

Brown, Social Movements, and Social Change

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Today I want to share with you five basic lessons about social movements and courts, five lessons about how social movements achieve their goals and, in the process, change the meaning of the United States Constitution. *Brown v. Board of Education*² and the struggle for civil rights will be my key example, but I will also have a few things to say along the way about other cases, including *Lawrence v. Texas*,³ the 2003 case that was a great victory for the gay rights movement.

The first lesson is that the Supreme Court is not counter-majoritarian, it is nationalist. All of us are familiar with the expression "judicial activism" and the charge that courts are basically anti-democratic institutions that are always vetoing what majorities want. But that's wrong, or at the very least it is misleading. Political scientists tell us that the Supreme Court is an integral part of the national political coalition. It never strays too far from the views of national majorities, and in particular from the views of national elites. Often what the

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²347 U.S. 483 (1954).

³539 U.S. 558 (2003).

Court does is ratify the views of national majorities and impose those views on regional majorities in states. That's what I mean when I say that the Supreme Court is less anti-majoritarian than nationalist.

Studies have confirmed this phenomenon repeatedly.⁴ If you want examples in recent history, you might consider the decisions of what is generally thought to be a very conservative Court in the 2003 Term. The Supreme Court struck down state sodomy laws in *Lawrence v. Texas*, it upheld the application of the Family and Medical Leave Act to state governments in *Hibbs v. Department of Social Services*,⁵ and it upheld race conscious affirmative action to promote diversity in *Grutter v. Bollinger*.⁶ How did this happen? Did the members of the Supreme Court suddenly have a brain transplant? Of course not. Although the Supreme Court may contain many conservative Justices, the Supreme Court as an institution does not stray too far from the political center— wherever that center happens to be— and from the views of national elites. One of the most interesting features of the *Grutter* case was that amicus briefs from a group of Fortune 500 corporations and from members of the United States Military argued that the nation could not do without race-conscious affirmative action.⁷ You can't get

⁴The key article is Robert A. Dahl, "Decisionmaking in a Democracy: The Supreme Court as a National Policy-Maker," 6 J. Pub. L. 279 (1957). For a review of the recent political science literature, see Barry Friedman, Mediated Popular Constitutionalism, 101 Mich. L. Rev. 2596 (2003), Terri Jennings Peretti, In Defense of a Political Court 80-132 (1999).

⁵538 U.S. 721 (2003).

⁶539 U.S. 306 (2003).

⁷See, e.g., Consolidated Brief of Lt. Gen. Julius W. Becton, Jr. et al. as Amici Curiae in Support of Respondents, *Grutter v. Bollinger* (No. 02-241), *Gratz v. Bollinger* (No. 02-516)(the Military Brief); Brief of General Motors Corporation as Amicus Curiae in Support of Respondents, *Grutter v. Bollinger* (No. 02-241), *Gratz v. Bollinger* (No. 02-516); Brief for Amici Curiae 65 Leading American Businesses in Support of Respondents, *Grutter v. Bollinger* (No. 02-241), *Gratz v. Bollinger* (No. 02-516); Brief of 3M, et al. as Amici Curiae in Support of Respondents, *Grutter v. Bollinger* (No. 02-241), *Gratz v. Bollinger* (No. 02-516).

much more establishment than the Fortune 500 and the U.S. Military.

This feature of Supreme Court decisionmaking puts the Supreme Court's 1954 decision in *Brown v. Board of Education* in a very different light. The Supreme Court was not really swimming against the tide in the way most people imagine. In 1954, only 17 states required segregation of public schools. Four other states had a local option, including Kansas, which is why the Topeka schools were segregated. The remaining twenty seven states— remember that there were only 48 at the time-- had abolished de jure segregation.⁸

Moreover, the 1940's and early 1950's had seen an important transformation in popular attitudes about race relations. People became increasingly optimistic about the possibility of real change. World War II in particular had been a watershed event. The United States had sacrificed many thousands of lives to fight a racist regime in Nazi Germany. Increasingly, people believed, it made little sense for America to condone racial apartheid at home.

American politics had changed too. The Democratic party was no longer solely the party of slaveocracy and Jim Crow. Franklin Roosevelt welcomed blacks into the New Deal coalition. Harry Truman, one of the great champions of civil rights, created the U.S. Commission on Civil Rights in 1947, which produced a famous report "To Secure These Rights," that formed a blueprint for future civil rights legislation. In February 1948 he delivered the first presidential message on civil rights to Congress, and he proposed 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 original result in *Plessy v. Ferguson*.⁹ The same year Truman issued two executive orders desegregating the Armed Forces and creating a Fair Employment Board to govern the U.S. Civil Service.¹⁰ Truman then ran for

⁸Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* 344–45 (2004); Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* 42 (1991).

⁹163 U.S. 537 (1896).

¹⁰See *President's Commission on Civil Rights: To Secure These Rights* (1947); Exec. Order No. 9980, 3 C.F.R. 720 (1948) (establishing a Fair Employment

President in 1948 on a party platform that included a call for civil rights. The Dixiecrats bolted the party, but Truman won the election anyway. Two years later, in 1950, Truman's Justice Department asked the Supreme Court to overrule *Plessy v. Ferguson* in *Sweatt v. Painter*.¹¹ But the Court wasn't as bold as Harry Truman. They waited until four years later.

By 1954, then, the Supreme Court was responding to a long term change in national attitudes about race spurred on by World War II. Foreign policy elites believed that Jim Crow was an embarrassment and was harming American interests in the Cold War; they pressured the Supreme Court to overrule *Plessy*.

Although I've just said that the Supreme Court follows the views of national majorities, it's important to understand that national majorities don't necessarily want the same things that social movements want. For example, the State Department and other foreign policy elites simply wanted a declaration that Jim Crow was unconstitutional. They didn't want wholesale social change, much less massive social redistribution from whites to blacks. And certainly the vast majority of white America didn't want that either. Not surprisingly, then, in the years immediately after *Brown* was decided, the Supreme Court was relatively silent on the issue of school desegregation. Its most important intervention during this period was to reassert federal supremacy in *Cooper v. Aaron*.¹² The fight for

Board within the Civil Service Commission); Exec. Order No. 9981, 3 C.F.R. 722 (1948) (ordering desegregation of U.S. Armed Forces). For accounts of Truman's policies on civil rights, see 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); William C. Berman, *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, 238-240 (1970).

¹¹339 U.S. 629 (1950). See Klarman, *From Jim Crow to Civil Rights*, supra note 8, at 210; The Justice Department made this request in in a trio of cases decided in 1950: *U.S. v. Henderson*, 339 U.S. 816 (1950), *Sweatt v. Painter*, and *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950). Brief for the United States, *Henderson v. United States*, 35-49; Memorandum for the United States as Amicus Curiae, *McLaurin v. Oklahoma State Regents*, and *Sweat v. Painter*, 9-14

¹²358 U.S. 1 (1958).

racial equality turned to the lower courts, with only limited success. In fact, only after the passage of the Civil Rights Act of 1964, and the landslide election of 1964, and the Voting Rights Act of 1965 was there any significant desegregation in the South.¹³ Desegregation took place only after public support had been mobilized and national coalitions got behind the idea. By 1964, all three branches of the Federal Government were more or less united in pushing a civil rights agenda, and so civil rights made progress.

Now compare what I've just told you about *Brown* with the story of *Lawrence v. Texas*, which struck down state laws banning same-sex sodomy. Like *Brown*, *Lawrence* may seem anti-majoritarian at first, but it also reflects and confirms a significant long-term change in social attitudes in the United States. In 1960 every state banned same-sex sodomy. In 1986 when the Supreme Court upheld Georgia's anti-sodomy law by a close 5-4 vote in *Bowers v. Hardwick*,¹⁴ twenty-five states banned the practice. It had been decriminalized in twenty-five others. The trend was clear, and the Supreme Court almost overturned these laws in 1986, but Justice Powell changed his mind at the last minute. By 2003, when *Lawrence* was decided, only thirteen states still decriminalized same sex sodomy, and in none of those states were the laws against sodomy seriously enforced.¹⁵ To be sure, having sodomy laws on the books had important collateral consequences for gays and lesbians in issues like employment, adoption, and so on, but the criminal provisions were hardly used at all. In the meantime, gays and lesbians

¹³Michael Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 Va. L. Rev. 7, 42-46 (1994); Rosenberg, *supra* note 8, at 52. Between 1955, when *Brown II* was decided, and 1964, the Court decided three 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*. 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.

¹⁴478 U.S. 186 (1986).

¹⁵*Lawrence v. Texas*, 539 U.S. at 572.

had become familiar and increasingly accepted in movies, television and popular culture.

Thus, in 2003, the Supreme Court was hardly swimming against the tide, even less so than it had been in 1954. After all, massive resistance followed the *Brown* decision. But there has been no massive resistance in the 13 states that maintained sodomy laws before *Lawrence*. Gays have not been thrown into prison in order to defy the Supreme Court. Instead, the debate has moved on, in a very short period of time, to the question of same-sex marriage. Think about that: only a year after the decision in *Lawrence* 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 civil unions or marriages. This demonstrates as well as anything that the Supreme Court was confirming a big change in national social attitudes that had already occurred and that it was getting recalcitrant states in line.

Here's the second lesson: Courts tend to protect minorities just about as much as majorities want them to. This follows fairly directly from Lesson One. If the Supreme Court tends to respond to the values and interests of national political coalitions and national elites, the Court will protect minority interests to the extent that this is congruent with the values, interests and self-conception of majorities. Conversely, to the extent that minorities demand more— for example, significant redistribution of resources-- the Supreme Court will probably offer little additional help, because doing so would be going against the wishes of the dominant political coalition.

I noted earlier that during the 1960's all three branches of government had coalesced on a national civil rights policy. This is the period when Congress passed new civil rights laws and the Supreme Court imposed new national policies concerning civil rights, criminal procedure reform, and school prayer on state governments, and particularly the South. In fact, one way of understanding what happened in the 1960's is that all three branches of government ganged up on the South and imposed national values, and particularly the values of national

elites, on southern state and local governments.¹⁶ The Civil Rights Act and the Voting Rights Act are part of this change. So too is the Warren Court's revolution in criminal procedure: it was motivated by an increasing national concern with the mistreatment of blacks by the criminal process in the South.

However, after the 1968 election, a gradual retrenchment began.¹⁷ Richard Nixon appointed four conservatives to the Supreme Court, and the Supreme Court, following changes in national public opinion, began to impose limits on how far courts would advance the goals of the Second Reconstruction. The retrenchment that followed the 1968 election is the other side of my point that minorities get protected by the Supreme Court just about as much as majorities want them to be protected. The national political coalition wanted the changes of the 1960's slowed down, and so they were slowed down.

Many of you have heard of the expression "discrete and insular minorities,"¹⁸ and the idea that the Supreme Court's basic function is to protect those minority groups who are spurned in society, who are politically powerless, and who have no one else to stand up for them. People often argue that the job of the Supreme Court is to protect discrete and insular minorities from deficiencies and defects in the political process that fail to take the interests of minorities into account.

It is a nice idea, but it is largely a myth. That is not the way it really works in practice. In general, minorities don't get much protection from the courts until they have shown that they have political muscle or that they are otherwise a force to be reckoned with. Minority groups that don't even appear on the radar screen of political concern are pretty much ignored by courts, and their claims are often routinely dismissed. The best way to get protection from the courts is to make a fuss in the political process. In constitutional law, as elsewhere, it is usually the squeaky wheel that gets greased.

¹⁶Lucas A. Powe, Jr. *The Warren Court and American Politics* 490–91, 493–94 (2000).

¹⁷See Jack M. Balkin and Reva Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 *U. Miami L. Rev.* 9 (2004).

¹⁸*United States v. Carolene Prods. Corp.*, 304 U.S. 144, 152 n.4 (1938).

During the first half of the twentieth century, many blacks left the stagnation of Southern rural life and moved North to large cities, a phenomenon that is sometimes called the Great Migration. Blacks migrated to the North in the hope of better jobs and a freer life, but one of the important side effects of the Great Migration is that blacks moved from a region in the country where they couldn't vote to a region where they could. Traditionally blacks had been loyal Republican voters, because the Republicans were the party of Lincoln, but as disenfranchisement swept the South in the early twentieth century, and the Republicans realized that they could do little to stop it, the Republican party gradually wrote off the black vote. That gave the emerging liberal, urban wing of the Democratic Party a chance to contest the Republicans for black votes in the North and the border states. The Great Migration accelerated this trend, transforming the two major political parties in the process.

Thus, as a result of the Great Migration, a funny thing happens in American politics in the middle of the twentieth century. Roughly between 1930 and 1960 blacks become swing voters whose support can make the difference in close elections. You may have heard of soccer moms and Nascar dads. They are groups of key voters who may vote for either party; as a result, both major political parties try to court them. Well, between 1930 and 1960, blacks were sort of like soccer moms and Nascar Dads. Both parties had an interest in appealing to them, although the parties were constrained by American racial attitudes, particularly in the South. I have already pointed out that Roosevelt saw the opportunity to make blacks part of the New Deal coalition. Harry Truman owed his 1948 victory to an increase in African-American support for the Democrats, and thus it was no accident that Truman was a great champion of black civil rights.

As the votes of black people began to count more, the two major political parties began competing with each other to appeal to blacks; each party developed a liberal wing that was strongly pro-civil rights. These changes in the agenda of the two major political parties, in turn, affected the sorts of people who were appointed to the courts, and particularly the Supreme Court. That is one reason why the Supreme Court eventually featured a coalition of Justices liberal on black civil rights who were appointed by Presidents from both political parties. Increased black political power played a central role in changing conditions for

blacks, and led to Truman's executive orders and the judicial decisions of the Warren Court. Thus, blacks were protected as discrete and insular minorities not because they were completely powerless but because their political power slowly increased from the 1930's onward.

This brings me to my third lesson: Social movements change constitutional law, but not as they intend. This lesson follows from the previous two. Because the Supreme Court tends, over the long run, to converge toward the views of national majorities, social movements for political change tend to succeed only when they gain political muscle, can credibly threaten to make trouble for majorities, or otherwise become important to majorities. In particular, social movements tend to succeed best when they are able to call upon the interests, the values, or the self-conception of majorities. Let me distinguish these three different ideas.

The first idea is an appeal to interests. National political elites and State Department officials were embarrassed by Jim Crow and believed that it undermined American foreign policy interests in the Cold War.¹⁹ That gave them and civil rights leaders a common interest in desegregation, although for different reasons.

The second idea is an appeal to shared values. Social movements succeed when they successfully appeal to the common values of the United States and show that the movement is asking for the application of values that Americans believe they have always treasured. The civil rights movement was able to summon the idea of equality guaranteed by the Declaration of Independence and the idea that the United States is a country that believes in liberty, equality and equal citizenship. Martin Luther King, Jr.'s famous "I Have A Dream" Speech brilliantly connected the interests of the civil rights movement to the values of freedom and liberty, and to the ideals of the Founders.

The third idea is an appeal to the majority's self-conception. Majorities, like everyone else, like to think well of themselves. They are susceptible to persuasion when they are shamed or embarrassed by their own practices or by the practices of others. When Sheriff Bull Connor turned the fire hoses and dogs on

¹⁹Mary Dudziak, *Cold War Civil Rights: Race and The Image of American Democracy* 80–81 (2000).

little children protesting in Birmingham, and when Alabama state troopers began beating protesters at the Edmund Pettus Bridge in Selma, national audiences were horrified. They were embarrassed and ashamed because of what these acts said about the United States. They wanted to believe that they lived in a country where this did not happen. Violence against civil rights protesters threatened their view of Americans as decent people who loved equality and liberty. This helped shift public opinion in favor of the Civil Rights Act of 1964 and the Voting Rights Act of 1965.²⁰

Nevertheless, he who lives by majorities dies by majorities. As I mentioned, the 1968 election began a long, slow retrenchment against the civil rights movement that led to the end of our Second Reconstruction. Every successful social movement— and many unsuccessful ones— leads to countermobilizations. These mobilizations and countermobilizations contend for the hearts and minds of the public. When the interests and values of majorities and social movements no longer coincide, progress becomes much more difficult. And because courts tend to move toward the center of gravity of public opinion, courts start to become less helpful to minority interests soon thereafter. This is roughly what happened during the 1970's and 1980's.

This brings me to my fourth lesson: All roads lead to reform.

The first three lessons explained that social movements succeed by appealing to the interests, values and self-conception of national majorities. But institutional settings for social movement activism are equally important. At the risk of oversimplifying, there are three basic institutional avenues for social movement politics: They are (1) litigation— seeking redress in the courts; (2) legislation— seeking redress in Congress or state legislatures; and (3) direct action— trying to change people's minds through street protests, boycotts, sit-ins, and other types of demonstrations.

The fight for civil rights for African-Americans involved all three of these approaches. The Civil Rights Movement, especially after 1960, focused on direct action. The NAACP's litigation campaign appealed to the courts. The push for the 1964 Civil Rights Act and the 1965 Voting Rights Act sought legislative

²⁰Klarman, Brown, Racial Change, and the Civil Rights Movement, *supra* note 13, at 141–49.

reform.

When we celebrate *Brown v. Board of Education* today, we are also celebrating the long campaign by the NAACP to challenge segregation in the courts. Until the beginning of the direct action phase of the Civil Rights Movement, the strategy of the NAACP relied heavily on litigation. The reason is that until around 1960, there were really few other viable alternatives for pushing change at the national level.

Between 1875 and 1957, there was not a single Civil Rights bill passed in the United States Congress. An important reason was the power of Southern Democrats, who wielded the combined powers of the filibuster and the seniority system. Ironically, they maintained their power to block change in part because blacks were largely disenfranchised in the states they represented. With Southern Congressmen and Senators blocking all federal civil rights bills, legislative solutions were not possible. We have seen that Harry Truman was able to push for reforms through executive orders, but these had only limited reach outside the internal operations of the federal government.

The other possible avenue for change was direct action. However, you really couldn't have had a successful direct action movement in the South before the mid-1950s. The reason is quite simple: If you think there was violence directed against the Civil Rights Movement in the 1960s, just imagine the amount of violence that would have been delivered against any attempt at a Civil Rights Movement in the deep South in the '20s, '30s and '40s.²¹ Lynchings were still quite common and they were employed ruthlessly to stamp out all forms of dissent. With legislation and direct action unavailable until the middle of the 1950s, that left only one path of reform for the social movement— litigation. And that's exactly the strategy that the NAACP employed. They brought a series of

²¹Klarman, *supra* note 8, at 446. This is not to say that black leaders did not try to protest outside the South or put pressure Washington politicians. For example, in May 1948, A. Philip Randolph and Rev. 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 9, at 98-99. Truman's executive order No. 9981, desegregating the Armed Forces, was in part an attempt to forestall such a campaign. *Id.* at 117.

carefully orchestrated cases to try to chip away at the constitutional and legal foundations of Jim Crow.

The lesson to draw from this is not that litigation is the best way for a social movement to pursue change. The NAACP chose litigation out of necessity— there was simply no other avenue that was likely to be as effective. Rather, the lesson one should draw is that things go best for a social movement when it can pursue all three avenues of relief at once. That’s what I mean when I say that all roads lead to reform— not that any road will get you there equally well, but that it’s necessary to take all the roads simultaneously if you want to get where you are going. As we have seen, courts are more likely to recognize social movement claims when these claims are winning a favorable reception in other arenas as well. When a social movement is working on all three fronts, courts don’t have to do everything by themselves. Other institutions— Congress, the Executive Branch, and the various organs of the administrative state— are working to achieve the same basic objective. There is an obvious historical example— the period between 1962 and 1968, in which all three branches of the federal government were controlled by the same political party, and that party pushed for black civil rights.

This brings me to my fifth and final lesson: striking down criminal laws is easy; managing a welfare state is hard to do.

What do I mean by a welfare state? Governments can govern in lots of different ways. They can make new crimes, they can create civil causes of action, and they can produce administrative regulations. These are all aspects of the regulatory state.

But modern governments do far more than this. They create jobs. They engage in public works projects. They spend and distribute tax revenues. They create or subsidize public goods like health care and education. These are the tasks of a welfare state.

It's relatively easy for courts to supervise the activities of the regulatory state, because it’s administratively easy for courts to strike down criminal penalties, strike down civil causes of action, and hold that certain administrative regulations are unconstitutional. It is administratively easy in part because these laws normally have to go through the courts in order to be enforced. By refusing to enforce them, courts can usually ensure that other actors in the political system

will comply.

By contrast, imposing constitutional requirements on a government's welfare state activities is far more difficult, especially when courts ask government officials to spend money to pursue goals like equal educational opportunity, adequate health care or housing, or minimum levels of subsistence. Achieving these goals requires complicated tradeoffs, and it is often difficult to prove when the goal has been met. Government compliance with court orders may be hard to monitor, and government officials usually have lots of different ways to disclaim responsibility, drag their heels, and resist the courts. Instead of declaring a single law unconstitutional and refusing to enforce it, courts may have to persuade different sets of government actors with different interests and agendas to work together over fairly long periods of time. Finally, achieving equal educational opportunity costs money, and may require significant expenditures that cut into the government's budget and drain money from other projects and services. Government officials may be unwilling or unable to raise additional revenues, and may continually plead that they lack the funds necessary to carry out the necessary reforms.

Problems like these arise whenever courts try to make a government's welfare state activities conform to constitutional values. In fact, they are quite similar to the problems courts in other countries have faced in trying to enforce constitutional guarantees of social rights like housing, health, and employment. The history of court-ordered school desegregation in the United States has much in common with the history of the enforcement of the social guarantees that appear in many post-World War II constitutions around the world.

For example, the South African constitution is one of the most progressive in the world. It includes constitutional guarantees of health care, housing and education. However, when people living in a shanty town petitioned the South African Supreme Court to enforce their rights to adequate housing, the Court realized that there were a limited number of things it could do in the face of a recalcitrant government.²² The history of that litigation is similar in many ways

²²See, e.g., *Republic of South Africa v. Grootboom*, 2000 (11) BCLR 1169 (CC), at P. 41, available at <http://www.concourt.gov.za/files/grootboom1/grootboom1.pdf>; 2000 SACLR

to the history of litigation in desegregation suits and suits for education equality in the United States. The reason is that courts face the same sorts of obstacles in enforcing constitutional norms where the welfare state is concerned. Often constitutional courts can do little more than exhort their governments to make reasonable efforts to vindicate these rights, and even then courts must continually worry that their legitimacy will be tarnished if they push too hard and governments evade their directives— or, even worse, simply ignore them.

What have we learned about social movements? Social movements succeed when they gain the attention and the support of the national political coalition. Social movements succeed when they appeal to the interests, the values and the self-conception of majorities. Finally, social movements succeed when they don't rely on one single avenue of relief, but try to use all avenues of relief at once. In particular, they should not just rely on courts if they can help it.

That does not mean that courts are unimportant. It just means that they can't do the job alone. Usually they need a little help, or a little direction, from other places in the system. Courts are a little bit like place kickers on a football team. They can't tackle a speedy running back on their own. But they can slow him down so others can tackle him, or, if the other players tackle him first, the placekicker can pile on.

That's the way we should think about *Brown*. The Supreme Court did its part, but it didn't do everything. It couldn't do everything. But it helped in the way that courts can help. We shouldn't view the Supreme Court as an isolated hero responding to injustice when no one else would. We should view the

Lexis 126 (holding that under the guarantee of the right to housing of Section 26 of South Africa's Constitution, the government had an obligation to “establish a coherent public housing programme directed towards the progressive realisation of the right of access to adequate housing within the State's available means.”). In the *Grootboom* case, the South African Constitutional Court did not hold that the government would have to provide a “minimum core” level of housing care, nor did it require that any specific amount be appropriated for housing in the government's budget. It simply stated that “a reasonable part of the national housing budget [must] be devoted to [providing housing to those in desperate need], but the precise allocation is for national government to decide in the first instance.” *Id.* at P. 66.

Supreme Court as one part of a complicated mix of actors who together did something great and brought about a profound change in America. That picture makes the Supreme Court less central in some ways, but no less important.

And that's the picture I want to leave you with: The running back is sprinting down the field. The linebackers tackle him and throw him to the ground, and as the running back lies there moaning and groaning. The judges come along and say– "it's time to do some justice!" and they throw themselves on the pile. That's courts for you– bad at tackling, but good at piling on.