VIRGINIA LAW REVIEW

VOLUME 90 OCTOBER 2004 NUMBER 6

ESSAYS

WHAT *BROWN* TEACHES US ABOUT CONSTITUTIONAL THEORY

Jack M. Balkin[*]

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-

[*] Knight Professor of Constitutional Law and the First Amendment, Yale Law School. My thanks to Bruce Ackerman, Barry Friedman, Mark Graber, Sanford Levinson, Robert Post, Scot Powe, Reva Siegel, and Mark Tushnet for their comments on previous drafts.

[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.

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).

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. 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, 238–40 (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 McCullough, 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.

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-

trait is quite misleading. In general, courts will protect minorities only after minorities have shown a fair degree of clout in the political process.[49] If they are truly politically powerless, courts may not even recognize their grievances; and if they have just enough influence to get on the political radar screen, courts will usually dismiss their claims with a wave of the hand.[50] Conversely, as a reform movement for minority rights gains prominence through political protest and legislative lobbying, courts will increasingly pay attention to minority rights and take their claims more seriously. As minority rights become increasingly acceptable to majorities, courts will begin to perform their characteristic function of "piling on."[51]

burne Living Ctr., 473 U.S. 432, 445 (1985) (asking whether affected group has the "ability to attract the attention of the lawmakers").

[49] J.M. Balkin, The Constitution of Status, 106 Yale L.J. 2313, 2340 (1997) ("[L]egal elites—whether judicial or legislative—usually respond to 'disadvantaged' groups only after a social movement has demanded a response. Ironically then, a status group must display some degree of political power—whether at the ballot box or in the streets—before it can be considered 'politically powerless' and hence deserving of legal protection.").

[50] Id. at 2340–41 ("[G]roups that are truly politically powerless usually do not even appear on the radar screen of legal decisionmakers—including courts—because the status hierarchy is so robust that few in power even notice that there is a problem.").

[51] There are exceptions to this general rule. For example, once courts held that race discrimination and national origin discrimination were unconstitutional, the same legal protections applied to other racial and ethnic groups that did not organize. In addition, groups that are seen as particularly attractive or upstanding, like the Amish, may also receive judicial protection even if they lack significant political clout. See Wisconsin v. Yoder, 406 U.S. 205, 235–36 (1972) (praising the Amish as "a successful and self-sufficient segment of American society," and suggesting that "few other religious groups or sects could make" convincing claims for protection).

Perhaps the most important exception to the general principle stated in the text is the Jehovah's Witnesses, who were the subject of a series of cases defining free speech rights beginning in the 1930s and 1940s. See William Shepard McAninch, A Catalyst for the Evolution of Constitutional Law: Jehovah's Witnesses in the Supreme Court, 55 U. Cin. L. Rev. 997 (1987). There is no single explanation why the Court protected the Jehovah's Witnesses in a wide variety of settings. It is likely, however, that, like blacks, the Jehovah's Witnesses benefited from the country's struggle against fascism in World War II, as well as the Court's revulsion at violence directed against them. In *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), decided before the country's entry into World War II, the Court rejected the claim that Jehovah's Witness schoolchildren had a Free Exercise right to be excused from saying the Pledge of Allegiance and saluting the American flag. Following the decision, the Justice Department reported Justice officials spoke of "an uninterrupted record of violence and persecution of the Witnesses. Almost without exception, the flag and the flag salute can be found as the percussion cap that sets off these acts." Victor W. Rotnem & F.G. Folsom, Jr., Recent Restrictions Upon Religious Liberty, 36 Am.

All other things being equal, the most effective way for minorities to secure protection by courts and legislatures is for the minority group to demonstrate that protection of its rights is in the interest of majorities, is required by values that majorities hold dear, or is necessary to maintain a positive self-image for majorities. Minorities must articulate their demands in ways that show that their interests and values converge with the interests and values of majorities.[52] Then courts, which tend to reflect the views of the dominant national political coalition, will follow suit. They will protect minority rights to the extent that they do not conflict too much with the interests of majorities.[53]

Conversely, to the extent that the minority group's interests diverge significantly from the interests of majorities, the minority group will face real limits to significant further reform. Moreover, because courts in the long run tend to hew to the wishes of national majorities—and particularly national elites—retrenchment in the political process will usually be accompanied by retrenchment in the courts.

Brown v. Board of Education and the fifty years of race-relations law that followed it provide ample evidence of these lessons. The road to *Brown* was prepared by long-term shifts in American politics that caused the interests of African-Americans

Pol. Sci. Rev. 1053, 1062 (1942), *quoted in* Louis Fisher, Nonjudicial Safeguards for Religious Liberty, 70 U. Cin. L. Rev. 31, 62 n.256 (2001). These waves of violence against the Witnesses troubled the Justices (as well as elite opinion generally) and caused them to have second thoughts. Three years later, the Court overruled *Gobitis*, holding that the schoolchildren had a free speech right to avoid saluting the flag. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

[52] For the classic statement of the "interest convergence" thesis, see Derrick A. Bell, Jr., *Brown v. Board of Education* and the Interest-Convergence Dilemma, 93 Harv. L. Rev. 518, 522–28 (1980); see also Klarman, supra note 9, at 450 ("[C]ourts are likely to protect only those minorities that are favorably regarded by majority opinion.").

[53] Bell, supra note 52, at 523–24 ("Translated from judicial activity in racial cases before and after *Brown*, this principle of 'interest convergence' provides: The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites."); see also Dudziak, supra note 12, at 13 (noting that the incentives toward racial reform produced by the Cold War also limited the nation's civil rights commitments and led to a "narrowing of acceptable civil rights discourse"); Girardeau A. Spann, Race Against the Court: The Supreme Court and Minorities in Contemporary America 2–5, 19–26, 81–82 (1993) (noting progress and decline in protection of civil rights for African-Americans in terms of interests and attitudes of majorities).

to converge with the interests of national majorities. Migration of African-Americans to the North beginning in the 1920s made them swing voters who could help decide close elections.[54] The foreign-policy demands of the Cold War made ending the most blatant features of Jim Crow a national imperative.[55]

The civil rights movement's success also depended on appealing to the values of national majorities. For example, Martin Luther King's famous "I Have A Dream" speech connected the struggles of the civil rights movement to the ideals of the Founders and to the central American value of liberty.

Finally, the civil rights movement simultaneously appealed to and threatened the positive self-image of America as a special place where freedom and human rights were particularly respected. Threats to a majority's self-conception are every bit as important as positive appeals to its shared values. Shaming the majority is one of the most powerful motivators available for any successful minority movement for social change. When Northern television audiences saw Bull Connor turn dogs and fire hoses on schoolchildren in Birmingham, Alabama, and Alabama state troopers attack civil rights protesters at the Edmund Pettus Bridge in Selma, they were shocked and appalled. The violent reaction of the forces of segregation in the South offended the majority of Americans' image of their country as a land of liberty and equal opportunity; it drove popular opinion toward protection of minority rights; and it helped President Lyndon Johnson win passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965.[56]

In short, African-Americans made progress in the 1960s because a majority of white Americans wanted them to. As Lucas Powe has pointed out, much of the Warren Court's jurisprudence in the 1960s—including its decisions favorable to blacks—reflected the political dominance of the liberal wing of the Democratic Party. The Court saw itself working hand-in-hand with the Cold War liberalism of the Kennedy-Johnson years.[57]

The 1968 election, on the other hand, represented the beginning of a long period of retrenchment, both in the political process and

[54] See Berman, supra note 34, at 6–7, 133.
[55] Dudziak, supra note 12, at 12–15; Powe, supra note 8, at 44–45.
[56] Klarman, supra note 20, at 141–49.
[57] Powe, supra note 8, at 489, 494.

in the courts.[58] Richard Nixon and George Wallace appealed to disaffected whites who disliked both the disorder of the 1960s and the loss of white privilege.[59] Both Wallace and Nixon—who watched carefully what Wallace was doing and developed more moderate and palatable versions of the same in his 1968 and 1972 presidential campaigns—ran against desegregation, busing, and the decisions of the Warren Court, and in favor of "law and order." Wallace and Nixon perfected the art of making appeals in coded language to whites who were unhappy with civil rights reform. Both appealed to white racial resentments and to the fears of many whites that things were moving too fast, that civil rights reform had contributed to unfairness and social disorder, and that the country was in chaos and spinning out of control. Nixon's Southern Strategy, which the Republican Party would perfect over the course of the next thirty years, attracted the support of white Southerners who saw traditional white privilege slipping away.

President Nixon's four appointments to the Supreme Court reflected these changes in the white majority's attitudes toward the Second Reconstruction and produced a corresponding retrenchment in constitutional doctrine. Many of the most important cases in the modern law of equal protection were decided in the years between 1970 and 1978, when Nixon's four Supreme Court appointees began to make a real difference. For example, in 1974, the Court refused to extend metropolitan desegregation plans to white suburbs except under narrow circumstances,[60] while holding the previous year that minority students relegated to impoverished school districts had no right to equal educational funding because education was not a federal constitutional right.[61] Both cases were decided by a 5-4 vote; all four Nixon appointees voted with the majority, while the dissenters—Justices White, Douglas, Brennan, and Marshall—were all holdovers from the Warren Court. During this crucial period the Supreme Court also (1) limited the reach of the

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

[59] On Nixon's and Wallace's campaign strategies and rhetorical appeals, see Thomas Byrne Edsall & Mary D. Edsall, Chain Reaction: The Impact of Race, Rights and Taxes on American Politics 10–11, 74–79, 82–90 (1991).

[60] Milliken v. Bradley, 418 U.S. 717 (1974).

[61] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

state-action doctrine, reducing courts' ability to reach various forms of discrimination under the Equal Protection Clause;[62] (2) created an intent standard in equal-protection cases[63] (later extended to require a showing of deliberate intent to harm[64]) that gave government officials greater leeway to adopt policies that perpetuated racial disadvantage free from judicial scrutiny; (3) placed constitutional restrictions on race-conscious efforts designed to redress past discrimination;[65] (4) limited the reach of constitutional protections designed to help the poor;[66] and (5) held that discrimination against the poor was not constitutionally suspect.[67] The cases involving poverty were important for the cause of racial reform because race and poverty were often intertwined both in practice and in the public imagination.

In the 1980s and 1990s, the Supreme Court continued to limit the reach of affirmative-action programs[68] and signaled that federal courts should extricate themselves from supervising desegregation

[62] Jackson v. Metro. Edison Co., 419 U.S. 345 (1974); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).

[63] Washington v. Davis, 426 U.S. 229 (1976).

[64] Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 274 (1979) (holding that a challenge to a state policy that has a disparate impact on women or minorities must show that state chose policy because of, not in spite of, its effect on the protected group).

[65] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 290–91 (1978) (opinion of Powell, J.) (holding that racial classifications in affirmative action programs are subject to strict scrutiny and imposing stringent limitations and proof requirements on attempts to use such policies to remedy past discrimination).

[66] Mathews v. Eldridge, 424 U.S. 319, 332–49 (1976) (holding that a recipient of disability benefits under the Social Security Act was not entitled to a hearing prior to termination, and announcing a balancing test for procedural due process cases); Ross v. Moffit, 417 U.S. 600, 610 (1974) (declining to extend right to counsel to indigents seeking discretionary review in the Supreme Court); United States v. Kras, 409 U.S. 434, 449–50 (1973) (holding that the Due Process Clause did not require waiver of a fifty dollar filing fee in bankruptcy cases); Lindsey v. Normet, 405 U.S. 56, 73–74 (1972) (rejecting claim that the "need for decent shelter" rose to the level of a fundamental interest protected by the Fourteenth Amendment); Wyman v. James, 400 U.S. 309, 318–24 (1971) (holding that a state did not violate the Fourth Amendment when it conditioned continuation of welfare benefits on unannounced "home visits" by welfare case workers, because the visitations were "not forced or compelled").

[67] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 22–25 (1973) (reaffirming the rule of *Dandridge v. Williams*, 397 U.S. 471 (1970), that poverty is not a suspect classification).

[68] Adarand Constructors v. Pena, 515 U.S. 200 (1995); Richmond v. J. A. Croson Co., 488 U.S. 469 (1989); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) (plurality opinion).

orders and return control to local school boards,[69] thus acquiescing in and legitimating the accelerating resegregation of the nation's public schools. African-Americans have continued to make progress socially and economically, but more slowly and haltingly than during the relatively brief period of the 1960s when all three branches of the federal government supported significant reforms.

From this history we can draw a few lessons about the gay rights movement. Although homosexuals have never been denied the right to vote as blacks have, their political organization was hampered for years by a central feature of discrimination against homosexuals—the closet. Social demands for homosexuals to keep their orientation secret and the social stigma of being thought homosexual discouraged many gays and their heterosexual political supporters from openly supporting homosexual rights. As social attitudes changed, however, political organization became easier, which, in turn, had a catalytic effect on social attitudes. By the middle of the 1990s, homosexuals had gained considerable political clout, and public acceptance of homosexuality had grown, particularly among political and judicial elites and among younger generations of Americans. This smoothed the way for *Lawrence* and the current movement for same-sex marriage. In addition to increased political influence, the gay rights movement successfully appealed to shared commitments to liberty and to the nation's self-image as a country that respects equality and civil rights. Some of the most powerful images in recent memory occurred during February and March 2004 when the Mayor of San Francisco briefly authorized same-sex marriages: the picture of gay and lesbian couples beaming with pride at the ability to announce to the world that they were now able to marry the people they loved and had lived with for years. The media coverage of these couples may have served the same function as televised pictures of Bull Connor turning fire hoses and dogs on the little schoolchildren in Birmingham. It portrayed to a mass audience that the movement for gay rights and for same sex marriage is a struggle for equal civil rights that echoes previous campaigns for civil rights in the nation's history. However, rather than generating anger and shame, as Bull Connor's ac-

[69] Freeman v. Pitts, 503 U.S. 467 (1992); Bd. of Educ. of Okla. City v. Dowell, 498 U.S. 237 (1991).

tions did, the sight of these gay and lesbian couples celebrating their marriages may lead an increasing number of heterosexual Americans to identify with them and with their quest for stable, loving, and committed relationships. Those images are quite powerful; indeed, in the long run they may prove more powerful in reshaping the law than the precedents of any court.

LESSON FOUR: SOCIAL MOVEMENTS CHANGE CONSTITUTIONAL LAW, BUT NOT AS THEY INTEND

Social movements are among the most important and most underappreciated sources of change in constitutional doctrine. Social movements change social meanings—legitimating some practices and delegitimating others—and reshape constitutional norms in the process.[70] In this way, they change how people (including the people who sit on courts) understand what the Constitution means.

Generally speaking, social movements succeed in changing constitutional doctrines in one of two ways. First, they influence political parties, either by taking over the party or becoming an important constituency. This influence allows them to push for legislation promoting their cause. Equally important, it gives the social movement influence over the appointment of judges who will consider their constitutional claims more favorably.[71]

Second, social movements can change constitutional doctrine through appeals to elite values. Judges tend to be selected from elites and thus tend to be more receptive to appeals to the values of elites. An important example of a successful appeal to elite values is the movement of doctors and public health workers who sought contraception and abortion rights for thirty years. Their work paid

[70] See Reva B. Siegel, Text in Contest: Gender and the Constitution from a Social Movement Perspective, 150 U. Pa. L. Rev. 297, 300–01 (2001).

[71] Jack M. Balkin, How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure (unpublished manuscript on file with the Virginia Law Review Association). The religious conservatives who became a crucial force in the Republican Party during the 1980s and 1990s are a good example. They influenced the legislative agenda of the Republican Party, but perhaps more importantly, they influenced executive and judicial appointments by Republican administrations from Ronald Reagan's Presidency onward. This led to changes in the law of the Religion Clauses, and curtailments of the right to abortion.

off in the Supreme Court's decisions in *Griswold v. Connecticut*[72] and *Roe v. Wade*.[73]

Brown and the cases that came after it involve both phenomena. The NAACP's litigation strategy before the Supreme Court succeeded because it appealed to elite values, including the values of foreign-policy elites. Blacks also had increasing influence on the two major political parties, especially outside the South. By the 1940s, large numbers of blacks had moved North, and both parties sought their votes. Thus, it is not entirely surprising that the Justices who were most liberal on race included appointees of both Republican and Democratic administrations. The civil rights movement influenced both elite opinion and national opinion and helped put *Brown* on firmer footing. Presidents Kennedy and Johnson nominated four Justices to a Supreme Court that looked favorably on civil rights claimants.[74] The last of these Supreme Court appointments went to Thurgood Marshall, who had been the architect of the NAACP's litigation strategy.

The claim that social movements are important contributors to constitutional change, nevertheless, has four important caveats:

First, most social movements fail. History forgets them, or if they are remembered at all, they are remembered as the work of dreamers and cranks.[75] The social movements we now remember—the first and second waves of American feminism, the Populists, the Progressives, the Prohibitionists, the Labor movement, the civil rights movement, the gay rights movement, and the Religious Right—are only a small fraction of the groups of Americans who have mobilized to shape constitutional norms; most of them were beaten back, co-opted, or ignored.

Second, social movements often lead to powerful countermobilizations, especially when a social movement succeeds in changing constitutional doctrine through appeals to elite values. That kind of success makes courts particularly vulnerable to popu-

[72] 381 U.S. 479 (1965).

[73] 410 U.S. 113 (1973).

[74] Justice Arthur Goldberg replaced Justice Felix Frankfurter, Justice Byron White replaced Justice Charles Whittaker, Justice Abe Fortas replaced Justice Arthur Goldberg, and Justice Thurgood Marshall replaced Justice Tom Clark.

[75] See generally Jules Lobel, Losers, Fools & Prophets: Justice as Struggle, 80 Cornell L. Rev. 1331 (1995) (discussing failed social movement efforts to reform the law through litigation).

list reprisals and accusations that the federal judiciary is elitist and is flouting the will of the majority. These counter-mobilizations may produce significant political reactions, and new judicial appointments that blunt the achievements of the social movement and limit the court decisions the social movement fought for. This is more or less what happened in response to *Roe* and, in somewhat different ways, to *Brown* itself. *Roe* energized social and religious conservatives who eventually reshaped the Republican Party and helped elect Ronald Reagan to the Presidency. President Reagan and his successor, George H.W. Bush, in turn, stocked the courts with conservative jurists, many of whom who were either skeptical of or actively opposed to abortion rights. Ultimately, the Supreme Court cut back on its decision in *Roe* significantly (without overruling it) in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[76]

The story of *Brown* is different in one important respect. Congress ratified the result in *Brown* ten years later in Title VI of the Civil Rights Act of 1964, but there was no Civil Rights Act of 1983 that would ratify the result in *Roe*. (A Freedom of Choice act that would have codified *Roe* was proposed during the Clinton administration, but congressional Democrats squabbled among themselves about its terms and it never came to a vote.) Hence, in contrast to *Roe*, no one doubts the legitimacy of *Brown* today. Instead people merely fight about its legacy and its proper interpretation, whereas the pro-life movement seeks to overturn *Roe* completely.

Even so, counter-mobilizations also blunted the force of *Brown*. Massive resistance made *Brown* largely unenforceable in the South for almost a decade. Opposition to desegregation and busing helped put Richard Nixon and Ronald Reagan in the White House. A series of conservative appointments to the Supreme Court and the lower federal courts, in turn, reinterpreted *Brown* in light of conservative values; by the 1990s the Supreme Court signaled strongly that it was time to end continuing judicial supervision of school districts.[77]

Third, success by social movements in reshaping constitutional doctrine can lead ironically to political demobilization that can

[76] 505 U.S. 833 (1992).
[77] Freeman v. Pitts, 503 U.S. 467 (1992); Bd. of Educ. v. Dowell, 498 U.S. 237 (1991).

harm the social movement's chances of broader success. The positive reinforcement of winning in the courtroom may lead members of social movements to focus their energies on litigation rather than direct action or legislative lobbying. Michael Klarman suggests, for example, that *Brown* may have unwittingly demobilized the nascent civil rights movement for a short time, as the focus shifted to the efforts of the NAACP and the possibility of success in the courts.[78] Direct action reemerged, however, following attempts by Southern state governments to shut down the NAACP.[79] It is also quite possible that the abortion reform movement's early success in *Roe*, which struck down virtually all of the nation's abortion laws, led the movement to focus on protecting the abortion right through litigation rather than on mass movement activism that would push for expanded abortion rights in state legislatures. This put the abortion rights movement continually on the defensive and required it to respond to counter-mobilizations by religious and social conservative groups.

Fourth, a social movement's efforts at changing constitutional norms can have a curious effect on the nature of the social movement itself. Social movements must choose their battles based on the existing political terrain and available opportunities for pressing their claims. Focusing on particular legal rights often subtly reshapes the group, its goals, and its interests in terms of the right asserted.[80] A group organizes around issues about which it feels aggrieved, but it also organizes in terms of the available opportuni-

[78] Klarman, supra note 9, at 377. Conversely, Barry Friedman has suggested that the loss in *Bowers v. Hardwick* in 1986 may have mobilized the gay rights movement and led to future successes in changing public opinion. Barry Friedman, Dialogue and Judicial Review, 91 Mich. L. Rev. 577, 670 & n.475 (1993); see also Michael Klarman, *Brown v. Board of Education*: Facts and Political Correctness, 80 Va. L. Rev. 185, 188 (1994) ("I think it probable that *Bowers* was one of the more significant factors in mobilizing today's gay rights movement.").

[79] The persecution of the NAACP, however, is not the sole explanation for why direct action reemerged in 1960. Klarman points to the decline of McCarthyism, which had previously discouraged organization by left-wing groups, and the decolonization of Africa, which demonstrated to American blacks that political change could be achieved through collective activity. Klarman, supra note 9, at 374–77.

[80] The first wave of American feminism, for example, sought reform on a number of different issues, including the right of women to keep earnings from their own labor, to gain entry to the professions, and to combat the gendered hierarchy of the family. Yet it eventually became organized around the right to suffrage, and hence its members became known as suffragettes.

ties for mobilization. Restating the movement's goals in terms of legal categories and legal rights subtly alters and reshapes the nature of the social movement itself. It also can create splits within the group's membership.

There are many ways, for example, in which African-Americans could have organized (and did organize) in the struggle for civil rights. They could have focused on labor rights and the rights of agricultural workers and sharecroppers, in which case the Thirteenth Amendment might have played a more central role.[81] They could have organized around equalizing facilities for blacks and whites; and in fact, equalizing salaries for black school teachers was a particular focus of the NAACP's strategy for a time.[82] Ultimately, however, the NAACP decided that the key issue was eliminating segregation of public facilities through the Fourteenth Amendment, and, in particular, segregation in education. That agenda helped shape the racial politics of later times. Among other things, the NAACP's focus on elementary and secondary education eventually led to a focus on court-ordered busing, which, in turn, helped opponents of racial reform focus political resistance on a particularly unpopular judicial remedy.

Now consider how the gay rights movement has been shaped by its choice of rights claims. Three years ago, many advocates of gay rights would have expected that the next battleground after decriminalization of sodomy would be a struggle to end employment and housing discrimination, as well as discrimination in the military. Remarkably, the opening for reform came instead in the area of marriage. Because courts in Vermont and Massachusetts were hospitable to these claims,[83] the energy of the movement flowed in that direction. This, in turn, led to a national debate premised on the notion that gays and lesbians want to be married just like all other adult citizens.

In fact, for some time there has been an important debate within the gay community concerning whether pushing for same-sex marriage was a good idea. Some gays, lesbians, and bisexuals are criti-

[81] Risa L. Goluboff, The Thirteenth Amendment and the Lost Origins of Civil Rights, 50 Duke L.J. 1609, 1615, 1669–85 (2001).

[82] Tushnet, supra note 16, at 116–17.

[83] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003); Baker v. State, 744 A.2d 864 (Vt. 1999).

cal of marriage, and do not want to adopt the norms of heterosexual marriage. Yet the openings made possible by politics and litigation can sometimes shift the movement's center of gravity, its self-presentation, the kinds of claims it presents, and the way it presents them. The dialectical relationships between social movement mobilization, the work of courts, and everyday politics channel and deflect social movement energy, subtly altering the nature of the group, its agendas, its goals, and its self understandings.

LESSON FIVE: PRINCIPLES ARE COMPROMISES, OR, YOU ONLY KNOW WHAT A DECISION MEANS LATER ON

We ordinarily think of constitutional principles as the opposite of compromises. Compromises, however, are usually buried in the principles that the Supreme Court uses to decide cases, or the principles are themselves compromises. Legal principles are limited, expanded, or replaced with new principles as the Court slowly adjusts its case law in response to long-term shifts in national political majorities.

Although the notion of principles as concealed compromises may seem strange, the conclusion follows directly from the previous lessons. If the Supreme Court is largely responsive to political majorities, and tends to protect minorities only as much as majorities want to protect them, the Court will tend to choose principles that make protection of minority rights acceptable or palatable to majorities. Although social movement mobilization will push majority views toward greater protection of minority rights, countermobilizations will push in the opposite direction. To the extent that constitutional doctrine reflects these long-term trends, it will tend to be a compromise that reflects the vector sum of political forces, even though doctrines are formally phrased and articulated in terms of the reasoned elaboration of legal principles.

In order for principles to serve as compromises, the practice of precedential argument must be agile and flexible—and revision, expansion, and contraction of key precedents must be consistent with the demands of legal professionalism. Precedents can strongly constrain some avenues of judicial revision. Nevertheless, in the kinds of controversial cases that usually come before the Supreme Court, there is usually enough play in the joints for Justices to make relatively minor adjustments, or characterize old decisions in

new ways, which, over time, can have a significant cumulative impact. In this way, the meaning and impact of decisions protecting minority rights develop over time, reflecting long-term shifts in majority (and elite) values. As a result, we often only know what a decision means many years after it was originally decided.

Brown v. Board of Education provides an excellent example of these features of constitutional decisionmaking. At first it was quite unclear what the decision meant. Rather than directly overruling *Plessy*, the Court merely stated that *Plessy* had no application "in the field of public education."[84] The reason, the Court explained, was that segregation harmed schoolchildren, and it offered as evidence social science studies.[85] Chief Justice Warren sought a justification that would be limited in scope and avoid pointing an accusatory finger at the South. The strategy backfired, as the use of social science quickly became a font of controversy.[86]

As Reva Siegel has pointed out, the notion that *Brown* rested on psychological harm to black schoolchildren led critics of the decision to insist that integration of the races harmed them too.[87] Dueling claims of psychological harm led Herbert Wechsler famously to opine that the decision could not be justified on any neutral principle.[88]

Massive resistance in the South and the constitutional objections of Southern politicians spurred enormous work by lawyers and legal academics devoted to justifying *Brown* and rearticulating the principles that explained the decision.[89] By 1964, the Court had reinterpreted *Brown* in *McLaughlin v. Florida*, which struck down a Florida law that punished interracial cohabitation but not cohabitation between members of the same race.[90] *Brown* was no longer a case about harm to schoolchildren but instead a case about the inherent odiousness of racial classifications:

[84] *Brown*, 347 U.S. at 495.
[85] Id. at 494–95, 494 n.11.
[86] Powe, supra note 8, at 41–44.
[87] Reva B. Siegel, Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over *Brown*, 117 Harv. L. Rev. 1470, 1486 (2004).
[88] Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1, 32–35 (1959).
[89] The story is told in Siegel, supra note 87, at 1497–1500.
[90] 379 U.S. 184 (1964).

> [W]e deal here with a classification based upon the race of the participants, which must be viewed in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States. This strong policy renders racial classifications "constitutionally suspect," *Bolling v. Sharpe*, and subject to the "most rigid scrutiny," *Korematsu v. United States*, and "in most circumstances irrelevant" to any constitutionally acceptable legislative purpose, *Hirabayashi v. United States*. Thus it is that racial classifications have been held invalid in a variety of contexts. See, e.g., *Virginia Board of Elections v. Hamm* (designation of race in voting and property records); *Anderson v. Martin* (designation of race on nomination papers and ballots); *Watson v. City of Memphis* (segregation in public parks and playgrounds); *Brown v. Board of Education* (segregation in public schools).[91]

Three years later, in *Loving v. Virginia*, the Court noted that Virginia's ban on interracial marriage was "obviously an endorsement of the doctrine of White Supremacy"—that is, it was part of a systematic attempt to subordinate blacks and relegate them to an inferior social position.[92] The Court, however, struck down the law on the ground that racial classifications must be subject to strict scrutiny.[93] *Brown* thus appeared to become an instance of a more general anticlassification principle. It now seemed that separation of schoolchildren in *Brown* violated the Constitution because the Topeka Board of Education had classified children on the basis of their race.

In two succeeding cases, *Green v. School Board of New Kent County*,[94] and *Swann v. Charlotte-Mecklenburg Board of Education*,[95] the principle of *Brown* came to mean that school boards not

[91] Id. at 191–92 (citations omitted).

[92] 388 U.S. 1, 7 (1967).

[93] Id. at 11–12.

[94] 391 U.S. 430, 437–38 (1968) (holding that school boards "operating state-compelled dual systems" at the time of *Brown II* were "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch").

[95] 402 U.S. 1, 15–16 (1971) (asserting that "[t]he objective today remains to eliminate from the public schools all vestiges of state-imposed segregation," and holding that when school authorities default on "their obligation to proffer acceptable reme-

only had to stop making invidious discriminations based on race, but also had an affirmative duty to eliminate all vestiges of prior discrimination. *Green* explained that *Brown* meant that states could no longer have racially identified schools and must take steps to integrate them.[96]

Within a few years, however, President Nixon's four appointments to the Supreme Court began to have an effect. The 1968 election had signaled a political and judicial retrenchment, and the meaning of *Brown* changed accordingly. By 1974, in *Washington v. Davis*,[97] it had become clear that what mattered in *Brown* was that the Topeka Board of Education either had made an overt racial classification or had acted with a deliberate intent to segregate; *Green* and *Swann* notwithstanding, de facto segregation did not violate either the principle of *Brown* or the Equal Protection Clause.[98] Ultimately, this construction of *Brown* meant that the accelerating resegregation of America's public schools in the 1990s was fully consistent with *Brown*, or perhaps more correctly, with what *Brown* had become. In the line of affirmative action cases starting with *Regents of the University of California v. Bakke*,[99] and continuing through *Richmond v. J. A. Croson Co.*[100] and *Adarand Constructors v. Pena*,[101] the Court decided that the antidiscrimina-

dies, a district court has broad power to fashion a remedy that will assure a unitary school system").

[96] See *Green*, 391 U.S. at 441 ("The Board must be required to formulate a new plan and . . . fashion steps which promise realistically to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools.").

[97] 426 U.S. 229 (1976).

[98] In *Keyes v. School District No. 1*, 413 U.S. 189 (1973), the Court, speaking through Justice Brennan, dealt with the de facto/de jure distinction through the artful use of presumptions. Although there would be no liability for merely de facto segregation without proof that the government had acted with intent to segregate, if plaintiffs demonstrated "intentionally segregative school board actions in a meaningful portion of a school system," this would create "a presumption that other segregated schooling within the system is not adventitious," and the burden would shift to the school system to prove that segregation in the rest of the system was "not also the result of intentionally segregative actions." Id. at 208. Justice Powell's opinion in *Keyes* criticized the de facto/de jure distinction and offered Justice Brennan a compromise in which de facto segregation would violate the Equal Protection Clause but busing as a remedy would be strongly curtailed. See id. at 224–32 (Powell, J., concurring in part and dissenting in part).

[99] 438 U.S. 265 (1978).

[100] 488 U.S. 469 (1989).

[101] 515 U.S. 200 (1996).

tion principle of *Brown* subjected all overt racial classifications to strict scrutiny whether they harmed blacks or whites. Taken together with *Washington v. Davis*, this meant that facially neutral government action that preserved racial stratification was subject to only a rational basis test, but race-conscious government action that attempted to ameliorate racial stratification was subject to strict scrutiny.[102] Nevertheless, the Court was unwilling to deliver the coup de grace to affirmative action; after the Court's latest pronouncement in *Grutter v. Bollinger*, the anticlassification principle of *Brown* is consistent with race-conscious affirmative action programs that promote diversity by ensuring a critical mass of minorities.[103] Once again, the meaning of *Brown* shifted to accommodate a shifting political center.

None of this, or very little of it, is clear from the original decision in *Brown*. Rather, fifty years of social contestation have produced the *Brown* we know today. To many, the reinterpretation of *Brown* over the years has discarded or downplayed important features of what they regard to be its true meaning.[104] The *Brown* we have today has been formalized and domesticated, limited in its remedial scope, and made palatable for mass consumption. This should hardly be surprising. Cases like *Brown* get their meaning from how they are understood and used in the years after they are decided. They are re-read and rewritten in each generation. And the more important and iconic the case, the more it gets re-read and rewritten by events. The passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965 changed the meaning of *Brown*, but so too did the riots of the mid-1960s, the 1968 election, controversies over busing and affirmative action, and debates over criminal procedure and the death penalty. Through the years, people have struggled—and continue to struggle—over the meaning of *Brown*, attempting to make it their own. And in the process, *Brown* has

[102] Reva Siegel, Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action, 49 Stan. L. Rev. 1111, 1129–31, 1135–37, 1140–45 (1997).

[103] 539 U.S. 306, 333 (2003).

[104] See, e.g., Owen M. Fiss, Groups and the Equal Protection Clause, 5 Phil. & Pub. Aff. 107 (1976); David A. Strauss, Discriminatory Intent and the Taming of *Brown*, 56 U. Chi. L. Rev. 935 (1989).

been created and recreated in public imagination, in public rhetoric, and in public law.

Much the same can be said of another iconic opinion, *Roe v. Wade*—although *Roe* does not enjoy the universal approval of *Brown*. Thirty years later, *Roe* has morphed into the formal right of adult women with sufficient means to have abortions. States need not fund or assist abortions or perform them in public hospitals, and states may even discourage abortions as long as they do not place an undue burden on the right. *Roe*, like *Brown*, has been remade in the light of decades of political contestation and judicial decisionmaking.[105]

The same thing, we may expect, will be true of *Lawrence v. Texas*. We do not yet know what *Lawrence* will become. The Supreme Court's decision is but the opening gambit in a much longer political struggle that will determine the rights of homosexuals in the United States and the meaning of *Lawrence* itself.[106]

LESSON SIX: STRIKING DOWN CRIMINAL LAWS IS EASY; MANAGING A WELFARE STATE IS HARD TO DO.

Governments have several different techniques at their disposal for governing citizens. They can pass criminal laws, impose civil fines, issue administrative regulations, and create civil causes of action that let people sue each other for redress. These are the basic devices of the regulatory state. However, among the most important technologies of government are the use of the government's fiscal powers to spend money on government activities, purchase services, subsidize private behavior, shift income, employ a workforce, and engage in public works and infrastructure projects. These are the characteristic devices of the welfare state.

Generally speaking, it is easier for courts to supervise the regulatory state—the state's creation of crimes, administrative regulations, civil fines and penalties, and civil causes of action—than to supervise the welfare state. Supervising the regulatory state is easier because fewer variables are involved and enforcement generally

[105] Jack M. Balkin, *Roe v. Wade*: A Critical Introduction, ch. 2 (forthcoming 2005).

[106] Cf. Siegel, supra note 87, at 1479 (noting that both *Brown* and *Lawrence* were "read and received . . . as a momentous intervention into a contested set of social arrangements, whose ultimate logic and practical application still remained unclear").

runs through the courts. Thus courts can protect constitutional rights simply by striking down laws that they believe violate the Constitution and refusing to enforce them thereafter.

Imposing constitutional requirements on the welfare state is usually considerably more difficult, particularly if courts require government officials to spend money to achieve a certain goal such as equal educational opportunity, adequate housing, or minimum levels of subsistence. Achieving these goals requires many complicated tradeoffs. It is often difficult to define or prove when a particular affirmative goal has been met. Government compliance may be hard to monitor, and government officials may have many different ways of dragging their heels and evading a court's constitutional demands. Often different groups of government actors with different political agendas may have to cooperate over long periods of time to make genuine progress, and securing their continuing collective cooperation may prove quite difficult. Reforms may require significant expenditures that cut into the government's budget and drain money away from other valuable government projects and services. Government officials may be unwilling or unable to raise additional revenues and may plead that they lack the funds necessary to carry out the reforms.[107]

The problems that courts face in enforcing constitutional rights in the welfare state are connected to a much larger debate over the enforcement of constitutional social rights. Many post-World War II constitutions feature social rights guarantees of minimum levels of welfare, housing, education, and health care.[108] Often constitu-

[107] Welfare state rights are not the only kinds of rights that courts may have difficulty defending. Without considerable supervision by federal officials, it was also easy for state governments to violate black voting rights. The effective right to vote, like positive rights, rests on cooperation by state officials and the creation of programs that facilitate easy access to voting. From the late nineteenth century onwards, Southern states devised a series of measures which effectively disenfranchised blacks until the White Primary Case, *Smith v. Allwright*, 321 U.S. 649 (1944), the abolition of the poll tax by the Twenty-Fourth Amendment, and the Voting Rights Act of 1965.

[108] See, 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 (holding that under the guarantee of the right to housing of § 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

tional 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.[109]

At one level, *Brown* announces a simple rule of nondiscrimination that has little to do with the complexities of the welfare state and positive rights. It insists that governments may not assign students to elementary and secondary schools on the basis of their race. In fact, *Brown* is very much a welfare state case. It is a case about social rights—in this case, the right to education—and how government distributes money for education and other educational resources to its citizens.

The NAACP pushed for integration because it sought to force white-controlled state and local governments to provide a quality education and equal educational opportunity to black schoolchildren. The NAACP had tried for many years to push for educational rights through equalization suits. Equalization suits tried to enforce *Plessy v. Ferguson*'s formula of "separate but equal" by requiring school districts to provide black schoolchildren with educational opportunities and resources as good as those enjoyed by students in all-white schools. The NAACP's strategy focused largely on a single aspect of equalization: equal salaries for teachers at black and white schools. Many years of frustrating efforts demonstrated that the mandate of equal educational resources was too easy for state governments to evade. Thus, the NAACP sought to integrate the public schools in part on the theory that "green fol-

within the State's available means") (on file with the Virginia Law Review Association).

[109] Thus, 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. For praise of *Grootboom*'s limited approach, see Cass R. Sunstein, Designing Democracy: What Constitutions Do 261 (2001); see also Mark S. Kende, The South African Constitutional Court's Embrace of Socio-Economic Rights: A Comparative Perspective, 6 Chap. L. Rev. 137, 145 (2003) (asserting that the *Grootboom* case "demonstrates that placing socio-economic rights in a Constitution does not mean that every individual is entitled to assistance on demand").

lows white." It believed that the white establishment would expend monetary resources and ensure quality education for black schoolchildren only if blacks were attending the same schools as the children of white parents.[110] Integration would force whites to take into account the social costs that black children suffered from inferior educational opportunities by linking the fates of white and black schoolchildren together.

Nevertheless, following *Brown*, courts faced many of the characteristic problems of administering constitutional guarantees of positive rights in a welfare state. School officials dragged their heels, pleaded lack of funds, and found countless ways to evade court orders. Courts found themselves making difficult administrative choices. White parents fled to suburban school districts, attempting to evade a common fate with black and Latino schoolchildren. The cumulative effects of housing discrimination and land-use policies helped produce largely white suburbs ringing largely minority inner cities. Green did follow white, straight to the suburbs.

The Supreme Court compounded the problem when, in the 1974 case of *Milliken v. Bradley*, it essentially let the suburbs off the hook by making it difficult to include new suburban districts in comprehensive desegregation plans.[111] With suburban districts freed of constitutional obligations to share wealth and resources, the remaining way to guarantee equal education opportunity was through suits for equal funding and resources. The year before *Milliken*, however, the Court held in *San Antonio Independent School District v. Rodriguez* that there was no federal right to equal educational funding.[112] Taken together, *Milliken* and *Rodriguez* meant that there were few ways for federal courts to secure equal educational opportunity for minority students as de facto segregation of America's public schools accelerated in the 1990s. *Rodriguez* spawned a series of lawsuits for educational equality under individual state constitutional provisions, but this litigation often proved difficult. State legislatures fought or resisted efforts by state

[110] See, e.g., James E. Ryan, The Influence of Race in School Finance Reform, 98 Mich. L. Rev. 432, 477 (1999); James E. Ryan, Schools, Race and Money, 109 Yale L.J. 249, 258–59 (1999).

[111] 418 U.S. 717 (1974).

[112] 411 U.S. 1 (1973).

courts to reform entrenched educational practices. In addition, unlike federal courts enforcing a federal constitutional right, state supreme courts were often hindered by existing state constitutional provisions specifying how money could be taxed and raised for public education.[113]

Brown v. Board of Education always had a dual nature: It was both a case about racial discrimination in pupil placement and a case about social rights within a welfare state—in particular, the right to equal educational opportunity. *Brown* tried to ensure the latter by prohibiting the former. School board resistance and white flight undermined not only integration but also equal educational opportunity. Metropolitan desegregation plans or constitutional reform of educational funding might have enforced some degree of educational parity. Nevertheless, after *Milliken* freed suburban districts of constitutional obligations to share wealth and resources through desegregation orders, reassigning pupils within largely minority districts did little to promote equalization of resources and equal educational opportunity. White-controlled legislatures had few incentives either to integrate schoolchildren or to ensure educational quality in central cities.

The dual nature of *Brown* is aptly symbolized by the division of the case into two opinions: *Brown I*,[114] which held that states could not assign pupils by race, and *Brown II*,[115] which urged states to remedy their historical denial of equal protection "with all deliberate speed."[116] Although the basic principle of nondiscrimination enunciated in *Brown I* has become hallowed with time, the remedies begun in *Brown II* have been much less successful. After fifty years of struggle over school desegregation, the country has arrived at a basic compromise: School districts may be de facto segregated by race as long as this is not done by government fiat, and there is no federal constitutional obligation to provide equal educational opportunity for economically disadvantaged students.[117] Securing

[113] See, e.g., Douglas S. Reed, On Equal Terms: The Constitutional Politics of Educational Opportunity 70 (2001) (noting that school finance in Texas was complicated by that state's constitutional provisions concerning taxation).

[114] 347 U.S. at 483.

[115] Brown v. Bd. of Educ., 349 U.S. 294 (1955).

[116] Id. at 301.

[117] Jack M. Balkin, *Brown v. Board of Education*: A Critical Introduction, *in* What

positive constitutional rights in a welfare state has proved very hard to do.

Brown teaches us that when reform movements try to promote affirmative social rights they are likely to meet with greater resistance and more obstacles than if their goal is simply the abolition of criminal penalties and statutory restrictions. We can see this by comparing *Brown* with the progress of the gay rights movement following *Lawrence v. Texas*. After *Lawrence* struck down the remaining sodomy laws in the states, gays were guaranteed the right to form intimate relationships. Although there will no doubt be important questions to be determined about the scope of the right of intimate association, the basic right to form same-sex relations has been secured. As a result, the debate over gay rights has moved on to the next frontier, same-sex marriage. At first glance, same-sex marriage seems to implicate a wide variety of welfare-state issues, including, for example, health care and pension benefits. Nevertheless, unlike the case of school desegregation, there seems to be a clear-cut administrative solution that courts can implement: ordering that same-sex couples have essentially the same rights as opposite-sex couples, regardless of whether this is called a "marriage" or a "civil union." In *Brown*, there was no similarly ineluctable way to guarantee black children access to the same educational resources as white children other than by ensuring that whites and blacks attended the same schools. Not only did that solution meet with enormous resistance—particularly where busing was involved—it also proved easy to evade.

Roe v. Wade falls somewhere between the cases of *Brown* and *Lawrence*. Abortions cost money, and poor women and women in rural areas must sometimes travel long distances to obtain them. Many states refuse to subsidize abortion with public funds, and many public hospitals refuse to perform abortions.[118] As a result,

"Brown v. Board of Education" Should Have Said 8 (2001).

[118] The Alan Guttmacher Institute, State Policies in Brief: Refusing to Provide Health Services, at http://www.guttmacher.org/pubs/spib_RPHS.pdf (last accessed on September 7, 2004) (on file with the Virginia Law Review Association); The Alan Guttmacher Institute, State Policies in Brief: State Funding of Abortion Under Medicaid, at http://www.guttmacher.org/pubs/spib_SFAM.pdf (last accessed on September 7, 2004) (on file with the Virginia Law Review Association); see also NARAL Pro-Choice America, Who Decides? A State-by-State Review of Abortion and Reproductive Rights (12th ed. 2003).

eighty-seven percent of the counties in the United States do not have an abortion provider.[119] *Roe* secures the right of affluent adult women to obtain safe and legal abortions, but, as later cases have established, it does not secure an effective right for poor women. In this sense, removing criminal penalties for abortion does not guarantee the practical right of abortion in the same way that removing criminal penalties for same-sex sodomy guarantees the practical right of homosexuals to form intimate relationships.

LESSON SEVEN: COURTS DON'T CARE ABOUT CONSTITUTIONAL THEORY; CONSTITUTIONAL THEORISTS CARE ABOUT COURTS.

To sum up what we have learned from our previous six lessons: courts, and particularly the U.S. Supreme Court, tend, over time, to reflect the views of national political majorities and national political elites. Constitutional doctrine changes gradually in response to political mobilizations and countermobilizations. Minority rights gain constitutional protection as minorities become sufficiently important players in national coalitions and can appeal to the interests, values, and self-conception of majorities, but minority rights will gain protection only to the extent that they do not interfere too greatly with the developing interests of majorities.

Although Supreme Court decisionmaking tends to reflect these larger institutional influences, it does not seem very much influenced by normative constitutional theories about the proper way to interpret the Constitution. No doubt individual Justices may align themselves from time to time with particular theoretical positions, but they mostly devote themselves to reading briefs and deciding cases rather than thinking about the latest arguments of constitutional theorists in law reviews. To the extent that individual Justices are influenced by constitutional theory, their views often

[119] Lawrence B. Finer & Stanley K. Henshaw, Abortion Incidence and Services in the United States in 2000, 35 Persp. Sexual & Reprod. Health 6, 6–15 (2003); Stanley K. Henshaw & Lawrence B. Finer, The Accessibility of Abortion Services in the United States, 2001, 35 Persp. Sexual & Reprod. Health 16, 16–24 (2003); The Alan Guttmacher Institute, Facts in Brief: Induced Abortion, at http://www.guttmacher.org/pubs/fb_induced_abortion.html (last accessed on September 7, 2004) (on file with the Virginia Law Review Association); The Abortion Access Project, Fact Sheet: The Shortage of Abortion Providers, at http://abortionaccess.org/AAP/publica_resources/fact_sheets/shortage_provider.htm (last accessed on September 7, 2004) (on file with the Virginia Law Review Association).

reflect the theoretical preoccupations of the years in which they were educated and came of age in the legal profession.[120] Moreover, even if some members of the Court have strong theoretical ambitions, the Court as a whole is a multimember body with shifting alliances among its members. To the extent that alliances on the Supreme Court are robust, they tend to be organized around political ideology—liberals versus conservatives—rather than around particular positions in constitutional theory. Thus, there is no reason to think that the product of Supreme Court decisionmaking would—or could—regularly or consistently correspond to the outcome of any particular normative constitutional theory.

These facts pose few problems for positive constitutional theory, because it does not purport to give advice to judges about what they ought to do or the right way to interpret the Constitution. However, these facts do complicate normative constitutional theory, which understands itself as offering, on at least some level, advice about how people—and particularly Supreme Court Justices—should interpret the Constitution. To put it bluntly, most of this advice is falling on deaf ears.

In addition, virtually all normative constitutional theories must begin with the assumption that a significant part of existing doctrine is correct. This creates an important asymmetry: Normative constitutional theorists must pay careful attention to what the Supreme Court does, because it forms the raw materials of what they seek to explain and justify. However, Supreme Court Justices, and more importantly, the work products of the Court as a whole, appear to pay little if any attention to the injunctions of contemporary normative constitutional theory. Thus, normative constitutional theorists are continually attempting rationally to reconstruct the work of a Court that is largely oblivious to their attempts to do so.

This does not make normative constitutional theory pointless or irrelevant. It does suggest, however, that the function (or, more likely, functions) of normative constitutional theory may be less obvious and more complicated than most people imagine. For ex-

[120] One is reminded of John Maynard Keynes's statement that "[p]ractical men, who believe themselves to be quite exempt from any intellectual influences, are usually the slaves of some defunct economist." John Maynard Keynes, The General Theory of Employment, Interest and Money 383 (Harcourt, Brace & World 1964) (1936).

ample, one important function of normative constitutional theory may not be giving advice to judges, but rather offering professional legitimation for the work of the Supreme Court. That may seem surprising, given that much constitutional theory criticizes particular decisions. Nevertheless, even when constitutional theorists strongly criticize the work of the Supreme Court, they collectively strive to uphold and support the general enterprise of constitutional lawmaking. When we view normative constitutional theory not as individual examples of normative advice, but collectively as an academic institution that exists alongside official judicial decisionmaking, supporting and commenting on it, its roles and functions become increasingly clear.

At the same time, the lessons we can derive from *Brown v. Board of Education* also suggest that positive constitutional theory may well be underappreciated.[121] Positive constitutional theory is important precisely because it sheds light on how the machinery of the political and constitutional system affects the subsequent development of constitutional norms. Knowledge of how change occurs—understanding the institutional engines and constraints of change—is crucial to any normative critical appraisal of the Supreme Court's performance, even if it cannot and should not be wholly determinative of how cases should be decided. We cannot know what we may reasonably expect from the institution of judiciary until we understand what is reasonably possible for it to do, and this means understanding the forces that shape its decisionmaking. Is does not imply ought, but ought implies can.

Viewed from the perspective of normative theory, *Brown* is a hallowed achievement that we must explain if we wish to remain within the mainstream of respectable academic opinion. We reject its rightness on penalty of being thought deliberately provocative or off-the-wall. That is to say, viewed from the perspective of normative theory, *Brown v. Board of Education* disciplines and normalizes our legal imaginations. Viewed from the perspective of positive constitutional theory, however, *Brown* proves to be an endless source of insights about how our Constitution grows and

[121] I am not alone in this view. See, e.g., Barry Friedman, The Importance of Being Positive: The Nature and Function of Judicial Review, 72 U. Cin. L. Rev. (forthcoming 2004); Mark A. Graber, Constitutional Politics and Constitutional Theory: A Misunderstood and Neglected Relationship, 27 Law & Soc. Inquiry 309 (2002).

evolves. After all, we already know that whatever our normative theory is, it is probably going to tell us that *Brown v. Board of Education* was rightly decided. But if we focus instead on what *Brown* can teach us about how the American Constitution develops, we may learn things that are new and surprising.