



REFLECTION

Debating the Past's Authority in Alabama

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In 2015, the city council of Birmingham, Alabama enacted an ordinance establishing a local minimum wage of \$10.10 an hour—a significant raise for the city's low-income workers from the federal floor of \$7.25.¹ The ordinance proved short-lived. Within months, the Alabama legislature had passed and the governor signed statewide preemption legislation nullifying all local wage regulations. Marnika Lewis, a twenty-three-year-old mother and employee of the Moe's Southwest Grill burrito chain, is among several plaintiffs challenging the Alabama preemption statute, HB 174, as unconstitutional and racially discriminatory.² "[T]he legislature and the governor," Lewis complains, have "stolen my raise."³

Lewis's legal claims rest upon a deeper set of claims about Alabama history. In the plaintiffs' account, HB 174 represents the latest iteration of a recurring pattern in which every time local black majorities assert political or economic power, Alabama's statewide white power structure reacts with hostility. The facts supporting this account include the following: After decades of white flight to its suburbs, the city of Birmingham is 73% black.⁴ Its city council is almost entirely black, and its population of low-wage workers disproportion-

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1. See Jana Kasperkevic, "The State Stole My Raise": Workers Sue Alabama over "Racist" Wage Law, *GUARDIAN* (Apr. 28, 2016), <https://perma.cc/J6T2-RPGG>.

2. See Scott Douglas, *Birmingham's Fight for a Living Wage*, *DISSENT* (Summer 2017), <https://perma.cc/KGF7-FLVQ>; Kasperkevic, *supra* note 1; see also H.R. 174, 2016 Leg., Reg. Sess. (Ala. 2016) (enacted) (codified at ALA. CODE §§ 25-7-40 to -45 (2018)).

3. See Kasperkevic, *supra* note 1.

4. Amended Complaint ¶ 31, *Lewis v. Bentley*, No. 2:16-cv-00690-RDP, 2017 WL 432464 (N.D. Ala. Feb. 1, 2017) [hereinafter *Lewis* Complaint].

ately black.⁵ Conversely, the state governor is white, the state legislature predominantly white, and the statewide population about 69% white.⁶ In both houses of the state legislature, the vote on HB 174 proceeded along almost exactly partisan and largely racial lines.⁷ Every black legislator opposed it.⁸ Alabama's state constitution—adopted in 1901—authorizes state-level overrides of local policymaking in a variety of contexts precisely because its Jim Crow-era framers feared empowering black local majorities.⁹

The countervailing account, offered by the state in defending HB 174 and accepted by the federal district judge who dismissed the complaint, does not deny Alabama's history of white supremacy but defines that history as irrelevant to this more recent episode of “run-of-the-mill” economic policymaking.¹⁰ On this account, the Birmingham ordinance exposed a heretofore unrecognized gap in Alabama law, a gap that required quick mending in order to “maintain stability in the State's business climate.”¹¹ It was purely incidental that the state legislature happened to be mostly white and the Birmingham city council mostly black. In its motion to dismiss, the state explained that HB 174 could not constitute a vestige of Jim Crow because the dictionary defines a “vestige” as “a remaining bit . . . of something formerly present,” whereas this legislation “was enacted in 2016, modeled after other

5. *Id.* at ¶¶ 30, 102; *see also* Plaintiffs-Appellants' Opening Brief at 4, *Lewis v. Alabama*, No. 17-11009 (11th Cir. June 5, 2017), 2017 WL 2463105.

6. *See* Press Release, Office of the Governor, State of Ala., Kay Ivey Sworn In as Governor (Apr. 10, 2017), <https://perma.cc/ZS25-Q537> (governor); Nat'l Conference of State Legislatures, *Legislators' Race and Ethnicity 2015*, at 1 (2016), <https://perma.cc/RHH4-SUKA> (legislature); *QuickFacts: Alabama*, U.S. CENSUS BUREAU, <https://perma.cc/8D3W-VF5D> (archived Apr. 8, 2018) (population).

7. *See Lewis* Complaint, *supra* note 4, ¶¶ 22-23, 26. Of those who cast a vote on HB 174, all but two Republicans voted in favor and all but one Democrat voted against. *See Roll Call: Alabama House Bill 174; House Motion to Read a Third Time and Pass*, LEGISCAN, <https://perma.cc/78H5-V78T> (archived Apr. 8, 2018); *Roll Call: Alabama House Bill 174; Senate Motion to Read a Third Time and Pass*, LEGISCAN, <https://perma.cc/QRZ3-AQ8U> (archived Apr. 8, 2018).

8. *See Lewis* Complaint, *supra* note 4, ¶¶ 23, 26.

9. *See id.* ¶¶ 66-68; *see also* Brief of Amici Curiae Historians Susan Ashmore et al. in Support of Appellants Seeking Reversal at 4, 7-9, 12, *Lewis*, No. 17-11009 (11th Cir. June 12, 2017), 2017 WL 2671578 [hereinafter *Lewis* Historians' Brief]; *Lewis* Complaint, *supra* note 4, at 2 (arguing that HB 174 “perpetuates an official policy of political white supremacy that has been maintained in Alabama since it became a state in 1819”).

10. *See* State of Alabama and Attorney General Strange's Motion to Dismiss the Amended Complaint (Doc. 18) & Initial Submission in Response to Exhibit B of the Court's Order at 4, *Lewis v. Bentley*, No. 2:16-cv-690-RDP, 2017 WL 432464 (N.D. Ala. Feb. 1, 2017), 2016 WL 7365664 [hereinafter *Lewis* Motion to Dismiss]; *see also Lewis*, 2017 WL 432464, at *1 (rejecting the plaintiffs' portrayal of “this dispute as yet another chapter in Alabama's civil rights journey”).

11. *See Lewis* Motion to Dismiss, *supra* note 10, at 2-4.

States' laws, endorsed in judicial opinions, and supported by social-science findings."¹²

That a dispute about Alabama labor law could transform into a dispute about how heavily to weigh the burdens of Alabama history exemplifies one of Bob Gordon's central insights: the recurrent tendency of American lawyers to appeal to the past as both "authority" and "social critic."¹³ In recent years, increasingly convoluted and self-referential debates about originalism have dominated the scholarly conversation about the relationship between history and law. But as Gordon has long recognized, explicit exegesis of past texts and practices is neither the only nor necessarily the most consequential way in which history informs legal argument. Lawyers and jurists are constantly making more diffuse appeals to the past's authority, draping their legal claims around the scaffolding of imagined metanarratives about how history unfolds and the place of lawyers and jurists within that unfolding. History is ever-present within the law, Gordon writes, in the form of "mostly implicit, taken-for-granted assumptions about the relation of the present to the past, about what is or should be permanent or unchanging, and about how we have changed and the general directions of change."¹⁴

In a series of lectures given in the 1990s and now brought together in *Taming the Past*, Gordon offered a perceptive taxonomy of these implicit assumptions.¹⁵ In the nineteenth century and in much of the twentieth century, most American lawyers operated within what Gordon labeled the "liberal progress" account of U.S. history, in which the polity progressively included more people and those people enjoyed progressively greater liberties and material blessings.¹⁶ For nineteenth century liberals, progress took the form of releasing commercial energy, developing the continent, and replacing slavery with free labor.¹⁷ Their twentieth century descendants appended the

12. *Id.* at 21-22 (quoting *Vestige*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED (2002)).

13. See ROBERT W. GORDON, *The Past as Authority and as Social Critic: Stabilizing and Destabilizing Functions of History in Legal Argument*, in TAMING THE PAST: ESSAYS ON LAW IN HISTORY AND HISTORY IN LAW 282, 282 (2017) (capitalization altered).

14. ROBERT W. GORDON, *Introduction* to TAMING THE PAST, *supra* note 13, at 1, 10.

15. See GORDON, *supra* note 13, at 282 (explaining that the essay is a revised version of a 1990 presentation at a conference hosted by the Program in Comparative Study in Social Transformation at the University of Michigan, first published in 1996); ROBERT W. GORDON, *Taming the Past: Histories of Liberal Society in American Legal Thought*, in TAMING THE PAST, *supra* note 13, at 317 [hereinafter GORDON, *Histories of Liberal Society*] (revised version of the 1993 Thomas M. Cooley Lectures at the University of Michigan Law School).

16. See GORDON, *supra* note 13, at 290 (capitalization altered); see also GORDON, *Histories of Liberal Society*, *supra* note 15, at 317, 322-26, 335.

17. See GORDON, *supra* note 13, at 290-91.

New Deal onto this timeline as well as the civil rights and gender equality gains of the 1960s and 1970s.¹⁸ Until the Reagan Revolution (more or less), this dominant progress narrative retained essentially a centrist-liberal valence and a basic optimism. Welfare and regulatory programs constituted beneficial adaptations, updating the meaning of liberty for modern industrial conditions. Gains, once made, tended to endure; programs, once in place, to entrench themselves. The project of lawyers and jurists, then, was to facilitate the ongoing process of gradually expanding the political circle and the meaning of liberty.

Critics from both the radical left and the neotraditionalist right counterposed more pessimistic metanarratives. Especially interesting for purposes of this Reflection is what Gordon called the “radical challenge” from the left, a gloomy epic of U.S. history in which the oppressed achieved no permanent gains but suffered a relentless cycle of “progress thwarted” and “promises betrayed.”¹⁹ Legislative achievements were subsequently nullified, judicial victories weakly enforced. This interpretation posited “no reliable trend toward ever increasing pluralism,” only “periods of struggle . . . , often followed by periods of intense reaction, sometimes xenophobic and hysterical, sometimes quite nicely calculated by established powers.”²⁰ What salutary role lawyers and judges might play in such a story was unclear, which may explain why—as of 1996—Gordon assessed the radical critique, though it was transformative within the academy, as having had “relatively little influence” on practicing lawyers.²¹

Today, legal liberals seem more influenced by the radical critique than they were when Gordon developed his taxonomy. In their rhetoric, they now often seem to have abandoned their own foundational metanarrative of progress, at least in its most optimistic varieties. In its place, they have fused a more modest teleological vision with elements of the radical dialectic among oppression, tenuous gains, and backsliding. When progressives invoke history in legal argument, their accounts less often revolve around an implicit Whiggishness and instead resemble a religious story in which the United States struggles constantly with the temptation to racial injustice that derives from the original sin of the founding compromise with slavery. Though the country has occasionally transcended that sin, it remains in constant danger of regressing. The task for lawyers and judges, then, is to remain vigilant, sounding the alarm at the first signs of a new round of threats and shoring up the beach as much as possible against the tides of reaction.

18. See GORDON, *Histories of Liberal Society*, *supra* note 15, at 331-35.

19. See GORDON, *supra* note 13, at 293 (capitalization altered).

20. See *id.* at 296.

21. See *id.* at 293; see also GORDON, *Histories of Liberal Society*, *supra* note 15, at 336.

A historians' amicus brief recently filed in the Alabama litigation illustrates this dynamic, warning that the district court erred because it ignored the perilous continuities between HB 174 and Alabama's "long history of restructuring government powers to deny decisionmaking authority to local black majorities."²² Another example is the amicus brief filed by Representative John Lewis with the U.S. Supreme Court in *Shelby County v. Holder*, which, in urging the Court to leave intact the challenged provisions of the Voting Rights Act of 1965, was structured explicitly around the argument that it is dangerous to believe in inevitable progress.²³ Lewis's "great-great-grandfather freely voted during Reconstruction," the brief explained, and yet look what Lewis had to do a hundred years later to (re)gain the right to vote.²⁴ Progress, then, must not be assumed as "the natural trajectory of emancipation"; democracy depends upon "continued vigilance."²⁵ The dissenting Justices in *Shelby County* adopted elements of this liberal-radical fusion metanarrative, as encapsulated in Justice Ruth Bader Ginsburg's memorable line that invalidating the challenged components of the Voting Rights Act—despite the documented threat of "retrogression" back to racial discrimination—was "like throwing away your umbrella in a rainstorm because you are not getting wet."²⁶

In the realm of civil rights, it is now conservative jurists who more frequently appeal to metanarratives of progress. They accept that the great civil rights statutes of the 1960s might have been necessary once, and even—matching the most fervent Whig's faith in legislative potential to remake society, and quite at odds with the more typical conservative agnosticism about that potential—celebrate these statutes for having largely achieved their aims. For example, in *Shelby County*, it was Chief Justice John Roberts's majority opinion that offered the closest thing to a full-throated progress narrative. Since 1965, in Chief Justice Roberts's summary, "things have changed dramatically" in Alabama; quoting congressional findings, he touted "[s]ignificant progress . . . in eliminating . . . barriers experienced by minority

22. See Lewis Historians' Brief, *supra* note 9, at 6 (capitalization altered).

23. See Brief for the Honorable Congressman John Lewis as Amicus Curiae in Support of Respondents and Intervenor-Respondents at 3-4, *Shelby County v. Holder*, 133 S. Ct. 2612 (2013) (No. 12-96), 2013 WL 476051 [hereinafter *Shelby County* Lewis Brief] (emphasizing "the danger of [the] claim of ever-forward progress" in the voting context); *id.* at 5 (arguing that the history of voting rights is one of "recurring retrenchment," not "continuous progress" (capitalization altered)). For a more detailed discussion of this brief, see Sara Mayeux, *Litigating the Line Between Past and Present*, BUNK (Sept. 28, 2017), <https://perma.cc/73T7-X7ZG>.

24. *Shelby County* Lewis Brief, *supra* note 23, at 8 (capitalization altered).

25. See *id.* at 11, 13 (capitalization altered).

26. See *Shelby County*, 133 S. Ct. at 2650 (Ginsburg, J., dissenting).

voters.”²⁷ “There is no doubt,” Chief Justice Roberts continued, “that these improvements are in large part *because of* the Voting Rights Act,” which “has proved immensely successful at redressing racial discrimination and integrating the voting process.”²⁸ It was as if the Voting Rights Act were not merely a well-engineered umbrella but had put an end to rain.

So we have arrived at an odd legal moment in which—at least for some purposes—the lawyers and jurists eager to blithely move on from history are the conservatives, and the lawyers and jurists staggering under the weight of the past are the liberals. Certainly, it is possible to hazard some guesses about what’s driving this rhetorical reshuffling. The new liberal pessimism mirrors the current balance of political strength. At both the federal level and, in much of the country, the state level, the political right controls the levers of policymaking. With some exceptions, the major project of civil rights litigators today is not forward movement but the work of preserving as much as possible the gains of the 1960s against legal and political battering.²⁹ Meanwhile, and ironically, the rise of conservative progress metanarratives reflects the achievement of both liberal and radical scholars of forcing into mainstream discourse greater recognition of the evils of slavery and Jim Crow. Respectable conservatives now join in denouncing the most flagrant forms of racial terror running through the American past (*pace* certain allies of the Trump Administration). But doing so places them in a bind, for they also generally reject arguments that today’s distribution of material blessings and life chances derives from past racial injustice in ways the law is bound or even permitted to worry about. To shimmy out of this bind, at least in the narrow realm of civil rights litigation, conservatives appeal not to their otherwise beloved past but instead to their own variation on twentieth century liberals’ faith in the future.

Yet there is inevitably something a bit off-kilter about conservative progress narratives. In 1996, in a brief but prescient passage identifying the emerging conservative narrative of civil rights, Gordon foresaw this problem: “One usually expects of conservative narratives a feeling for the sheer weight of history, the slowness to respond to efforts to cut across accumulated custom,

27. *Id.* at 2625 (majority opinion) (first alteration in original) (quoting Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 2(b)(1), 120 Stat. 577, 577 (codified at 52 U.S.C. § 10301 app. at 8 (2016))).

28. *Id.* at 2626.

29. In the context of LGBT rights, at least in the realm of marriage equality, the liberal progress metanarrative remains a live and effective resource for legal argument. *See, e.g., Obergefell v. Hodges*, 135 S. Ct. 2584, 2593-95 (2015) (discussing how “[t]he history of marriage” has involved “both continuity and change”).

the gradual nature of evolutionary change.”³⁰ The conservative objection to *Brown v. Board of Education*, after all, had been precisely the idea “that long-embedded social customs could not be altered overnight through legislation and court orders.”³¹ Yet in more recent conservative accounts, Gordon continued, “the weight of history disappears almost entirely” as the civil rights legislation of the 1960s is now “supposed to have achieved its purposes of equalizing opportunity almost from the moment of its enactment.”³² In the years since Gordon made this observation, this incongruous oblivion to “the weight of history” has only gained in legal power. It’s a testament to Gordon’s acuity that we can so readily use his 1990s lectures to help make sense of the Roberts Court, even as recent cases around the country also seem to be rescrambling the political valence of some of the tropes Gordon identified.

30. GORDON, *Histories of Liberal Society*, *supra* note 15, at 348.

31. *See id.* (discussing *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)).

32. *Id.*