
VIRGINIA LAW REVIEW

VOLUME 90

OCTOBER 2004

NUMBER 6

ESSAYS

WHAT *BROWN* TEACHES US ABOUT CONSTITUTIONAL THEORY

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MOST law professors agree that any serious normative theory of constitutional interpretation must be consistent with *Brown v. Board of Education*¹ and show why the case was correctly decided. One of the great ironies of this fact is that *Brown* may have little to teach us about how judges should decide constitutional cases, because almost every serious constitutional theory is already consistent with it.

Nevertheless, *Brown* does offer important lessons for constitutional theory. For the most part, however, they are lessons about positive constitutional theory, not normative constitutional theory. Positive constitutional theory studies how the constitutional system works and develops over time. It focuses on how government and political institutions influence and interact with each other, and how features of politics and institutional structure influence the creation and development of constitutional doctrine. Normative constitutional theory, as its name implies, is interested in what people should do. One branch of normative constitutional theory concerns constitutional design; another branch concerns interpretation of existing constitutions. Remarkably—or perhaps not re-

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¹ 347 U.S. 483 (1954).

markably at all, given the professional commitments of the legal academy—most normative constitutional theory in the United States focuses only on a subset of the latter inquiry: how judges, and particularly Supreme Court Justices, should interpret the Constitution.

In this Essay, I will offer seven possible lessons of *Brown*, comparing it along the way with other famous constitutional cases and controversies, including *Roe v. Wade*² and *Lawrence v. Texas*.³ Six of the lessons concern positive constitutional theory; only one concerns normative constitutional theory. As will soon become clear, the reason for this imbalance is that one of the most enduring lessons *Brown* offers us is the relative importance of positive constitutional theory and the relative limitations of normative constitutional theory.

LESSON ONE: THE SUPREME COURT IS NOT
COUNTERMAJORITARIAN; IT IS NATIONALIST

Political scientists have long argued that the Supreme Court is part of the national political coalition,⁴ that Supreme Court decisionmaking is strongly influenced by national political majorities and national public opinion,⁵ and that the Supreme Court tends to impose the values of national majorities on regional majorities.⁶ The Supreme Court is nationalist in two different senses: It is responsive to national political majorities as opposed to regional majorities, and it is responsive to the views of national elites as op-

² 410 U.S. 113 (1973).

³ 539 U.S. 558 (2003).

⁴ Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. Pub. L. 279 (1957).

⁵ Robert A. Dahl, *Democracy and Its Critics* 190 (1989) (“[T]he views of a majority of the justices of the Supreme Court are never out of line for very long with the views prevailing among the lawmaking majorities of the country.”); Robert G. McCloskey & Sanford Levinson, *The American Supreme Court* 208–09 (2d ed. 1994) (“It is hard to find a single instance when the Court has stood firm for very long against a really clear wave of public demand.”). For a review of the recent political science literature on judicial decisionmaking and popular opinion, see Terri Jennings Peretti, *In Defense of a Political Court* 80–132 (1999); Barry Friedman, *Mediated Popular Constitutionalism*, 101 Mich. L. Rev. 2596, 2601–13 (2003).

⁶ Mark Tushnet, *Taking the Constitution Away from the Courts* 144–45 (1999).

posed to the views of regional elites.⁷ In fact, as Lucas Powe has argued in his recent history of the Warren Court, although the Warren Court has come to symbolize courts acting against majority will, the reverse is more the case: the Warren Court worked hand in hand with Congress and helped promote the dominant political values of Cold War liberalism. Much of the Warren Court's jurisprudence imposed national values—and, in particular, the values of national elites—over the values of regional majorities in the South.⁸ Although the Court gravitates toward the views of national majorities, popular opinion and elite opinion may not coalesce, and so the Supreme Court is often caught between them. Because the Court is composed of relatively well-connected professional elites, it tends to follow national elite opinion.⁹

In 1954, when *Brown* was decided, seventeen states and the District of Columbia had some version of “separate but equal” in elementary and secondary schools. These states were concentrated in the South and reflected the borders of the old Confederacy. Four other states (Arizona, Kansas, New Mexico, and Wyoming) allowed counties to segregate schools as a local option. Thus, the Topeka schools at issue in *Brown* were segregated because the county required it. In the rest of the country (twenty-seven states), de jure segregation had effectively been abolished.¹⁰

By 1954, in other words, a national majority (albeit a fairly narrow majority measured simply in terms of state policies) believed

⁷ Although the Supreme Court is nationalist in the sense that it responds over time to changes in national public opinion, this does not necessarily mean that it is nationalist in the sense of always favoring centralization of national power.

⁸ Lucas A. Powe, Jr., *The Warren Court and American Politics* 490–91, 493–94 (2000); see also Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 *Yale L.J.* 153, 175 (2002) (noting that Southern objections to *Brown* were “far more heavily . . . grounded in respect for minority viewpoints and states’ rights than in countermajoritarian criticism”).

⁹ I hasten to add that this does not necessarily speak well for the Supreme Court. The decision in *Plessy v. Ferguson*, 163 U.S. 537 (1896), also reflected the casual racism of elites in 1896, who believed in natural, scientifically proven differences between the races and thought that racial separation would buy social peace. Michael Klarman also notes that *Plessy* was largely consistent with Northern white opinion, or at least did not greatly offend Northern sensibilities, and that the decision produced little comment in the Northern press. Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* 22–23 (2004).

¹⁰ Klarman, *supra* note 9, at 344–45; Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* 42 (1991).

that Jim Crow was wrong, even though national racial attitudes were by no means egalitarian by today's standards.¹¹ Perhaps more important, an increasingly strong view had developed among national elites—and particularly foreign-policy elites—that Jim Crow was an embarrassment that harmed American interests in the Cold War struggle against the Soviet Union and gave America a poor image in the eyes of the developing nations of the Third World.¹² Southern segregation was the Soviet Union's best argument that America's promises of liberty and equality rang hollow. In addition, national elites—and the educated public more generally—sensed that the cause of racial equality had made enormous strides since World War I, and particularly since World War II, when America emerged victorious in a war against the racist ideology of Nazism. World War II had enormous impact in shifting popular imagination against segregation.¹³ During the Supreme Court conferences on *Sweatt v. Painter*¹⁴ and *McLaurin v. Oklahoma State Regents for Higher Education*,¹⁵ Justice Black told his colleagues that segregation was “Hitler's creed—he preached what the South believed.”¹⁶ By the early 1950s, the demise of Jim Crow seemed inevitable to many Americans; it was only a matter of time. This sense of inevitable progress is probably quite important in motivating elites, and particularly elites in the federal judiciary, to respond to demands for constitutional change.

National political elites, however, could do little to end Jim Crow legislatively. Southern segregationists were a key element of

¹¹ A Gallup Poll taken shortly after *Brown* revealed that fifty-five percent of Americans supported “the Supreme Court ruling that racial segregation in all public schools is illegal, meaning that all children, no matter what their race, must be allowed to go to the same schools.” *Race and Education 50 Years After Brown v. Board of Education*, at <http://www.gallup.com/content/?ci=11686> (last accessed Sept. 14, 2004) (on file with the Virginia Law Review Association). Majorities continued to support the decision through the period of massive resistance, although a May 1959 poll revealed that fifty-three percent of the public believed that “the decision caused a lot more trouble than it was worth.” By April 1994, eighty-seven percent of Americans approved of *Brown*.

¹² Mary Dudziak, *Cold War Civil Rights: Race and the Image of American Democracy* 80–81 (2000).

¹³ Klarman, *supra* note 9, at 445.

¹⁴ 339 U.S. 629 (1950).

¹⁵ 339 U.S. 637 (1950).

¹⁶ Mark V. Tushnet, *Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936–1961*, at 142 (1994).

the New Deal coalition. The power of Southern Congressmen and Senators was amplified by filibuster and seniority rules in the Senate, preventing passage of any significant civil rights legislation.¹⁷ Indeed, no significant national civil rights legislation protecting blacks from discrimination was passed between 1875 and 1957, and it was not until 1964 that a real civil rights bill made it through Congress.

These features of American democracy allowed a regional majority in the South to block the wishes of a national majority. The Supreme Court, however, was not so constrained, and it eventually responded to national majorities, and particularly to the views of national elites. Nevertheless, the Court's response was comparatively limited. In *Brown* itself, the Supreme Court did little more than announce that "separate but equal" was unconstitutional as applied to elementary and secondary education,¹⁸ making a symbolic statement about basic American values that played well overseas.¹⁹ The Court did relatively little to enforce *Brown* until the legislative deadlock over civil rights was broken with the passage of the Civil Rights Act of 1964 and President Lyndon B. Johnson's landslide election in the same year.²⁰ Thus, the Court generally worked with national majorities rather than against them. It did not take the lead so much as work in tandem with political forces that had been growing in strength and influence for some time. It was countermajoritarian primarily with respect to those states that resisted a growing national trend, and it became most insistent precisely at the moment when civil rights became a national legislative policy. Throughout, the Supreme Court supported national values at the expense of regional values.

¹⁷ Tushnet, *supra* note 6, at 145.

¹⁸ 347 U.S. at 495.

¹⁹ Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 *Stan. L. Rev.* 61, 118–19 (1988).

²⁰ Michael Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 *Va. L. Rev.* 7 (1994); Rosenberg, *supra* note 10, at 52. Between 1955, when *Brown II* was decided, and 1964, the Court decided three segregation cases: *Griffin v. Prince Edward County School Board*, 377 U.S. 218 (1964); *Goss v. Board of Education of Knoxville*, 373 U.S. 683 (1963); and *Cooper v. Aaron*, 358 U.S. 1 (1958). Although in each case the Court reminded the nation that school segregation was unconstitutional, and struck down obvious attempts to circumvent *Brown*, the Court had little effect on the actual desegregation of the public schools until after the 1964 Civil Rights Act. Klarman, *supra*, at 42–46.

Compare the story of *Brown v. Board of Education* to the Court's treatment of civil rights for homosexuals in *Bowers v. Hardwick*²¹ and *Lawrence v. Texas*.²² In 1960, same-sex sodomy was a crime in all fifty states. By 1986, when the Court decided *Bowers*, twenty-five states and the District of Columbia still retained their criminal penalties. Although laws against same-sex sodomy were rarely, if ever, enforced, they did have many important collateral effects on gays and lesbians in a variety of areas, including adoption and employment. By 2003, when the Supreme Court decided *Lawrence*, only thirteen states still criminalized same-sex sodomy.²³ National majorities had concluded that sodomy laws were outmoded. Even in the states where they still existed, the case for retaining these laws argued that they expressed important moral sentiments of the community although they should not be generally enforced. It was therefore not entirely surprising that the Supreme Court found constitutional arguments for protection of gays increasingly compelling after most states had already abolished their laws against same-sex sodomy.

Both *Lawrence* and *Brown* are key decisions in ongoing reform movements for minority rights. There is, however, at least one important difference between *Lawrence* and *Brown*. By the time *Lawrence* was decided, the movement for gay rights had gained more success in winning over popular opinion and shifting popular attitudes in favor of decriminalization than the corresponding movement for desegregation had achieved when *Brown* was decided.²⁴

Lawrence occurred well after public opinion had shifted toward decriminalization of sodomy, and at a time when same-sex sodomy statutes were rarely enforced against consenting adults. *Brown*, by

²¹ 478 U.S. 186 (1986).

²² 539 U.S. 558 (2003).

²³ 539 U.S. at 572.

²⁴ We might say as a rough shorthand that *Lawrence* occurs "later" in the progress of the relevant reform movement than does *Brown*, but that way of speaking can be quite misleading. First, the movement for civil rights for blacks could be said to have begun with the movements for abolition in the first part of the nineteenth century, and we still do not know how each of these reform movements ultimately will end. Second, social movements go through various phases that bring new issues to the fore. The gay rights movement has now convinced the public that same-sex relations should be decriminalized, but that is only the first of many issues that the movement will face in the future.

contrast, was decided when segregation of the schools (and indeed most public facilities) was an entrenched way of life in several Southern states. Although the analogy is imperfect in several respects, deciding *Lawrence* in 2003 is somewhat like deciding *Brown* in 1967, thirteen years after it was actually decided.²⁵

One piece of evidence that the relevant reform movement had progressed much further (and in a much shorter time) in *Lawrence* than in *Brown* is the popular reaction to both decisions. After *Brown* was decided, Southern states clung to Jim Crow and to segregated schools for many years, and many politicians insisted that *Brown* was not the law. In contrast, popular views about homosexuality had changed so greatly between 1986 and 2003 that *Lawrence* failed to spark the same degree of massive resistance. No states decided to pass new sodomy laws in protest against *Lawrence*, and officials in states whose laws were invalidated did not threaten to round up homosexuals and imprison them. By the time *Lawrence* was handed down, criticism was remarkably tepid, and much of it was on procedural grounds: the Court should not have preempted the states from making their own reforms.²⁶

In fact, *Lawrence* served to propel the debate about gay rights past the question of decriminalization and onto the question of gay marriage. Only a year after the decision was handed down, Americans are embroiled in a heated controversy over whether people who recently were branded outlaws for even forming intimate relationships should be permitted to solemnize those relationships in

²⁵ The analogy is imperfect because, among other reasons, by 1967 Congress had already passed national civil rights and voting rights statutes protecting the rights of African-Americans. No such national legislation had emerged for gays, although the Employment Non-Discrimination Act ("ENDA") had barely lost in the Senate during the Clinton administration.

²⁶ When the Court decides a high profile case like *Lawrence*, opinion polls sometimes register a short-term shift against the position the Court upholds, reflecting populist resentment that the decision comes from courts rather than the political branches. A Gallup poll found that the portion of Americans who said "homosexual relations between consenting adults should be legal" dropped from sixty percent in May 2003—the month before the *Lawrence* decision (decided June 26, 2003)—to forty-eight percent in a poll taken July 25–27, 2003, a month afterwards. This was the lowest percentage of support since 1996. See Alan Cooperman, *Sodomy Ruling Fuels Battle Over Gay Marriage*, Wash. Post, July 31, 2003, at A1; Gallup Poll, *Focus on Gay and Lesbian Marriages*, at <http://www.gallup.com/poll/focus/sr040127.asp> (last accessed May 15, 2004) (on file with the Virginia Law Review Association).

civil unions or marriages. Less than a year after *Lawrence*, the notion that states might recognize civil unions, once regarded as a wildly extreme demand, seems comparatively mild given the fact that one state (Vermont) has recognized civil unions since 2000 and another (Massachusetts) now recognizes same-sex marriages. Indeed, President George W. Bush's recent call for an amendment banning same-sex marriage was premised on the idea that states would still be permitted to pass civil union laws.²⁷ In short, *Lawrence* confirmed and gave the force of law to a transformation in national attitudes about homosexuality that had already occurred.

Brown, by contrast, occurred when the reform movement for racial equality had made comparatively less progress.²⁸ Although *Brown* was the culmination of a decades-long litigation strategy, it largely predated the civil rights movement. It would take a decade, and the passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965, to secure *Brown*'s canonical status. Nevertheless, in both *Brown* and *Lawrence*, the Supreme Court showed why law matters. The Court changed the structure of doctrine and placed its weight and its prestige behind an emerging national majority. *Brown* shifted the terrain of discussion, placing the Constitution and the Supreme Court behind the cause of racial equality. Before *Brown*, segregated schools may have been unjust, but they were consistent with constitutional doctrine. After *Brown*, supporting segregation meant advocating policies that had been declared outside the law.

Now contrast *Brown* and *Lawrence* with *Roe v. Wade*. If *Lawrence* occurred relatively "late" in the progress of the relevant reform movement, *Roe* occurred relatively "early." In 1960 abortion was illegal in all fifty states, with only very limited exceptions. By the early 1970s, public opinion and elite opinion had begun to swing toward reform of abortion laws. A Gallup poll taken in January of 1972 suggested that some fifty-seven percent of Ameri-

²⁷ See Comparing Marriage and Civil Unions, at <http://www.cnn.com/2004/LAW/02/26/bush.civil.unions/> (last accessed August 23, 2004) (on file with the Virginia Law Review Association).

²⁸ Lesson Six, *infra*, offers another important difference between *Brown* and *Lawrence*: *Lawrence* struck down criminal laws that were not being enforced anyway; desegregation required courts to order school districts to move students, shift teaching assignments, and expend resources, generating more resistance and making *Brown* easier to evade.

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cans, and indeed, fifty-four percent of Catholics, believed that the abortion decision should be left to the woman and her doctor.²⁹ The relatively conservative American Bar Association had endorsed the view that abortion should be left to a woman and her doctor up to twenty weeks into the pregnancy (about halfway through the pregnancy). The report of a presidential commission on population control in March 1972 advocated abortion-by-choice as a matter of policy, and the only dissenters were the four Catholic members of the commission.³⁰ Between 1967 and 1972 seventy-five leading national groups—including twenty-eight religious organizations and twenty-one medical organizations—advocated the repeal of all abortion laws.³¹

Viewed from this perspective, *Roe* does not seem all that surprising. Once again the Supreme Court imposed national values and national elite values on the rest of the country. However, there is an important difference between *Roe* on the one hand, and *Lawrence* and *Brown* on the other. Even though popular opinion had shifted in a relatively short space of time, and many states were beginning to consider reforming their abortion statutes, most states had not yet modified their abortion laws. By 1973, thirteen states had passed abortion reform statutes; these statutes gave doctors discretion to perform abortions if a woman's life or physical or mental health were threatened—or in cases of rape or incest. But they did not recognize a woman's right to abortion. In fact, when *Roe* was handed down, only four states (Alaska, Hawaii, New York, and Washington) had passed abortion repeal statutes that left the abortion decision up to a woman and her doctor up to a certain point in the pregnancy.³² For this reason (among many others), the history of *Roe* would turn out quite differently from the history of *Lawrence* or *Brown*. Many critics of *Roe* who also sup-

²⁹ David J. Garrow, *Liberty and Sexuality: The Right to Privacy and the Making of *Roe v. Wade** 539 (1994).

³⁰ *Id.*

³¹ Rosenberg, *supra* note 10, at 184. These groups included, among others, the American Jewish Congress, the American Baptist Convention, the American Medical Association, the American Psychiatric Association, the American Council of Obstetricians and Gynecologists, and the YMCA.

³² *Id.*; The Alan Guttmacher Institute, *Lessons From Before *Roe*: Will Past Be Prologue?*, at http://www.agi-usa.org/pubs/ib_5-03.html (last accessed May 15, 2004) (on file with the Virginia Law Review Association).

port abortion rights, including, most notably, Justice Ruth Bader Ginsburg, have argued that the Court decided *Roe* prematurely, and that it might have let the question percolate in the states longer than it did.³³ Again, by way of (imperfect) analogy, deciding *Roe* in 1973 would be somewhat like deciding *Brown* in 1947. Perhaps the Court was morally obligated to put an end to Jim Crow much earlier, but it is likely that the earlier it did so, the greater the resistance and the greater the danger to the decision's legitimacy. This analogy, of course, assumes what is quite controversial: that without *Roe* in 1973 there would have been a gradual liberalization of abortion laws in the states during the 1970s and early 1980s, and that American politics would have been very different. It is entirely possible that resistance to abortion reform would have been every bit as staunch as it was in the wake of *Roe*, and that the moral case against abortion would have been just as compelling if the Supreme Court had never gotten involved.

LESSON TWO: COURTS ARE BAD AT TACKLING, GOOD AT PILING
ON

Lesson One noted the role that courts play in the success of social movements for reform, such as the movement for racial equality, the movement for abortion reform, and the gay rights movement. Generally speaking, however, reform movements are well advised not to rely primarily on courts to push their agenda. Relying wholly on courts is usually unsuccessful, and any court decisions in one's favor are likely to meet with considerable popular resistance. Conversely, when litigation is one part of a larger strategy that includes direct action and legislative reform, the reform movement is more likely to be successful and to make progress more quickly. *Brown* helps us see why this is so. Although we naturally focus on the decision in *Brown* as a central event in the struggle for civil rights and the abolition of Jim Crow, it is important to remember that *Brown* was only one moment in that struggle. The NAACP's litigation strategy that led up to *Brown* is widely known and justly praised. But it is likely that it would not

³³ Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. Rev. 375, 376, 381-82 (1985); Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. Rev. 1185, 1208 (1992).

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have succeeded as well as it did without the help of social and political changes outside the courts.

This story has been told many times before, and so I will offer only a few highlights. Two important heroes in the desegregation of public facilities are Jackie Robinson and President Harry Truman. Jackie Robinson broke the color barrier in Major League Baseball in 1947, and although baseball was a private entity rather than a state facility, the integration of baseball was a powerful symbol that race relations were changing rapidly. Perhaps even more important are the contributions of President Harry Truman.³⁴ In 1947, Truman created the United States Commission on Civil Rights which produced a report, *To Secure These Rights*,³⁵ that formed a blueprint for future civil rights legislation. In February 1948, Truman delivered the first presidential message on civil rights to Congress, proposing, among other things, a permanent civil rights division in the Justice Department, anti-lynching legislation, abolition of the poll tax, and prohibition of segregation in interstate transportation, which would have effectively overturned the result of *Plessy* in its original context. After his civil rights bill languished in Congress, Truman issued two executive orders. The first established a Fair Employment Board to govern the U.S. Civil Service.³⁶ The second desegregated the Armed Forces over the objections of the Joint Chiefs of Staff.³⁷ Truman then ran for President in 1948 on a party platform that included a call for civil rights. As a result, Strom Thurmond bolted the party and ran for President as a Dixiecrat, undermining the Democrats' traditional base of support in what was then called the Solid South. Truman won

³⁴ For accounts of President Truman's policies on civil rights, see William C. Ber- man, *The Politics of Civil Rights in the Truman Administration* 55, 61–64, 67–68, 74–78, 83–85, 116–118, 120–21, 123, 140, 165–68, 185–86, 238–40 (1970); Michael R. Gardner, *Harry Truman and Civil Rights: Moral Courage and Political Risks* 28–32, 43–48, 58–61, 65–86, 105–21, 152–55, 171–95, 204–05, 213–14 (2002); David McCul- lough, *Truman* 586–595, 915 (1992); Dudziak, *supra* note 19, at 79–81; Klarman, *supra* note 20, at 34–35.

³⁵ President's Commission on Civil Rights: *To Secure These Rights* (1947).

³⁶ Exec. Order No. 9980, 3 C.F.R. 720 (1948) (establishing a Fair Employment Board within the Civil Service Commission).

³⁷ Exec. Order No. 9981, 3 C.F.R. 722 (1948) (ordering desegregation of U.S. Armed Forces).

the election anyway.³⁸ Two years later, Truman's Justice Department asked the Supreme Court to overrule *Plessy v. Ferguson*.³⁹ The Supreme Court, however, was not as bold as Harry Truman; it refused to overrule *Plessy*, deciding *Sweatt v. Painter* on separate-but-equal grounds.⁴⁰ It would take four more years before the Court would finally decide *Brown*, and even then it did not officially overturn *Plessy*. Rather, Chief Justice Warren's opinion merely said that *Plessy* had no application to public elementary and secondary education.⁴¹

The civil rights movement's direct action phase began around the same time as *Brown*. The Baton Rouge boycott preceded *Brown*; the Montgomery Bus Boycott of 1955–1956 followed it. But the direct action movement really gathered steam only around 1960 with the first lunch-counter sit-ins. The civil rights movement, and the violent reaction to it in places like Birmingham and Selma, moved public sympathies toward the cause of civil rights. This broke the deadlock that had prevented civil rights legislation for almost a century, and led to the 1964 Civil Rights Act and the Voting Rights Act of 1965. Once the legislative deadlock was broken, events moved quite quickly. The Civil Rights Act placed Congress's seal of approval on *Brown* and the project of desegregation, and it made civil rights a national commitment of the executive and legislative branches of the federal government. The Voting Rights Act enfranchised a large number of African-Americans, who now had to be taken seriously as an electoral force in the South. The year 1964 also witnessed the ratification of the Twenty-Fourth Amendment, abolishing the poll tax in elections for federal officers. The 1964 Civil Rights Act gave the Department of Health, Education and Welfare ("HEW") the power to withhold federal

³⁸ He won thanks in no small part to the black vote, especially in the crucial states of California, Illinois, and Ohio. In all, Truman won close to two-thirds of the black vote. Berman, *supra* note 34, at 129.

³⁹ Klarman, *supra* note 9, at 210. The Justice Department made this request in a trio of cases decided in 1950. Brief for the United States at 35–49, *Henderson v. United States*, 339 U.S. 816 (1950) (No. 25); Memorandum for the United States as Amicus Curiae at 9–14, *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950) (No. 34), and *Sweatt v. Painter*, 339 U.S. 629 (1950) (No. 44).

⁴⁰ *Sweatt*, 339 U.S. at 636 (finding it unnecessary to decide whether *Plessy* should be overruled).

⁴¹ *Brown*, 347 U.S. at 495.

funds from segregated school districts. In 1965 this became a genuine threat with the passage of the Elementary and Secondary Education Act, which distributed large amounts of money to local school districts and placed the HEW in a key position to influence desegregation efforts. Not surprisingly, desegregation efforts in the federal courts were re-energized following 1964, and by 1968 the Supreme Court—which had done relatively little since *Brown*—began to get serious about enforcing desegregation.⁴²

Placing *Brown* in the context of these political changes helps us understand the role that courts play in reform movements. Courts are quite important to these movements, but they are not the sole player, and often not even the most important player.

The political history surrounding *Brown* suggests that, by themselves, courts are relatively slow to act and ineffective when social movements ask them to vindicate their rights. When they work in tandem with other branches of government, however, their contributions in shaping legal doctrine are amplified by the work of others and often become quite important.⁴³ Judges are sort of like place kickers in football. Most place kickers are pretty bad at making an open-field tackle to stop a speedy running back returning a kickoff. But place kickers can help pile on after the other players have tackled or slowed down a runner. That is sometimes how I imagine courts and their relationship to social change: They see the running back lying on the ground, groaning under the weight of a huge pile of linebackers. The judges say to themselves, “It’s time for us to do some justice!” and they throw themselves on the pile. Indeed, when it comes to sensing large-scale changes in social attitudes and acting on them, courts are often like the cuckolded husband in the French farce: always the last to know. In such cases, a significant amount of groundwork has already been prepared

⁴² Rosenberg, *supra* note 10, at 42–53. The Supreme Court reasserted itself in *Green v. School Board of New Kent County*, 391 U.S. 430 (1968) (rejecting school board’s “freedom of choice” desegregation plan and ordering it to adopt an effective plan), although it earlier signaled that its patience was wearing thin in *Griffin v. School Board*, 377 U.S. 218, 234 (1964) (ordering reopening of schools in Prince Edward County, Virginia), and *Bradley v. School Board*, 382 U.S. 103, 105 (1965) (ordering hearings on faculty desegregation).

⁴³ Cf. Rosenberg, *supra* note 10, at 33 (offering as rules of thumb that courts can assist significant social reform when other actors offer positive incentives and/or impose costs to induce compliance).

through political agitation, direct action, and legislative reform; courts confirm what has already been happening in the larger legal and political culture. Sometimes, of course, courts are ahead of the curve, although that is much more likely true of lower federal courts and state courts than the U.S. Supreme Court. Nevertheless, the basic insight still holds: Unless courts are fairly quickly supported by other political and social forces, what they do will ultimately have little effect.⁴⁴

The ultimate success of the NAACP's litigation strategy in overturning *Plessy* has encouraged imitation by later reform movements. But reliance on a litigation strategy from the 1930s through the 1950s was less a model for reform than the product of necessity. Generally speaking, reform movements can advance their cause in one of three ways: direct action, legislative reform, and litigation. Pursuing all three avenues for relief simultaneously can have synergistic effects that will propel the movement forward more quickly. By contrast, relying on only one avenue of redress is likely to require a long, hard slog.

This fact puts the NAACP's litigation strategy in a different light. As noted previously, it was impossible to pass any national civil rights legislation because of the power of Southern Congressmen and Senators, who not only held the advantages of seniority (and the filibuster in the Senate) but were a central part of the New Deal coalition that dominated American politics for decades. Direct action was also a difficult strategy; before the mid-1950s, any sustained attempt at black protest in the Deep South would have probably resulted in lynchings and violent reprisals.⁴⁵ Black leaders had repeatedly tried to influence the executive branch, but they had little success until the Truman Administration, and even Truman's executive orders were largely confined to the internal operations of the federal government. As a result, except for Tru-

⁴⁴ To continue the metaphor, the place kicker can slow down the running back until the other players can tackle him.

⁴⁵ Klarman, *supra* note 9, at 446. This is not to say that black leaders did not try to protest outside the South or put pressure on Washington politicians. For example, in May 1948, A. Philip Randolph and the Reverend Grant Reynolds threatened to begin a civil disobedience campaign if Congress refused to pass legislation outlawing discrimination and segregation in the Armed Forces. Berman, *supra* note 34, at 98–99. President Truman's Executive Order No. 9981, desegregating the Armed Forces, was in part an attempt to forestall such a campaign. *Id.* at 117.

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man's executive orders, the only effective avenue of relief for black civil rights for many years was litigation,⁴⁶ and it is not surprising, given that the two other avenues were effectively blocked, that the litigation strategy took several decades to succeed.

Once the direct action phase of the civil rights movement got under way, however, progress was much quicker. And once the deadlock in Congress was finally broken, very significant changes occurred in a relatively short amount of time. This suggests that relying primarily on a litigation strategy like that followed by the NAACP is a good model only if there are no other avenues available. Much more can be achieved, and more quickly, by pushing for reform on multiple fronts. That is but another way of making the point—viewed from the perspective of social movements—that courts are least effective in open-field tackling and most effective when piling on.

LESSON THREE: COURTS TEND TO PROTECT MINORITIES JUST ABOUT AS MUCH AS MAJORITIES WANT THEM TO

This lesson follows fairly directly from the previous two: If the Supreme Court is responsive to national majorities, and if it promotes social reform movements best when it works in concert with the political branches, it follows that the Court will protect minority rights best when national majorities support these rights and when political forces elsewhere in the system are actively working on behalf of minority rights.

Law students are usually taught that it is the job of courts to protect what *United States v. Carolene Products* called “discrete and insular minorities.”⁴⁷ These are groups that have suffered a long history of discrimination, are relatively politically powerless, and are unable to protect themselves in the political process.⁴⁸ This por-

⁴⁶ The Truman administration also helped the cause of litigation by signaling its support for the NAACP's position in various amicus briefs. See supra note 39 and accompanying text.

⁴⁷ 304 U.S. 144, 152 n.4 (1938).

⁴⁸ See *Frontiero v. Richardson*, 411 U.S. 677, 686 & n.17 (1974) (plurality opinion) (noting that women, although not technically a minority, “still face pervasive, although at times more subtle, discrimination in our educational institutions, in the job market and, perhaps most conspicuously, in the political arena,” and are “vastly under-represented in this Nation's decisionmaking councils”); see also *Cleburne v. Cle-*

