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On Rights, the Supreme Court Has Done More Harm Than Good

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The Supreme Court decision in *Obergefell v. Hodges* struck a blow for equality and justice. But there are reasons to worry when the courts interfere with democratic politics, even when you like the result.

To be sure, complaints about judicial activism have become a predictable and hypocritical ritual for the losing side in an ideologically polarized court. The same justices complaining that a right to same sex marriage undercut democratic process were perfectly happy to overturn laws *they* disagreed with, including important provisions of the [Voting Rights Act](#), [campaign finance](#)

[reform](#) and the [Affordable Care Act](#).

When the court invalidates laws, it acts as a super-legislature, usually defending the status quo and the powerful rather than the powerless.

But given the vagueness and malleability of constitutional law, few disputes have clear answers. So when the Supreme Court invalidates legislation, it basically acts as a super-legislature of nine. And the Supreme Court uses this power to defend the status quo and the powerful much more often than to defend the weak and powerless. When it comes to championing the rights of vulnerable minorities, the Supreme Court rarely does more than anticipate popular opinion. On the question of same-sex marriage, the Supreme Court stepped in at the last minute to take the credit after grass roots activists already did the hard and crucial work of changing hearts and minds. [Polls before Obergefell](#) showed that a majority of Americans supported same sex marriage. Arguably, Obergefell was neither heroic nor overreaching: it was a validation of an emerging national consensus.

When the court does get too far ahead of public opinion, it can produce unintended consequences. We still don't know whether Obergefell will produce an enduring backlash, as the abortion rights decision in [Roe v. Wade did](#). Even some of the Supreme Court's most celebrated civil rights decisions have been a mixed bag. Brown v. Board of Education is widely seen as ending Jim Crow segregation with a strike of the judge's gavel. But in fact, real desegregation didn't start until Congress threatened to deny federal funding to schools that refused to desegregate. And when white

flight from inner cities made desegregation impossible in many school districts, the Supreme Court eventually relented and allowed many suburbs to avoid desegregation in 1971's [Milliken v. Bradley decision](#). In 2007, the Supreme Court cited Brown as precedent when it [blocked democratically endorsed school desegregation plans](#). Today, many [public schools are more racially segregated than they were in the early 1980s](#).

If — as Winston Churchill believed — democracy is the worst form of government save all the alternatives, perhaps judicial review is an important corrective. But overall, the Supreme Court's interventions in the democratic process have probably done more harm than good for civil rights.

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