

CAN COURTS GENERATE SOCIAL CHANGE?

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...[According to] legal historian Michael Klarman, “constitutional lawyers and historians generally deem *Brown v. Board of Education* to be the most important U.S. Supreme Court decision of the twentieth century, and possibly of all time.”⁴ The question I address is whether the decision in *Brown* made the contribution to American society that this comment suggests. In asking this question, I mean to disparage no one. Civil rights lawyers like Thurgood Marshall, Jack Greenberg and countless others dedicated their careers, and sometimes their lives, to a principled belief in justice for all. My question does not challenge their commitment [or] their principles. It does ask whether litigation was the right strategic choice to further their goals, whether their understanding of the strengths and weaknesses of courts as agents of social change was subtle enough to guide them to the best strategy for change.

Underlying this question about *Brown* is a broader question about the role of the Supreme Court in the larger society. Since the mid-twentieth century, there has been a belief that courts can act to further the interests of the relatively disadvantaged. Starting with civil rights and spreading to issues raised by women’s groups, environmental groups, political reformers, and others, American courts seemingly have become important producers of political and social change. Cases such as *Brown* and *Roe v. Wade* are heralded as having produced major change. Further, such litigation has often occurred, and appears to have been most successful, when the other branches of government have failed to act. Indeed, for many, part of what makes American democracy exceptional is that it includes the world’s most powerful court system, protecting minorities and defending liberty in the face of opposition from the democratically elected branches. Americans look to activist courts, then, as fulfilling an important role in the American scheme.

Courts, many also believe, can bring heightened legitimacy to an issue. Courts deal with rights. Judges, at their best, are not politically beholden nor partisan. Rather, they are independent and principled, deciding not what policy they want but rather what the Constitution requires. This gives judicial decisions a moral legitimacy that is missing from the actions of the other branches. Court decisions can remind Americans of our highest aspirations and chide us for our failings. Courts, [Alexander] Bickel suggests, have the “capacity to appeal to men’s better natures, to call forth their aspirations, which may have been forgotten in the moment’s hue and cry.” For Eugene Rostow, the “Supreme Court is, among other things, an educational body, and the Justices are inevitably teachers in a vital national seminar.” Bickel agrees, viewing courts as “a great and highly effective educational institution.” Courts, one commentator put it, can provide “a cheap method of pricking powerful consciences.”...

REASONS FOR CAUTION

Before uncritically accepting this view of the Court as correct, there are at least three reasons to be skeptical. First, it is almost entirely lawyers who make this argument. Although lawyers may be no less self-critical than other professionals, they may be no more self-critical either. That is, they may have deep-seated psychological reasons for believing in the importance of the institutions in which they work. This may lead to overvaluing the contribution of the courts to furthering the interests of the relatively disadvantaged.

Second, there is an older view of the role of courts which sees them as much more constrained. Under this view, courts are the least able of any of the branches of government to produce change because they lack all of the necessary tools to do so. They are the “least dangerous branch” because they lack budgetary or coercive power. That courts are uniquely dependent on the executive branch is a view that was most forcefully argued over two hundred years ago by Alexander Hamilton in Federalist 78. Hamilton wrote: the judiciary “has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL but merely judgment of and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.” As President Jackson reportedly commented in response to *Worcester v. Georgia*, a decision with which he disagreed, “[Chief Justice] John Marshall has made his decision, now let him enforce it.” This view suggests that Court decisions furthering the interests of the relatively disadvantaged will only be implemented when the other branches are willing to do so.

The third reason for skepticism about the role of courts as producers of progressive change comes from several decades of public opinion research. If courts are dependent on public and elite support for their decisions to be implemented, as Hamilton suggests, this requires both public knowledge of Court decisions and a public willingness to act based on them. Proponents of an activist, progressive Court assume this. According to one defender of the claim, “without the dramatic intervention of so dignified an institution as a court, which puts its own prestige and authority on the line, most middle-class Americans would not be informed about such grievances.” However, decades of public opinion research paint a mixed picture, at best. In general, only about 40% of the American public report having read or heard something contemporary about the Court....In 1973, 20% of respondents to a Harris poll identified the Court as a branch of Congress, as did 12% of respondents with college degrees. In a culture in which personality is important, the public, too, is quite ignorant of the Justices’ identity. In a 1989 *Washington Post* poll, for example, 71% of 1,005 respondents could not name any Justice while only 2% could correctly name all nine. Somewhat humorously, while 9% named the distinguished Chief Justice of the United States (Rehnquist), a whopping 54%, six times as many respondents, correctly identified the somewhat less distinguished “judge of the television show ‘The People’s Court’” (Judge Wapner). The Supreme Court is not in the forefront of the consciousness of most Americans. ...

The point of this discussion is that there are good reasons to be wary of claims that the Court can further the interests of the relatively disadvantaged. Lacking the power to implement their decisions, courts are dependent on other elite institutions and the public at large. And given the findings of the survey literature, this is not a comforting thought for those who believe in the efficacy of the courts to further the interests of the relatively disadvantaged. With this background in mind, I return to *Brown*.

Examining the effects of *Brown* raises questions of how to deal with complicated issues of causation. Because it is difficult to isolate the effects of court decisions from other events in furthering the interests of the relatively disadvantaged, special care is needed in specifying how courts can be effective. On a general level, one can distinguish two types of influence courts can exercise. Court decisions may produce significant social reform through a judicial path that relies on the authority of the court. Alternatively, court influence can follow an extra-judicial path that invokes court powers of persuasion, legitimacy, and the ability to give salience to issues. Each of these possible paths of influence is different and requires separate analysis,

The judicial path of causal influence is straightforward. It focuses on the direct outcome of judicial decisions and examines whether the change required by the courts was made. In civil rights, for example, if a Supreme Court decision ordering an end to public segregation was the cause of segregation ending, then one would see lower courts ordering local officials to end segregation, those officials acting to end it, the community at large supporting it, and, most important, segregation actually ending,

Separate and distinct from judicial effects is the more subtle and complex causal claim of extra-judicial effects. Under this conception of causation, courts do more than simply change behavior in the short run. Court decisions may produce significant social reform by inspiring individuals to act or persuading them to examine and change their opinions. Court decisions, particularly Supreme Court decisions, may be powerful symbols, resources for change. They may affect the intellectual climate, the kinds of ideas that are discussed. The mere bringing of legal claims and the hearing of cases may influence ideas. Courts may produce significant social reform by giving salience to issues, in effect placing them on the political agenda. Courts may bring issues to light and keep them in the public eye when other political institutions wish to bury them. Thus, courts may make it difficult for legislators to avoid deciding controversial issues.

In 1954, in *Brown v. Board Education*, the U.S. Supreme Court found that state laws requiring race-based segregation in public elementary and secondary schools violated the Equal Protection Clause of the Fourteenth Amendment. Overturning nearly sixty years of Court-sanctioned racial segregation, *Brown* is heralded as one of the U.S. Supreme Court's greatest decisions. In particular, *Brown* is the paradigm of the Court's ability to protect rights and bring justice to minorities. To the human rights activist Aryeh Neier, *Brown* is the great "symbol" of courts' ability to protect rights and produce significant social reform." For Jack Greenberg, long-time civil rights litigator, *Brown* is the "principal inspiration to others" who seek change and the protection of rights through litigation."

Given the praise accorded to the *Brown* decision, examining its actual effects produces quite a surprise. The surprise is that a decade after *Brown* virtually nothing had changed for African-American students living in the eleven states of the former Confederacy that required race-based school segregation by law. For example, in the 1963–1964 school year, barely one in one hundred (1.2%) of these African-American children was in a nonsegregated school. That means that for nearly ninety-nine of every 100 African-American children in the South a decade after *Brown*, the finding of a constitutional right changed nothing. A unanimous landmark Supreme Court decision had no effect on their lives. This raises the question of why there was no change.

The answer, in a nutshell, is that there was no political pressure to implement the decision and a great deal of pressure to resist it. On the executive level, there was little support for desegregation until the Johnson presidency. President Eisenhower steadfastly refused to commit his immense popularity or prestige in support of desegregation in general or *Brown* in particular. As Roy Wilkins, executive secretary of the National Association for the Advancement of Colored People (NAACP), put it, "if he had fought World War II the way he fought for civil rights, we would all be speaking German today." ...Although President Kennedy was openly and generally supportive of civil rights, he took little concrete initiative in school desegregation and other civil rights matters until pressured by events to do so. He did not rank civil rights as a top priority and, like Eisenhower before him, was "unwilling to draw on the moral credit of his office to advance civil rights."

Civil rights were not supported by other national leaders until late in the Kennedy administration. In March 1956, Southern members of Congress, virtually without exception, signed a document entitled a "Declaration of Constitutional Principles," also known as the Southern Manifesto. Its 101 signers attacked the Brown decision as an exercise of "naked power" with "no legal basis." They pledged themselves to "use all lawful means to bring about a reversal of this decision which is contrary to the Constitution and to prevent the use of force in its implementation." This unprecedented attack on the Court demonstrated to all that pressure from Washington to implement the Court's decisions in civil rights would not be forthcoming.

If national political leaders set the stage for ignoring the courts, local politicians acted their part perfectly. A study of the 250 gubernatorial candidates in the Southern states from 1950 to 1973 revealed that after Brown "ambitious politicians, to put it mildly, perceived few incentives to advocate compliance." This perception was reinforced by Arkansas Governor Orval Faubus's landslide reelection in 1958, after he repeatedly defied court orders to prevent the desegregation of Central High School in Little Rock, demonstrating the "political rewards of conspicuously defying national authority." Throughout the South, governors and gubernatorial candidates called for defiance of court orders. Any individual or institution wishing to end segregation pursuant to court order, that is, to obey the law as mandated by the Supreme Court, would incur the wrath of state political leaders and quite possibly national ones. The best they could hope for was a lack of outright condemnation. Political support for desegregation was virtually nonexistent.

At the prodding of state leaders, state legislatures throughout the South passed a variety of pro-segregation laws. By 1957, only three years after Brown, at least 136 new laws and state constitutional amendments designed to preserve segregation had been enacted. These ranged from depriving policemen of their retirement and disability if they failed to enforce the state's segregation laws (Georgia), to denying promotion or graduation to any student of a desegregated school (Louisiana), to simply making it illegal to attend a desegregated school (Mississippi) to Virginia's massive resistance including closing public schools, operating a tuition grant scheme, suspending compulsory attendance laws, and building private segregated schools. ...As the Southern saying went, "as long we can legislate, we can segregate."

Along with opposition to desegregation from political leaders at all levels of government, there was hostility from many white Americans. Law and legal decisions operate in a given cultural environment, and the norms of that environment influence the decisions that are made and the impact they have. In the case of civil rights, decisions were announced in a culture in which slavery had existed and apartheid did exist. Institutions and social structures throughout America reflected a history of, if not a present commitment to, racial discrimination. Cultural barriers to civil rights had to be overcome before change could occur. And courts do not have the tools to do so. This is well illustrated in the decade after Brown.

One of the important cultural barriers to civil rights was the existence of private groups supportive of segregation. One type, represented by the Ku Klux Klan, White Citizens' Councils, and the like, existed principally to fight civil rights. Either through their own acts, or the atmosphere these groups helped create, violence against blacks and civil rights workers was commonplace throughout the South....[C]ountless bombings and numerous murders occurred throughout the South. During the summer of 1964 in Mississippi alone there were thirty-five shootings, sixty-five bombings (including thirty-five churches), eighty beatings, and six murders. It was a brave soul indeed who worked to end segregation or implement court decisions. ...

The cultural biases against civil rights that pervaded private groups also pervaded local governments. Court-ordered action may be fought or ignored on a local level, especially if there is no pressure from higher political leadership to follow the law and pressure from private groups not to. It was common to find, for example, that where bus companies followed the law and removed segregation signs in terminals, state and local officials put them back up. In the five Deep South states, as a matter of principle no school-board member or superintendent openly advocated compliance with the Supreme Court decision. And despite *Cooper v. Aaron*,¹ and the sending of troops to Little Rock in 1957, as of June 1963, only sixty-nine out of 7,700 students at the supposedly desegregated, “formerly” white, junior and senior high schools of Little Rock were black. Public resistance, supported by local political action, can almost always effectively defeat court-ordered civil rights.

In sum, in civil rights, court-ordered change confronted a culture opposed to that change. That being the case, the American judicial system, constrained by the need for both elite and popular support, constrained change.

The analysis above, however, omits one key institution and one key group: the judiciary, lawyers and their academic counterparts. The South, like the rest of the country, has both state and federal courts as well as lawyers. And the courts have a natural constituency in the American legal profession. Indeed, Justice Frankfurter believed that lawyers’ support of the Court’s decision in *Brown* would be decisive. As he put it in a letter to a friend, “it is the legal profession of the South on which our greatest reliance must be placed...because the lawyers of the South will gradually realize that there is a transcending issue, namely respect for law as determined so impressively by a unanimous court [in *Brown*].” But Justice Frankfurter was to be doubly disappointed; both Southern lawyers and elite lawyers and legal academics throughout the country condemned the case or offered only the most tepid support.

Lawyers and the Legal Profession

While there were undoubtedly some white Southern lawyers who supported the Court, they were few and far between. Opponents, in contrast, were everywhere. And surprisingly, opposition was voiced not merely by white Southerners but also by elite, Northern lawyers as well. A notable example was the American Bar Association (ABA), which is the nation’s major professional legal organization. Politically neutral, it claims the legitimacy of professional expertise. However, in the wake of *Brown*, it lent the pages of its journal, the *ABA Journal*, to condemnation of *Brown*, from the vicious to the technical. It published only the most tepid, rule-of-law, defenses of the decision. Not once, in either editorials or articles, was there an argument that *Brown* was morally, constitutionally, or substantively correct. ...

Elite legal academics also joined the fray. “[S]peaking the rhetoric of institutional legitimacy, a significant number of northeastern, white, liberal lawyers joined with white, southern, never-say-die segregationists in questioning the Court’s authority and legitimacy in *Brown*.” Although there was some support for the decision in law reviews immediately following *Brown*, it was found mostly in short pieces. In contrast, elite law reviews repeatedly blasted the Court. For example, the Harvard Law Review poured out a torrent of criticism, especially in its annual Forewords. *Brown* was criticized as poorly thought out, insufficient to support other cases, and unprincipled. The most important article was undoubtedly written by Herbert Wechsler, a law professor at Columbia University in New York City. Giving the Holmes Lecture at Harvard, and appearing as the Foreword to the 1959 Harvard Law Review,... [he criticized] *Brown* as unprincipled. *Brown* lacked a neutral principle, Wechsler argued, because separate but equal, if truly equal, was itself a neutral principle and there was no neutral way of deciding between it and equality. Wechsler’s piece is the second most cited law review article in the period 1957 through March 1985! The popularity of his critique of *Brown* as unprincipled is a powerful indicator of the lack of support elite academic lawyers gave to *Brown*.

Local Courts

Judges seldom stepped in where politicians, lawyers, and the public at large were unwilling to go. The “fifty-eight lonely men” who served the federal judiciary in the South were being asked to dismantle a social system they had grown up with and of which they were a part. Even a judge as pro-civil-rights as John Minor Wisdom was sympathetic, finding it “not surprising that in a conservative community a federal judge may feel that he cannot jeopardize the respect due the court in all of his cases by vigorously supporting civil rights.” Although there were some outstanding Southern federal judges such as J. Skelly Wright, John Minor Wisdom, Bryan Simpson, and Frank Johnson, there were also some who were not. For example, Judge Elliott (M. Dist. GA) stated that he did not want “pinks, radicals and black voters to outvote those who are trying to preserve our segregation laws.” Judge Cox (S. Dist. Miss.), speaking from the Bench in March 1964, referred repeatedly to black voter-registration applicants in derogatory language (as “a bunch of niggers”) who were “acting like a bunch of chimpanzees.” It is important to note that both judges Elliott and Cox were Kennedy appointees. ...

On the state levels judges were even more biased. Chief Justice J. Edwin Livingston of the Alabama Supreme Court, speaking in 1959 to several hundred students and business leaders, announced: “I’m for segregation in every phase of life and I don’t care who knows it. ...I would close every school from the highest to the lowest before I would go to school with colored people.” Alabama circuit judge Walter B. Jones wrote a column in the Montgomery Advertiser that he devoted to the “defense of white supremacy.” In June 1958 he told readers that in the case against the NAACP, over which he was presiding, he intended to deal the NAACP a “mortal blow” from which it “shall never recover.” It is no wonder, then, that despite clear Supreme Court rulings, Alabama was able to keep the NAACP in litigation for eight years and effectively incapacitated in the State. As Leon Friedman, who talked with scores of civil rights lawyers in the South, concluded, “the states’ legal institutions were and are the principal enemy.”

The use of the courts in the civil rights movement is considered the paradigm of a successful strategy for social change. Yet, a closer examination reveals that courts had virtually no direct effect on ending discrimination in education, Courageous and praiseworthy decisions were rendered, and nothing changed. *Brown* and its progeny stand for the proposition that courts are impotent to further the interests of the relatively disadvantaged. *Brown* is a paradigm, but for precisely the opposite view.

This, however, is not the end of the story. By the 1972–1973 school year, more than 91% of African-American children in the eleven states of the former Confederacy were in a nonsegregated school. Eighteen years after *Brown*, Southern school systems were desegregated. How did this occur?

Change came to Southern school systems in the wake of congressional and executive branch action. Title VI of the 1964 Civil Rights Act permitted the cut-off of federal funds to programs receiving federal monies where racial discrimination was practiced, and the 1965 Elementary & Secondary Education Act provided a great deal of federal money to generally poor Southern school districts. By the 1971–1972 school year, for example, federal funds comprised from between 12% and 27.8% of Southern state school budgets, up from between 4.6% and 11.1% in the 1963–1964 school year. This combination of federal funding and Title VI gave the executive branch a tool to induce desegregation when it chose to do so. When the U.S. Department of Health, Education, and Welfare began to threaten fund cut-offs to school districts that refused to desegregate, dramatic change occurred. By the 1972–1973 school year, more than 91% of African-American school children in the eleven Southern states were in integrated schools, up from 1.2% in the 1963–1964 school year. With only the constitutional right in force in the 1963–1964 school year, no more than 5.5% of African-American children in any Southern state were in school with whites. By the 1972–1973 school year, when economic incentives were offered for desegregation, and costs imposed for failure to desegregate, in no Southern state were fewer than 80% of African-American children in integrated schools. School desegregation occurred in the years 1968–72, then, because a set of conditions provided incentives for it and imposed costs for failing to desegregate. When those conditions were lacking, as in the first decade after *Brown*, constitutional rights were flouted. What a Court decision was unable to accomplish, federal dollars were able to achieve. The Supreme Court, acting alone, lacked the power to produce change.

INDIRECT EFFECTS

The judicial path of influence is not the only way an institution can contribute to civil rights. By bringing an issue to light courts may put pressure on others to act, sparking change. Thus *Brown* and its progeny may have been the inspiration that eventually led to congressional and executive branch action and some success in civil rights. According to one commentator, “*Brown* set the stage for the ensuing rise in black political activism, for legal challenges to racial discrimination in voting, employment, and education, as well as for the creation of a favorable climate for the passage of the subsequent civil rights legislation and the initiation of the War on Poverty.” Indeed, most commentators (and I assume most readers) believe this is the case and hold their belief with little doubt. As C. Herman Pritchett put it, “if the Court had not taken that first giant step in 1954, does anyone think there would now be a Civil Rights Act of 1964?”

In the next few pages I examine these claims. What evidence exists to substantiate them? How important was *Brown* to the civil rights struggle? In examining these questions, it must be noted that social scientists do not understand well enough the dynamics of influence and causation to state with certainty that the claims of Court influence (or any other causal claims) are right or wrong. Similarly, social scientists do not understand fully the myriad of factors that are involved in an individual’s reaching a political decision. Ideas seem to have feet of their own, and tracking their footsteps is an imperfect science. Thus, even if I find little or no evidence of extra-judicial influence, it is simply impossible to state with certainty that the Court did not contribute in a significant way to civil rights. On the other hand, claims about the real world require evidence. Otherwise, they are merely statements of faith.

Turning to the specifics, I have tried to delineate the links that are necessary for the Court to have influenced civil rights by the extra-judicial path. The bottom line, the last link, is that the action of the President and Congress resulted in change. That is, the passage of the 1964 Civil Rights Act brought about change....The key question, then, is the extent to which congressional and presidential action was a product of Court action.

One hypothesized link postulates that Court action gave civil rights prominence, putting it on the political agenda. Media coverage of civil rights over time could provide good evidence to assess this link. A second link, put quite simply, is that Court action influenced both the President and Congress to act. The Court, in other words, was able to pressure the other branches into dealing with civil rights. A third hypothesized link proposes that the Court favorably influenced white Americans in general about civil rights and they in turn pressured politicians. By bringing the treatment of black Americans to nationwide attention, the Court may have fomented change. A final hypothesized link suggests that the Court influenced black Americans to act in favor of civil rights and that this in turn influenced white political elites either directly or indirectly through influencing whites in general.

Saliency

When the Supreme Court unanimously condemned segregation in 1954, it marked the first time since 1875 that one of the three branches of the federal government spoke strongly in favor of civil rights on a fundamental issue. The Court, it is claimed, put civil rights on the political agenda. "Brown," Neier writes, "launched the public debate over racial equality." One important way in which the political agenda is created is through the press. Thus, one way in which the Court may have given saliency to civil rights is through inducing increased press coverage of it and balanced treatment of blacks. ...

The most powerful way to determine if there was a sustained increase in press coverage of civil rights in response to Brown is to actually count press stories over time. The evidence shows that while press coverage of civil rights, as measured by the number of stories dealing with the issue in the Readers' Guide to Periodical Literature, increased moderately in 1954 over the previous year's total, by 1958 and 1959 coverage actually dropped below the level found in several of the years of the late 1940s and early 1950s! In addition, if one examines the magazines in America in the 1950s and early 1960s with the largest circulations, Reader's Digest, Ladies Home Journal, Life, and the Saturday Evening Post, the same general pattern again repeats. And it was not until 1962 that TV Guide ran a story having to do with civil rights. Thus, press coverage provides no evidence that the Court's decision gave civil rights saliency for most Americans. ...

There was one media outlet that gave enormous coverage to Brown: Voice of America! The decision was immediately translated into thirty-four languages and broadcast around the world. In poignant contrast, Universal Newsreels, the company that made news reports for movie theaters in the United States, never mentioned Brown.

In sum, press coverage of civil rights provides no evidence for the claim that the Court has important extra-judicial-effects claim. This finding is striking since Brown is virtually universally credited with having brought civil rights to national attention.

Elites

The extra-judicial-effects argument claims that the actions of the Supreme Court influenced members of Congress, the President, and the executive branch. The argument might be that because of the "deference paid by the other branches of government and by the American public" to the Supreme Court, its decisions prodded the other branches of the federal government into action. Further, the argument might run that the Court's actions sensitized elites to the legitimate claims of blacks. As Wilkinson puts it, "Brown was the catalyst that shook up Congress.

A sensible place to look for evidence of indirect effects is in the legislative history and debates over the 1957, 1960, and 1964 civil rights acts, and in presidential pronouncements on civil rights legislation. If Court action was crucial to congressional and presidential action, one might reasonably expect to find members of Congress and the President mentioning it as a reason for introducing and supporting civil rights legislation. While it is true that lack of attribution may only mean that the Court's influence was subtle, it would cast doubt on the force, if not the existence, of this extra-judicial effect.

At the outset, the case for influence is supported by the fact that civil rights bills were introduced and, for the first time since 1875, enacted in the years following *Brown*. While this makes it seem likely that *Brown* played an important role, closer examination of the impetus behind the civil rights acts of 1957, 1960, and 1964 does not support this seemingly reasonable inference. The 1957 and 1960 bills were almost entirely driven by electoral concerns. Republicans attempted to court Northern urban black voters and, at the same time, embarrass the Democrats by exposing the major rift between that party's Northern and Southern wings. The press and political opponents understood the bills as a response to electoral pressures, not to constitutional mandates.

The story of the 1964 act is similar in that there is no evidence of Court influence and a great deal of evidence for other factors, in this case the activities of the civil rights movement. The Kennedy administration offered no civil rights bill until February 1963 and the bill it offered then was "a collection of minor changes far more modest than the 1956 Eisenhower program." When a House subcommittee modified and strengthened the bill, Attorney General Robert Kennedy met with the members of the full Judiciary Committee in executive session and "criticized the subcommittee draft in almost every detail." It was not until the events of the spring of 1963 that the administration changed its thinking.

In Congress, there is little evidence that *Brown* played any appreciable role. The seemingly endless congressional debates, with some four million words uttered in the Senate alone, hardly touched on the case. References to *Brown* can be found on only a few dozen out of many thousands of pages of Senate debate. While much of the focus of the debate was on the constitutionality of the proposed legislation, and on the Fourteenth Amendment, the concern was not with how *Brown* mandated legislative action, or even how *Brown* made such a bill possible. Even in the debates over the fund cut-off provisions, *Brown* was seldom mentioned. ...Thus, there does not appear to be evidence for the influence of *Brown* on legislative action.

Reviewing the public pronouncements of Presidents Eisenhower, Kennedy, and Johnson on civil rights legislation, I do not find the Court mentioned as a reason to act. Neither Eisenhower nor Kennedy committed the moral weight of their office to civil rights. When they did act, it was in response to violence or upcoming elections, not in response to Court decisions. While President Johnson spoke movingly and eloquently about civil rights, he did not mention Court decisions as an important reason for civil rights action. In his moving speeches to Congress and the nation in support of the 1964 Civil Rights Act and the 1965 Voting Rights Act he dwelt on the violence that peaceful black protesters were subjected to, the unfairness of racial discrimination, and the desire to honor the memory of President Kennedy. It was these factors that Johnson highlighted as reasons for supporting civil rights, not Court decisions.

In sum, I have not found the evidence necessary to make a case of clear attribution for the Court's effects on Congress or the President. Students of the Civil Rights Acts of 1957, 1960, and 1964 credit their introduction and passage to electoral concerns, or impending violence, not Court decisions. The extra-judicial-effects claim is not supported with Congress or the President.

Whites

The extra-judicial-effects thesis views courts as playing an important role in alerting Americans to social and political grievances. The view here is that the Supreme Court “pricked the conscience” of white America by pointing out both its constitutional duty and its shortcomings. “Except for Brown,” Aryeh Neier contends, white Americans “would not have known about the plight of blacks under segregation.” For this claim to hold, in order for courts to affect behavior, directly or indirectly, people must be aware of what the courts do. While this does not seem an onerous responsibility, I have shown earlier that most Americans have little knowledge about U.S. courts and pay little attention to them. The specific question this leaves unanswered is whether this holds true for a case such as Brown.

Surprisingly, and unfortunately, there appear to be no polls addressing awareness of Brown. There are, however, polls charting the reaction to Brown by Southerners over time. They show both very little support for desegregation and lessening support throughout the 1950s. By 1959, for example, support for desegregation actually dropped, with only 8% of white Southerners responding that they would not object, down from 15% in 1954.

If there is little evidence that Brown changed opinions about school desegregation in the South, perhaps it helped change white opinions more generally. It is clear that throughout the period from the beginning of the Second World War to the passage of the 1964 Act, whites became increasingly supportive of civil rights. Is there evidence that this change was the effect of Court action? The answer appears to be no. Writing in 1956, Hyman and Sheatsley found that the changes in attitude were “solidly based” and “not easily accelerated nor easily reversed.” Further, they found that the changes were not due to any specific event, such as Kennedy’s assassination, or a Supreme Court decision. They found that changes in national opinion “represent long-term trends that are not easily modified by specific—even by highly dramatic—events.”

Another way of examining the indirect-effects claim on white Americans is to look at how the sensitivity of Americans to civil rights changed generally. According to one proponent of judicial influence, the “Brown decision was central to eliciting the moral outrage that both blacks and whites were to feel and express about segregation.” If the Court served this role, it would necessarily have increased awareness of the plight of blacks. The evidence, however, shows no sign of such an increase. Survey questions as to whether most blacks were being treated fairly resulted in affirmative responses of 66% in 1944, 66% in 1946, and 69% in 1956. The variation of 3% is virtually meaningless. By 1963, when Gallup asked if any group in America was being treated unfairly, 80% said no. Only 5% of the sample named “the Negroes” as being unfairly treated while 4% named “the whites.”...As Burke Marshall, head of the Justice Department’s Civil Rights Division put it, “the Negro and his problems were still pretty much invisible to the country...until mass demonstrations of the Birmingham type.” These results, and the change over time, hardly show an America whose conscience is aroused. If the Court pricked the conscience of white Americans, the sensitivity disappeared quickly.

In sum, in several areas where the Supreme Court would be expected to influence white Americans, evidence of the effect has not been found. Most Americans neither follow Supreme Court decisions nor understand the Court’s constitutional role. It is not surprising, then, that change in public opinion appears to be oblivious to the Court. Again, the extra-judicial-effects thesis lacks evidence.

Blacks

The indirect-effects thesis makes claims about the effect of the Supreme Court on black Americans. Here, a plausible claim is that *Brown* was the spark that ignited the black revolution. By recognizing and legitimizing black grievances, the public pronouncement by the Court provided blacks with a new image and encouraged them to act. This assumption is virtually universal among lawyers and legal scholars, and representative quotations can be found throughout this chapter. *Brown* “begot,” one legal scholar tells us, “a union of the mightiest and lowliest in America, a mystical, passionate union bound by the pained depths of the black man’s cry for justice and the moral authority, unique to the Court, to see that justice realized.” Thus, *Brown* may have fundamentally re-oriented the views of black Americans by providing hope that the federal government, if made aware of their plight, would help. Black action, in turn, could have changed white opinions and led to elite action and civil rights. If this is the case, then there are a number of places where evidence should be found.

One area where this effect should be seen is in civil rights demonstrations. The evidence plainly indicates that civil rights marches and demonstrations affected both white Americans and elites and provided a major impetus for civil rights legislation. As Wilkinson puts it, “the Court sired the movement, succored it through the early years, [and] encouraged its first taking wing.” If this were the case, if, in the words of civil rights litigator Jack Greenberg, the direct-action campaign would not have developed “without the legal victories that we’d won earlier,” then one would expect to see an increase in the number of demonstrations shortly after the decision. However, there is almost no difference in the number of civil rights demonstrations in the years 1953, 1954, and 1955. There was a large jump in 1956.² But then the numbers drop. For example, 1959 saw fewer civil rights demonstrations than in four of the years of the 1940s! And the number of demonstrations skyrocketed in the 1960s, six or more years after *Brown*. This pattern does not suggest that the Court played a major role. The time period is too long and the 1960s increases too startling to credit the Court with a meaningful effect. ...

Dr. Martin Luther King, Jr.

One possible way in which *Brown* might have ignited the civil rights movement is by inspiring Dr. King. His ringing denunciations of segregation, his towering oratory, and his ability to inspire and move both blacks and whites appear to have played an indispensable role in creating pressure for government action. Was King motivated to act by the Court? From an examination of King’s thinking, the answer appears to be no. King rooted his beliefs in Christian theology and Gandhian nonviolence, not constitutional doctrine. His attitude to the Court, far from a source of inspiration, was one of strategic disfavor. “Whenever it is possible,” he told reporters in early 1957, “we want to avoid court cases in this integration struggle.” He rejected litigation as a major tool of struggle for a number of reasons. He wrote of blacks’ lack of faith in it, of its “unsuitability” to the civil rights struggle, and of its “hampering progress to this day.” Further, he complained that to “accumulate resources for legal actions imposes intolerable hardships on the already overburdened.” In addition to its expense, King saw the legal process as slow. Blacks, he warned, “must not get involved in legalism [and] needless fights in lower courts” because that is “exactly what the white man wants the Negro to do. Then he can draw out the fight.” Perhaps most important, King believed that litigation was an elite strategy for change that did not involve ordinary people. He believed that when the NAACP was the principal civil rights organization, and court cases were relied on, “the ordinary Negro was involved [only] as a passive spectator” and “his energies were unemployed.” As he told the NAACP Convention on July 5, 1962, “only when the people themselves begin to act are rights on paper given life blood.” King’s writings and actions do not provide evidence for the Dynamic Court view that he was inspired by the Court.

Black Groups

The founding of the Student Non-Violent Coordinating Committee (SNCC), the Congress of Racial Equality (CORE), and the Southern Christian Leadership Conference (SCLC), the organizations that provided the leadership and the shock troops of the movement, could quite plausibly have been inspired by the Court. Although SNCC was not founded until six years after *Brown*, and CORE was not revitalized until 1961, it may have taken that long for the effect to be felt.

However, it is quite clear that the Court played no role in inspiring these key groups of the civil rights movement to form. To the contrary, they were formed as an explicit rejection of litigation as a method of social change. ...The founding of SNCC in 1960 [for example]...was aimed at helping students engaged in sit-ins to create at least some communication and organization network.” And CORE was founded in 1942 as a Gandhian-type movement of mass non-violent direct action. As its Executive Director James Farmer told Roy Wilkins of the NAACP in response to Wilkins’s opposition to the Freedom Ride, and preference for litigation, “we’ve had test cases and we’ve won them all and the status remains quo.” The point is that *Brown* is simply not mentioned as a source of inspiration. ...

In sum, the claim that a major contribution of the courts in civil rights was to give the issue salience, press political elites to act, prick the consciences of whites, legitimate the grievances of blacks, and fire blacks up to act is not substantiated. In all the places examined, where evidence supportive of the claim should exist, it does not. The concerns of clear attribution, time, and increased press coverage all cut against the thesis. Public-opinion evidence does not support it and, at times, clearly contradicts it. The emergence of the sit-ins, demonstrations, and marches does not support it. While it must be the case that Court action influenced some people, I have found no evidence that this influence was widespread or of much importance to the battle for civil rights. The evidence suggests that *Brown*’s major positive impact was limited to reinforcing the belief in a legal strategy for change of those already committed to it. The burden of showing that *Brown* accomplished more now rests squarely on those who for years have written and spoken of its immeasurable importance.

CONCLUSION: THE FLY-PAPER COURT

[I have] examined whether the Supreme Court’s decision in *Brown v. Board of Education* was able to desegregate schools. Surprisingly, the analysis showed the Court’s decision, praiseworthy as it was, did not make much of a contribution. This is the case because, on the most fundamental level, courts depend on political support to produce such reform. Thus, political hostility doomed the Court’s contributions.

Courts will also be ineffective in producing change, given any serious resistance because of their lack of implementation powers. The structural constraints built into the American judicial system, make courts virtually powerless to produce change. They must depend on the actions of others for their decisions to be implemented. With civil fights, little changed until the federal government became involved. Where there is local hostility to change, court orders will be ignored. Community pressure, violence or threats of violence, and lack of market response all serve to curtail actions to implement court decisions. When Justice Jackson commented during oral argument in *Brown*, “I suppose that realistically this case is here for the reason that action couldn’t be obtained from Congress,” he identified a fundamental reason why the Court’s action in the case would have little effect.

In general, then, not only does litigation steer activists to an institution that is constrained from helping them, but also it siphons off crucial resources and talent, and runs the risk of weakening political efforts. In terms of financial resources, social reform groups do not have a lot of money. Funding a litigation campaign means that other strategic options are starved of funds....Further, the legal strategy drained off the talents of such as Thurgood Marshall and Jack Greenberg. As Martin Luther King, Jr., complained: "to accumulate resources for legal actions imposes intolerable hardships on the already overburdened."

It is important to note here that there were options other than litigation. Massive voter registration drives could have been started in the urban North and in some major Southern cities. Marches, demonstrations, and sit-ins could have been organized and funded years before they broke out, based on the example of labor unions and the readiness of groups like the CORE. Money could have been invested in public relations. Amazingly, in 1957 the NAACP spent just \$7,814 for its Washington Bureau operations. Its entire "public relations and informational activities" spending for 1957 was \$17,216. NAACP lobbyists did not even try to cultivate the black press or the black church, let alone their white counterparts. And even in 1959 the public relations budget was only \$10,135. When activists succumbed to the "lawyers' vision of change without pain," a "massive social revolution" was side-tracked into "legal channels." Because the NAACP failed to understand the limits on U.S. courts, its strategy was bound to fail.

If this is the case, then there is another important way in which courts effect social change. It is, to put it simply, that courts act as "fly-paper" for social reformers who succumb to the "lure of litigation." Courts, I have argued, can seldom produce significant social reform. Yet if groups advocating such reform continue to look to the courts for aid, and spend precious resources in litigation, then the courts also limit change by deflecting claims from substantive political battles, where success is possible, to harmless legal ones where it is not. Even when major cases are won, the achievement is often more symbolic than real. Thus, courts may serve an ideological function of luring movements for social reform to an institution that is structurally constrained from serving their needs, providing only an illusion of change. ...