the Supreme Court, especially those involving contentious political issues. Yet their durability, as in the past, may be affected by subsequent events, as the contest over their meaning and application moves into the political sphere.

Moreover, court cases—won or lost—can also serve different functions, including extra-legal ones. Litigation teaches advocates how to articulate and construct their arguments, while also expanding notions of what is right and just.[181] The symbolic power of a court decision can also galvanize public opinion, mobilize advocates and other citizens, and spur legislative or other actions.[182] Both *Roe* and *Brown* are examples where backlash spurred anti-abortion and anti-integration efforts. In the case of *Roe*, the legal loss for anti-choice advocates became legislative wins as states passed increasingly restrictive abortion regulations. Progressives have also benefited from this dynamic. As one example, the Lilly Ledbetter Fair Pay Act,[183] extending the

[179] Nancy Gertner, *The "Lower" Federal Courts: Judging in a Time of Trump*, 93 IND. L.J. 83, 89 (2018).
[180] *Id.* For examples of the federal courts' intervention in the area of immigration reversing the Administration's policies, *see* CIVIL RIGHTS LITIGATION CLEARINGHOUSE, https://www.clearinghouse.net (last visited Dec. 24, 2020). Other areas have also shown a notable reversal rate. *See, e.g.*, *Roundup: Trump-Era Agency Policy in the Courts*, INST. FOR POL'Y INTEGRITY https://policyintegrity.org/trump-court-roundup (last updated Dec. 28, 2020) (noting that only 29 of 170 legal challenges to regulatory roll backs as of December 28, 2020 were upheld by the courts).
[181] McCann in his study of the pay equity movement found that even unsuccessful litigation efforts have spillover effects, helping reformers articulate and construct their cause in the political arena, and even expanding their notion of what pay equity rights mean. MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION (1994).
[182] *See Id. See also* STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE (2d ed. 2004).
[183] Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009).

statute of limitations for pay equity cases, was passed in response to a losing Supreme Court decision.[184] In another example, when the Court failed in *Matthews v. Eldridge* to extend the *Kelly* ruling to Old-Age, Survivors, and Disability Insurance (OASDI) recipients, Congress passed legislation providing for pre-termination hearings, which still exist today.[185] A legislative win after a judicial loss can lead to more lasting social change, as the resulting laws, policies and programs become embedded in the life of a nation.

While much about the current political environment seems unique, including the current Administration's violations of basic institutional and constitutional norms and practices of governing,[186] these lessons from the past still hold. As in the past, judicial intervention functions both as a legal strategy and a political resource. Legal action has stopped many illegal actions in their tracks, forcing the current Administration to recalibrate.[187] Litigation has also served an educative function, providing a civics lessons to both the public and policymakers. It has made more visible the current and cumulative assaults on our democratic system, as the courts litigate such contentious issues as voter suppression, campaign financing and gerrymandering. For advocates, this education is invaluable as they strategize how best to advance the cause of social justice in these tumultuous times.

Moreover, history demonstrates that legal action alone is rarely, if ever, sufficient to secure lasting social change. It must be coupled with grassroots action and with appeals to the other branches of government, as the civil rights movement demonstrated in *Brown*.[188] In short,

[184] In Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007), the Court held that the 180-day statute of limitations for equal pay lawsuits begins on the date of the initial discriminatory wage decision, notwithstanding the fact that the employee may not become aware of the inequity until much later.
[185] Mathews v. Eldridge, 424 U.S. 319 (1976); Goldberg v. Kelly, 397 U.S. 254 (1970).
[186] LEVITSKY & ZIBLATT, *supra* note 3; SUNSTEIN, *supra* note 3.
[187] *See supra* text accompanying note 180.
[188] *See* Balkin, *supra* note 13.

courts are only one player in a constellation of players, and their role may wax and wane. Electoral politics, especially in the current environment, is equally if not more important. A change in elected officials can change the conversation and ultimately change policy outcomes.