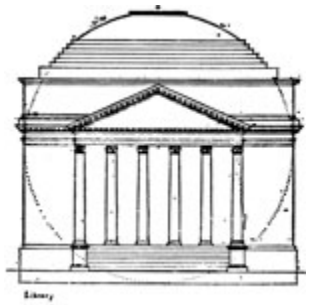

Some Legacies of "Brown v. Board of Education"
Author(s): Mark Tushnet
Source: *Virginia Law Review*, Vol. 90, No. 6, 50 Years of Brown v. Board of Education (Oct., 2004), pp. 1693-1720
Published by: Virginia Law Review
Stable URL: http://www.jstor.org/stable/3202411
Accessed: 09-08-2015 23:45 UTC

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SOME LEGACIES OF *BROWN V. BOARD OF EDUCATION*

Mark Tushnet[*]

INTRODUCTION

THE litigation campaign against segregation that culminated in *Brown v. Board of Education*[1] remains an important subject of study. *Brown* continues to be controversial because Americans remain uncertain about what its substantive commitments were, and, perhaps more important, how those commitments, as we now understand them, fit together with the other values and institutions that provide the structure of contemporary politics. This Essay will follow up on three aspects of the litigation campaign preceding *Brown* in an effort to show how *Brown* and its legacy illuminate enduring features of the organization of the U.S. political system.

Part I of this Essay will begin with a discussion of the very idea of a litigation strategy. *Brown* came to exemplify the possibility that lawyers could structure and execute a litigation strategy designed to produce substantial changes in the law. Liberals, and then conservatives, were captivated by the idea of coordinated litigation campaigns, even though the NAACP's legal campaign against segregation, when examined in detail, does little to support the proposition that strategic litigation campaigns matter.[2] Part I will continue with an examination of the ways in which later litigation campaigns were modeled on, in modified form, the one that ended (provisionally) with *Brown*.

A litigation campaign can matter only if its outcome—the decisions it generates, the forces in civil society it mobilizes—matters. The second question this Essay will take up is whether *Brown* matters. Professor Gerald Rosenberg's critique of Supreme Court adjudication as a vehicle for social reform uses the aftermath of

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[1] 347 U.S. 483 (1954).

[2] That is one of the main arguments in Mark Tushnet, The NAACP's Legal Strategy against Segregated Education, 1925–1950 (1st ed. 1987) [hereinafter Tushnet, The NAACP's Legal Strategy].

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Brown as one of his major examples.[3] Rosenberg's thesis has generated a large critical literature.[4] Part II of this Essay will rely on recent studies in American political development to explain why Rosenberg's analysis, while clearly correct on one level, misses one important way in which *Brown* matters: as part of a long-term collaboration between the Supreme Court and the New Deal (and later the Great Society) political coalition.

One point about which Rosenberg is clearly right is that *Brown* did not transform education in the segregated South, much less American race relations. Again, the study of American political development helps explain what *Brown* did accomplish, and why its accomplishments were from one point of view so limited, and from another cut short. In 2001, the distinguished historian James Patterson published his account of *Brown* and its impact, referring in his subtitle to the case's "troubled legacy."[5] Part III will offer a brief account of what happened to *Brown* in the four decades after it was announced, parting company with Professor Patterson only in giving more weight than he does to *Brown*'s effects on U.S. politics and less weight to the purely legal dimensions of the Court's cases dealing with school segregation.

I. THE NAACP'S LITIGATION CAMPAIGN AS A MODEL

Drawing in part on what some scholoars took to be the lessons of the U.S. experience, political scientist Charles Epp examined the course of reform litigation in India, Great Britain, and Canada.[6] He concluded:

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[3] Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring About Social Change? 42–71 (1991) (arguing that judicial power to affect social change is limited to circumstances not present in the desegregation context).

[4] See, e.g., Bradley C. Canon, The Supreme Court and Policy Reform: *The Hollow Hope* Revisited, *in* Leveraging the Law: Using the Courts to Achieve Social Change 215 (David A. Schultz ed., 1998); Michael Paris & Kevin J. McMahon, The Politics of Rights Revisited: Rosenberg, McCann, and the New Institutionalism, *in* Leveraging the Law, supra, at 63; David Schultz & Stephen E. Gottlieb, Legal Functionalism and Social Change: A Reassessment of Rosenberg's *The Hollow Hope*, *in* Leveraging the Law, supra, at 169. My earlier contribution to that literature is Mark Tushnet, The Significance of *Brown v. Board of Education*, 80 Va. L. Rev. 173 (1994).

[5] James T. Patterson, *Brown v. Board of Education*: A Civil Rights Milestone and Its Troubled Legacy (2001).

[6] Charles R. Epp, The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective (1998).

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> [S]ustained judicial attention and approval for individual rights grew primarily out of pressure from below, not leadership from above. This pressure consisted of deliberate, strategic organizing by rights advocates. And strategic rights advocacy became possible because of the development of . . . the support structure for legal mobilization, consisting of rights-advocacy organizations, rights-advocacy lawyers, and sources of financing, particularly government-supported financing.[7]

Epp emphasizes that the creation and maintenance of a support structure is itself "contingent on learning and political strategy."[8] The experience with strategic litigation campaigns after *Brown* confirms many of Epp's insights, and illustrates as well the ways that a support structure can be eroded by political counter-mobilization.

The decades after *Brown* saw a proliferation of planned litigation campaigns. For example, the NAACP Legal Defense and Education Fund developed a campaign against the death penalty.[9] The American Civil Liberties Union established a project aimed at eliminating the dreadful conditions that characterized many U.S. prisons. Welfare rights advocates worked together with poverty lawyers on what they called "impact litigation,"[10] designed to eat away at restrictions on the availability of public assistance to those who needed it.[11]

Some of these campaigns achieved successes. Anti-capital-punishment litigation produced first a moratorium on executions,[12] then a Supreme Court decision holding unconstitutional the death penalty as it was then administered.[13] Courts issued injunctions against prison conditions that, taken in the aggregate, imposed

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[7] Id. at 2–3.

[8] Id. at 201.

[9] See Michael Meltsner, Cruel and Unusual: The Supreme Court and Capital Punishment 54 (1973).

[10] "Impact litigation" is litigation "that, either through class action mechanisms or a more complicated set of facts and circumstances, seek[s] systemic relief applicable to many people." Deborah M. Weissman, Gender-Based Violence as Judicial Anomaly: Between "The Truly National and the Truly Local," 42 B.C. L. Rev. 1081, 1130 n.268 (2001).

[11] See Martha F. Davis, Brutal Need: Lawyers and the Welfare Rights Movement, 1960–1973 (1993).

[12] See Meltsner, supra note 9, at 107.

[13] Furman v. Georgia, 408 U.S. 238, 256–57 (1972).

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cruel and unusual punishment on prisoners.[14] Welfare rights litigators obtained decisions holding a number of important state restrictions on the distribution of public assistance inconsistent with federal regulations.[15]

Despite these successes, by the end of the twentieth century most of the planned litigation campaigns had petered out. Liberal-oriented groups continued to litigate, but on a far more catch-as-catch-can basis, looking for targets of opportunity in an increasingly conservative judicial climate. New conservative public-interest litigating groups held on to the idea of strategic litigation, and made some improvements in designing litigation campaigns.[16] But, their goals were so far-reaching that they too could anticipate only scattered victories, not the march through the courts conveyed by the image of a litigation campaign. Structural characteristics of NAACP-style litigation campaigns accounted for some of the limitations that litigators faced by the end of the twentieth century—as did the reaction to the successes of such campaigns.

I begin by observing that client interests placed some constraints on the litigation leading up to *Brown*.[17] They did so even more in the campaign against the death penalty, where the lawyers obviously had to accept decisions vacating death sentences for reasons that did little or nothing to move the campaign forward.[18]

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[14] The foundational case was *Jackson v. Bishop*, 404 F.2d 571, 572 (8th Cir. 1968), holding unconstitutional the administration of corporal punishment in Arkansas state prisons.

[15] See, e.g., King v. Smith, 392 U.S. 309, 333 (1968) (invalidating as inconsistent with federal statutory law a state regulation denying public assistance to a recipient where the recipient's mother was cohabiting with an able-bodied man).

[16] Their primary innovation was modifying the strategy of supporting litigation from the outset to supporting it only after higher courts granted review to cases where favorable rulings seemed possible, thereby saving the resources that would go into litigation that was resolved at the trial or intermediate appellate level. For a discussion, see Mark Tushnet, A Court Divided: The Rehnquist Court and the Future of Constitutional Law, ch. 1 (forthcoming 2005) [hereinafter Tushnet, The Rehnquist Court].

[17] For examples, see Tushnet, The NAACP's Legal Strategy, supra note 2, at 148–49.

[18] See, e.g., Meltsner, supra note 9, at 166 (discussing the dilemma faced by Anthony Amsterdam in an oral argument when he was pressed on an issue whose resolution would have led to vacating the death sentence but would not have made any new law); id. at 184 (referring to the Court's decision in *Boykin v. Alabama*, 395 U.S. 238 (1969), as a "sad omen" because the Court vacated Boykin's conviction on the ground that the trial court had failed to ask him about whether he understood the consequences of his guilty plea, rather than on the ground that it was unconstitutional to impose the death penalty for robbery).

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Client interests are only one example of the structural characteristics of litigation campaigns modeled on the pre-*Brown* campaign. In concept, such campaigns involve control of the case from beginning to end. Again in concept, lawyers—acting with members of the interest groups supporting the litigation campaign—select plaintiffs with two characteristics: (1) facts that place their claims in the most attractive light, and (2) facts that frame as precisely as possible the legal claim that has to be made at the particular stage of the litigation campaign. If the case is lost at the trial level, the lawyers can use the appeal to move the campaign forward by securing a reversal that will govern a wider swath of cases. And, if the case is won at the trial level, the lawyers expect their opponents to appeal, giving the lawyers the same opportunity to set precedent.

Finally, lawyers can lose control of a litigation campaign if they lack monopoly power in the area. Attorneys acting on their own—pursuing their particular visions of what matters at any particular time, for example—can push cases forward earlier than the strategists think wise, or they may bring cases whose facts are less than ideal, from the strategists' point of view, for inducing judges to respond sympathetically to the claims.

The concept of such a lawyer-controlled litigation campaign was flawed from the outset. The NAACP's lawyers only occasionally could select "attractive" plaintiffs from a larger pool; relatively few African-Americans were willing to step forward and subject themselves to the difficulties—sometimes minor, such as the suspension of other plans, and sometimes severe, such as physical harassment—of being a litigant.[19] Client interests meant that ethically responsible lawyers had to raise every issue and advance every argument whose successful resolution or acceptance would achieve the client's goals (unless, as sometimes occurred, the lawyers could obtain the client's agreement to advance only the arguments the lawyers wanted to advance).[20]

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[19] For examples, see Tushnet, The NAACP's Legal Strategy, supra note 2, at 87 (describing the difficulties a potential plaintiff had in getting a job, and his plans to enter the Army, which led him to withdraw from litigation).

[20] This occurred, most notably, in the initiation of the lawsuits that culminated in *Brown* itself. See id. at 140 (describing the decision by potential plaintiffs in Prince Edward County to shift from demanding a new segregated high school to demanding desegregation).

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The NAACP's lawyers came close to having monopoly power in the field, but not close enough. The handful of Southern lawyers interested in the NAACP's issues were typically closely affiliated with the organization and worked willingly with the NAACP's strategists. In the North and the West, though, some lawyers struck out on their own, most notably in bringing challenges to racially restrictive covenants in Michigan and Missouri rather than California,[21] where the NAACP's lawyers thought they had a better chance of winning. It took some serious political efforts by Thurgood Marshall and other NAACP lawyers to regain control of the restrictive-covenant litigation.[22]

More important, plaintiffs lose control of their cases as soon as they are filed. Their opponents can offer attractive settlements.[23] They can win at the trial level, and their opponents can decide against appealing.[24] Or, their opponents can raise issues on appeal that—win or lose—will do nothing to establish useful precedents. They can lose at the trial level, and discover that the appellate courts focus on issues that are peripheral to the litigation campaign. And, of course, the Supreme Court can deny review, which either limits the scope of a lower court victory or leaves in place an unfavorable decision. Indeed, even if the Court grants review, it may rule in the plaintiff's favor, but on grounds that are too limited to be of much use in the overall litigation campaign.

The anti-death-penalty campaign was affected by all of these structural features, made more important by the obvious need for the lawyers to defer to the client's interests in avoiding execution,

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[21] See, e.g., McGhee v. Sipes, 331 U.S. 804 (1947).

[22] See Mark V. Tushnet, Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936–1961, at 88–91 (1994) (describing the origins of the restrictive covenant cases).

[23] See, e.g., Davis, supra note 11, at 68–69 (describing Mississippi's acquiescence in plaintiffs' claims in an important welfare rights case, which "seemed like a favorable result" but "created no precedent on which [welfare rights] lawyers could rely in future cases"); Tushnet, The NAACP's Legal Strategy, supra note 2, at 60–61 (describing settlements in early cases challenging unequal salaries paid to African-American teachers).

[24] This occurred, most notably, in the first lawsuit attacking segregated university programs, where the state lost at the trial and appellate levels, and decided not to appeal to the U.S. Supreme Court. See Tushnet, The NAACP's Legal Strategy, supra note 2, at 56–58 (discussing Donald Murray's lawsuit against the University of Maryland).

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no matter how that outcome was reached. At a relatively early stage, the strategic litigators trying death penalty cases in which the juries that were selected excluded members who had objections to capital punishment identified two problems: Such juries were not a fair cross-section of the community, and they were more likely to convict the defendant. A lawyer unconnected to the strategic campaign got to the Supreme Court first with a case involving such a "death-qualified" jury. The strategic litigators worried that the lawyer would not be able to persuade the Court on the second, prosecution-bias issue. To the annoyance of the lawyer actually litigating the case, the strategic lawyers filed an amicus brief urging the Court to reach only the "fair cross-section" issue and leave the other issue for future development. The Court did so, but the strategic litigators believed they had avoided a defeat that would have arisen because they did not control the litigation.[25]

Similar structural problems affected the welfare rights litigation campaign. The deepest goal of that litigation was to establish a constitutional right to public assistance, including housing and subsistence payments. The lawyers had a significant number of victories, but all the victories rested on statutory grounds.[26] They accepted those victories, of course, but they could not extract from the courts the rulings they truly wanted.

The structural characteristics of NAACP-style litigation reduced its cost-effectiveness. A big victory, of course, could compensate for all the lost opportunities in cases that washed out for one reason or another. But big victories are never guaranteed, and sponsors of litigation with some concern for getting their money's worth might look for other ways of reaching their goals. An early desegregation case offered a glimpse of what turned out to be the most attractive strategy for developing a cost-effective litigation campaign. In 1945, the NAACP's lawyers filed an amicus brief in a case challenging the segregation of Mexican-American children by a California school district.[27] The amicus strategy has the advantage

[25] For the story, see Meltsner, supra note 9, at 118–23.

[26] See generally Davis, supra note 11, at 81–82 (discussing the history of the "poverty law" practice in the 1960s and early 1970s).

[27] See Tushnet, The NAACP's Legal Strategy, supra note 2, at 118–23 (discussing NAACP participation as amicus in *Westminster School District v. Mendez*, 161 F.2d 774 (9th Cir. 1947)).

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of restoring control to the strategic litigators. They can participate only in those cases where the issues they are concerned with are presented cleanly, or only in cases where the facts are particularly attractive. And, of course, lawyers representing amici have no ethical responsibility to the person who initially brought the case.[28] The amicus strategy also has the advantage of loading the costs of unsuccessful litigation onto someone else: The lawyers conducting the litigation campaign do not have to pay for the cases that wash out prematurely.

Conservative public interest lawyers perfected the cost-effective versions of litigation campaigns.[29] Facing severe resource constraints when they began, conservatives interested in challenging the regulations characteristic of the activist post-New Deal state waited until someone with private representation filed suit. Typically the private lawyer would raise issues of administrative law or other issues under state or federal law, but would not make the constitutional challenge to regulation a prominent part of the case. The conservative public interest lawyers would offer their expertise to the private lawyer. Sometimes they provided canned briefs on the constitutional issues the conservative lawyers cared about. Sometimes they would file amicus briefs making their constitutional points to supplement the more routine ones the private lawyers raised. Notably, the conservative public interest lawyers would lose little if the plaintiff won the case on non-constitutional grounds.

Another cost-effective strategy developed by conservative public interest lawyers was to take over litigation at the Supreme Court stage. That strategy had the advantage of giving the lawyers almost complete control over the case: The Court had already granted review, and the lawyers could offer their services only in the cases they believed had the greatest prospects of success. The only difficulty was that wresting control over the case from the private lawyer who had handled it from the beginning was sometimes touchy,

[28] Such responsibility would not exist except to the extent that that person's permission to file as amicus might have been conditioned on the amicus's agreement to defer to the plaintiff's judgment on some matters.

[29] See Steven P. Brown, Trumping Religion: The New Christian Right, the Free Speech Clause, and the Courts (2002); Lee Epstein, Conservatives in Court (1985); Tushnet, The Rehnquist Court, supra note 16, at ch. 1.

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particularly when the case was probably the only chance the private lawyer would ever have to argue before the Supreme Court.

The mature version of planned litigation campaigns brought those campaigns closer to the model that lawyers thought, mistakenly, was provided by the campaign that led up to *Brown*. But, as planned litigation matured, so did adverse reactions to it.

The first adverse reactions came when Southern states tried to shut down the NAACP. Virginia addressed the activities of NAACP lawyers in the state by charging them with unethical practices: soliciting clients and stirring up litigation. The Supreme Court held that the lawyers' activities were protected by the First Amendment.[30] The Court later extended its holding by giving similar protection to a lawyer affiliated with the American Civil Liberties Union who had written a letter to a woman who had been sterilized as a condition of receiving continued public assistance, offering to represent her should she decide to sue the doctor who performed the procedure.[31]

Directly attacking the litigators proved futile. Indirectly attacking them was more effective. One target was the funding for litigation campaigns. Here I return to Epp's focus on funding. One of Epp's most striking findings is that governments provide financing for much of the litigation that contributes to rights revolutions.[32] But what the government provides, the government can take away. Adverse reactions to litigation campaigns led to precisely that outcome for some of the post-*Brown* litigation campaigns.

The litigation leading up to *Brown* was financed by the NAACP's members, by the plaintiffs and their communities, and to a minor extent by foundation grants. Foundation funding became increasingly important in financing liberal litigation campaigns over the next few decades. But, learning that foundations were reluctant to provide sustained support for any project, liberal interest groups looked elsewhere for funding. Their search ended by settling on their opponents as the source of funding. That is, liberal litigators argued that they should be able to recover attorneys' fees from the

[30] NAACP v. Button, 371 U.S. 415, 444 (1963).

[31] In re Primus, 436 U.S. 412, 439 (1978).

[32] See Epp, supra note 6, at 58–60 (discussing government financing of rights-oriented litigation in the United States); id. at 182–84 (discussing government financing of such litigation in Canada).

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losing party. They failed to persuade the Supreme Court to adopt that rule as a general matter.[33] In 1976, however, Congress adopted a statute authorizing the federal courts to award attorneys' fees to prevailing parties in cases raising constitutional challenges to actions by state and local officials.[34]

Although the attorneys' fees statute held out the promise of some reasonably stable funding for litigation campaigns, the statute had some downsides. It induced litigating groups to divert resources away from the cutting edge cases where they would be making precedents to sure winners where they could rely on established law to guarantee some income that might be used to subsidize the more speculative cases. Another downside was that the statute itself provided a target for critics of the underlying litigation. If the lawsuits were being brought because litigating groups could recover attorneys' fees, critics could eliminate the litigation by eliminating the fees. Congress did this in the Prison Litigation Reform Act of 1996.[35] One provision of that statute replaced the earlier rule, flowing from the 1976 statute, that prevailing parties could obtain market-rate attorneys' fees[36] with a rule limiting the fees to the much lower rate paid to lawyers appointed to represent criminal defendants in federal prosecutions.[37]

Congress also restricted litigation against public assistance programs. As I noted earlier, many of the challenges to state public assistance programs were brought by lawyers employed by legal services organizations funded by the federal government. "Impact" litigation required the deployment of specialized knowledge, which legal services organizations provided through what were known as their "back-up" centers. First Congress denied funds to these back-up centers.[38] Still, local legal services organizations, particularly

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[33] Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 241 (1975).

[34] 42 U.S.C. § 1988 (2000).

[35] Pub. L. No. 104-134, 110 Stat. 1321 (1996) (codified in scattered sections of the United States Code).

[36] See Missouri v. Jenkins, 491 U.S. 274, 283 (1989) ("Our cases have repeatedly stressed that attorney's fees awarded under this statute are to be based on market rates for the services rendered.").

[37] 42 U.S.C. § 1977e(d)(1) (2000).

[38] See Committees on Civil Rights and Professional Responsibility, A Call for the Repeal or Invalidation of Congressional Restrictions on Legal Services Lawyers, 53 The Rec. 13, 17 (1998) ("All 16 of the LSC's National Support Centers and all 50 State Support Units have been defunded, and many have ceased to exist.").

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those in large cities, might have been able to develop the required expertise. To close that loophole, Congress decided that no federal funds could be used to support lawsuits challenging state public assistance programs.[39] The Supreme Court invalidated the restriction, but only to the extent that it barred legal services lawyers from challenging the constitutionality of a particular provision in the course of representing clients who were challenging the denial of public assistance to them.[40] As a formal matter, the holding preserved the possibility that legal services lawyers would be able to develop litigation campaigns. But, the political reaction that the restriction symbolized meant that lawyers in federally funded legal services organizations could in practice no longer develop substantial "impact" cases.

These restrictions on funding severely curtailed the ability of liberal litigating groups to continue to pursue litigation campaigns on the NAACP model. More important, perhaps, were substantive and procedural restrictions on what such campaigns could accomplish. The welfare rights litigation campaign provides the best example of successful substantive restrictions. As indicated earlier, the campaign's ultimate goal was to establish a constitutional right to public assistance. For strategic reasons, and because of the need to respond to client interests, the initial wave of litigation combined statutory challenges with constitutional ones. The courts agreed that many state regulations were inconsistent with federal statutes. The Supreme Court consistently rejected the constitutional challenges.[41] When Congress and the President agreed on a statute that eliminated welfare as we knew it, welfare rights litigators could do nothing.[42] The statutory precedents they had built up

[39] See Legal Serv. Corp. v. Velazquez, 531 U.S. 533, 538 (2001) (describing the provisions of the Omnibus Consolidated Rescissions and Appropriations Act, § 504(a)(16), 110 Stat. 1321-53 (1996)).

[40] Id. at 536–37.

[41] See, e.g., Lindsey v. Normet, 405 U.S. 56, 73–74 (1972) (implicitly rejecting the claim that the Constitution guarantees a right to shelter); Dandridge v. Williams, 397 U.S. 471, 487 (1970) (rejecting statutory and constitutional challenges to a state's decision to place a cap on the public assistance provided to families, without regard to family size).

[42] For a discussion of the absence of litigation challenging the 1996 welfare reform statute, see David A. Super, Offering an Invisible Hand: The Rise of the Personal Choice Model for Rationing Public Benefits, 113 Yale L.J. 815, 876–80 (2004) (ex-

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mattered only as long as the existing welfare system was in place, but the constitutional precedents against them continued to matter once welfare was reformed.

Prison reform litigation offers another, more complex example. Prison reform cases rested on court decisions finding that prison conditions violated the Constitution's ban on cruel and unusual punishments.[43] Unlike the welfare rights litigation, then, Congress could not respond by directly changing the underlying substantive rule. Instead, the Prison Litigation Reform Act imposed new procedural requirements on judicial orders dealing with prison conditions, and purported to require judges to order remedies targeted exclusively at constitutional violations.[44] These new requirements did not eliminate the possibility of successful prison reform litigation, but they did raise the cost of successful challenges. Reform litigators had to overcome the procedural obstacles. Perhaps more important, they had to develop evidentiary records that would allow sympathetic judges to find specific constitutional violations when, earlier, they would have been able to obtain orders aimed at specific conditions based on general findings about the unconstitutionality of the conditions in the prison overall. The Prison Litigation Reform Act thus raised the cost of conducting successful prison reform litigation without changing the substantive law and,

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plaining the absence of litigation by noting the restrictions imposed on legal services and the rise in informal methods of allocating public assistance).

[43] See, e.g., Ruiz v. Estelle, 503 F. Supp. 1265, 1390 (S.D. Tex. 1980), modified, 650 F.2d 555 (5th Cir. Unit A June 1981), aff'd in part and rev'd in part, 666 F.2d 854 (5th Cir. 1982), modified, 679 F.2d 1115 (5th Cir. 1982) (ordering system-wide relief in Texas); Newman v. Alabama, 559 F.2d 283, 289–90 (5th Cir. 1977), rev'd in part sub nom., Alabama v. Pugh, 438 U.S. 781 (1978) (ordering system-wide relief in Alabama); Palmigiano v. Garrahy, 443 F. Supp. 956, 986–89 (D.R.I. 1977) (ordering system-wide relief in Rhode Island); Holt v. Sarver, 309 F. Supp. 362, 382–85 (E.D. Ark. 1970), aff'd, 442 F.2d 304 (8th Cir. 1971) (ordering system-wide relief in Arkansas).

[44] Pub. L. No. 104-134, 110 Stat. 1321 (1996) (codified in scattered sections of the United States Code). For a discussion, see Mark Tushnet and Larry Yackle, Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act, 47 Duke L.J. 1, 47–70 (1997). The former set of restrictions is procedural, while the latter is substantive. Both differ from the strategy of depriving litigating groups of financial resources to support their projects.

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at the same time, reduced the resources available to prison reform litigators.[45]

Epp may be right in saying that successful rights revolutions require a support structure provided by litigating groups, among others. Yet, the course of strategic litigation after *Brown* suggests that even more may be needed. Sympathetic courts matter, but so do the structures for financing sustained litigation. And, as the post-*Brown* experience suggests, those structures may not be stable enough to support strategic litigation campaigns over the long term.

II. How Hollow a Hope?

Gerald Rosenberg opens his skeptical examination of the ability of the courts to effect social change with an extended study of *Brown* and the civil rights movement.[46] The immediate effects of the Court's decision were limited, as is well known. Many school systems in the border states desegregated, eliminating race as the basis for assigning children to schools and substituting (ordinarily) assignment of children to the schools in their neighborhoods. Neighborhood schools in areas characterized by residential segregation remained racially identifiable, of course, but on one understanding of what desegregation meant, the schools were desegre-

[45] I believe that the changes in the habeas corpus statute enacted in 1996 are a less successful effort to change procedural rules so as to discourage sustained litigation campaigns, but I acknowledge that my judgment is likely to be controversial. It is less successful, I believe, for several reasons. The only real sustained campaign affected by the statute was the campaign against capital punishment. The stakes in each case are so high that procedural obstacles seem to me unlikely to stand in the way of litigation. In addition, it is not difficult to shift that campaign from the federal courts, affected by the habeas corpus statute, to state courts. See, e.g., Roper v. Simmons, 124 S. Ct. 1171, 1171 (2004) (granting certiorari to review a decision by the Missouri Supreme Court holding it unconstitutional to subject people who committed their crimes when aged sixteen or seventeen to the risk of execution by including them within the class of criminals eligible for the death penalty); Atkins v. Virginia, 536 U.S. 304, 321 (2002) (holding, on direct appeal from the state supreme court, that states cannot subject people with mental retardation to the risk of execution by including them within the class of criminals eligible for the death penalty). Finally, the statute's procedural changes were at most small modifications of the rules the Supreme Court had already adopted, and the Court's interpretations of the statute have reduced even more the distance between the Court's prior position and what the Court says Congress did. See, e.g., Williams v. Taylor, 529 U.S. 362, 402–13 (2000).

[46] See Rosenberg, supra note 3.

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gated. Elsewhere, and particularly in the deep South, resistance to desegregation meant that race remained either formally or informally the basis for assigning children to schools.[47] Actual desegregation in the deep South came only after Congress enacted the Civil Rights Act of 1964, which authorized the denial of federal funds to school districts that discriminated,[48] and the Elementary and Secondary Education Act of 1965, which for the first time made substantial federal funds available to support elementary and secondary education.[49] Faced with the prospect of losing access to federal funds, school systems desegregated.[50]

Rosenberg places these observations within an institutional context by describing what he calls alternative views of the courts. According to the "Dynamic Court" view, courts can be "powerful, vigorous, and potent proponents of change."[51] The contrasting "Constrained Court" view emphasizes the ways in which other institutions of government place limits on what courts can accomplish, making the courts "weak, ineffective, and powerless."[52] For Rosenberg, *Brown* and its aftermath support the Constrained Court view, as revealed, he asserts, in his examination of the factual evidence bearing on the alternative views.

That evidence fell into two categories, encompassing the direct and indirect effects of *Brown* on public policy. Rosenberg concludes that the Supreme Court's decision in *Brown* "had virtually *no direct effect* on ending discrimination" and that change occurred only "when Congress and the executive branch acted in tandem with the courts."[53] He then turned to an examination of whether the decision indirectly led to substantial effects. The mechanism for indirect effects is the civil rights movement. *Brown*'s defenders ar-

[47] The most widespread informal systems of using race as a basis for assignment were the pupil-placement systems adopted in many areas, under which children were assigned to schools, nominally on the basis of objective non-race-related criteria such as ability, school capacity, and the like, but actually on the basis of race.

[48] Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended in scattered sections of 20 U.S.C, 29 U.S.C, and 42 U.S.C.).

[49] Pub. L. No. 89-10, 79 Stat. 27 (1965) (codified as amended in scattered sections of 20 U.S.C.).

[50] See Rosenberg, supra note 3, at 52–54 (demonstrating the lack of desegregation prior to 1965 and its dramatic increase thereafter).

[51] Id. at 2.

[52] Id. at 3.

[53] Id. at 70–71.

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gue that the decision had an important impact on the African-American community, giving it hope that their activities could eventually lead to changes in race relations. The decision, they claim, inspired the civil rights movement, which in turn generated political pressures that led Congress and the President to sign on to the movement's goals.

Rosenberg questions this claim. As he sees it, the claim rests on the hypothesis that "Court action gave civil rights prominence, putting it on the political agenda[,] . . . influenced both the President and Congress to act[,] . . . favorably influenced white Americans in general about civil rights[,] . . . [and] influenced black Americans to act in favor of civil rights."[54] Rosenberg argues that the evidence failed to bear out any of the factual predicates of the hypothesis. Press coverage of civil rights issues did not increase in a sustained way after *Brown*; rather, press coverage gradually drifted upward, with peaks when dramatic events like the Montgomery bus boycott occurred.[55] When Congress adopted civil rights bills in 1957, 1960, and 1964, the debates rarely referred to *Brown*.[56] Changes in white opinions on race flowed from long-term trends, not from the Supreme Court's decisions, and whites did not regard civil rights as "[t]he [m]ost [i]mportant [p]roblem [f]acing [t]his [c]ountry . . . until the explosion in the summer of 1963."[57] The black press responded with "understandable caution" to *Brown*, and there was no large increase in civil rights demonstrations immediately after *Brown*.[58] The Montgomery bus boycott did have a major impact in the African-American community, but the boycott resulted from long-standing concerns in the local community, and was modeled on boycotts that had taken place before *Brown*.[59] Those who organized civil rights demonstrations rarely mentioned *Brown* in their descriptions of what led them to act.[60]

One part of Rosenberg's argument on this point is right. *Brown* did not change white attitudes on race. The civil rights movement

[54] Id. at 109–10.
[55] Id. at 111–16.
[56] Id. at 118–20.
[57] Id. at 130.
[58] Id. at 133–34.
[59] Id. at 134–38.
[60] Id. at 139–45.

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did effect such a change, but not directly. Professor Michael Klarman's account of how *Brown* contributed to change in race relations is entirely persuasive.[61] According to Klarman, *Brown* pushed Southern white politics sharply toward strong defenses of segregation,[62] eliminating the modest movement white politicians had been making in the direction of a less rigorous system of apartheid.[63] The political defenders of segregation either encouraged or tolerated violence against civil rights proponents.[64] Publicity about that violence led Northern whites to turn against the South and in favor of civil rights.[65] Northern (and national) politicians responded to this changed political context by sponsoring civil rights legislation.

Other parts of Rosenberg's argument are overstated, partly because of his search for measures that could capture the causal chain he thought important. Cultural changes, however, are rarely measurable by the methods Rosenberg uses. The African-American press was often quite conservative on race issues, and it is not surprising that it did not give *Brown* the attention Rosenberg thinks it should have were it to be the case that *Brown* influenced the African-American community. The fact that civil rights leaders only occasionally mentioned *Brown* as motivating them does not mean that the Supreme Court's decision played a small role as they tried to figure out what to do. They were, after all, civil rights leaders before *Brown*, so they did not need the Supreme Court to tell them that segregation was wrong and ought to be eliminated. What they did need, though, was some hint about the probability that their strategies to eliminate it would succeed. *Brown* was the first indication from the very top of one of the nation's major governmental institutions that the civil rights leaders' appeal to the Constitution might actually have some resonance—not only with the leaders and their constituencies, but with a broader public. Such an indication could always be used to raise spirits that would inevitably flag in the course of a long campaign against segregation. As Klarman

[61] See Michael J. Klarman, From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality 385–442 (2004).

[62] Id. at 389–400.

[63] Id. at 385–89 (describing the gradual moderation of segregation before *Brown*).

[64] Id. at 427–28 (describing the reaction among Southern politicians to violent opposition to *Brown*).

[65] Id. at 441–42 ("It was televised scenes of officially sanctioned brutality against peaceful black demonstrators that transformed northern opinion on race.").

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puts it, "Because a principal obstacle for any social reform movement is convincing potential participants that success is feasible, *Brown* must have facilitated the mobilization of civil rights protest."[66]

Rosenberg concludes his discussion of *Brown* by examining what he calls "the current of history."[67] He argues that the civil rights movement was fostered more by economic changes, including the migration of African-Americans from the rural South to the industrial North to take advantage of economic opportunity, than by *Brown*.[68] The population shift itself strengthened the political power of African-Americans: Barred from voting in large numbers in the South, they could vote in the North, and their votes became a resource over which politicians contended by proposing civil rights statutes to satisfy a standard interest-group-like demand.[69] Finally, Rosenberg argues, Cold War pressures led the national government to move decisively against segregationists whose actions were impeding the nation's efforts to gain the allegiance of emerging nations, including many in Africa.[70]

In one sense, Rosenberg is clearly correct. The Supreme Court's contribution to the transformation in American race relations that occurred in the 1960s and afterwards is easily exaggerated, and it is important, particularly for lawyers and legal scholars, to understand the limited impact of judicial decisions on large-scale social change. But, in another sense, Rosenberg's focus misleads him. By looking at the on-the-ground details of how much desegregation actually occurred and then at the high-level changes in the economy and international relations, Rosenberg misses the intermediate level, where politicians used the courts to promote civil rights because doing so advanced their political interests.

Recent scholarship in American political development indicates what happened on this intermediate level, and points to a broader understanding of the relationship between the courts and social change. Professor Kevin McMahon, in an important recent book,

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[66] Id. at 369.
[67] Rosenberg, supra note 3, at 157.
[68] Id. at 159–60 (discussing migration).
[69] Id. at 160–62 (discussing the electoral effects of migration).
[70] Id. at 162–67 (discussing the international dimensions of the civil rights controversy).

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argues that Franklin Roosevelt deliberately focused on the courts as a weapon in his effort to dismantle the political structures of Southern conservatism—located in the Democratic party—that impeded the success of his New Deal economic programs.[71] For example, McMahon shows how the Roosevelt administration's Department of Justice targeted the Southern white primary for elimination in the expectation that Southern Democratic parties with substantial African-American participation would support Roosevelt's economic liberalism.[72]

More important in the present context, Roosevelt looked for liberals to appoint to the Supreme Court because they would not stand in the way of the New Deal. By the late 1930s and 1940s, however, liberalism was a package. Those who were liberal on economic matters were likely to be liberal on race matters as well—not always, but often enough that a Court dominated by judges who took the liberal position on economic matters, that is, who deferred to legislative judgments about economic regulation, were likely to be liberal on race issues too; that is, they were likely to be sympathetic to constitutional challenges to racially discriminatory statutes.[73]

In some ways Justice Felix Frankfurter is a paradigmatic figure here. Justice Frankfurter was an ardent New Dealer who attacked the conservative pre-New Deal Court for its activism. To Justice Frankfurter, judges should defer to the judgments made by elected representatives rather than read their own views of good economic policy into the Constitution. Justice Frankfurter developed a general theory of judicial restraint out of his concern over the conser-

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[71] Kevin J. McMahon, Reconsidering Roosevelt on Race: How the Presidency Paved the Road to *Brown* (2004).

[72] Id. at 150–56 (discussing the Department of Justice's actions in white primary cases in the 1940s). According to McMahon, "FDR believed that if he could reach those southerners who had never or rarely cast a ballot on election day, southern democracy would be disrupted." Id. at 102.

[73] McMahon summarizes the characteristics of Roosevelt's Supreme Court appointments in this way:

> As a group, then, the Roosevelt justices . . . were easily more willing to accept new ideas and methods than those justices they replaced . . . . [H]is nominees' adherence to rights-centered liberalism combined with their devotion to defer to the executive branch ensured that the NAACP would find fertile ground to lay its antisegregation precedential seeds . . . .

Id. at 142.

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vative Court's challenge to progressive economic legislation. According to Justice Frankfurter's articulated theory, as a justice he should have deferred to legislative decisions in the area of race as well as economics. But he simply could not do so because his substantive liberalism, while compatible with judicial restraint on economic matters, required that he endorse judicial intervention on race.[74]

Roosevelt regarded the Court as a potential collaborator in the construction of the political order he hoped to entrench.[75] He could use the courts to weaken his enemies, the conservative Southern Democrats, and to strengthen the attachment of his friends to his programs. Constructing a political order is obviously a dynamic process.[76] Importantly, the political institutions that initiate a transformation in the political order need not be the ones that sustain it. For example, Roosevelt used the Presidency to start the process of institutionalizing a distinctive New Deal constitutional order and he used the courts as tools in the early stages of its construction. Once the newer order gained a foothold, the Supreme Court could play a larger role in collaborating in its maintenance.[77]

Students of American political development describe two central features of constitutional orders.[78] Each has a distinctive set of in-

[74] For a discussion of how Justice Frankfurter got tied into knots for these reasons in the deliberations over *Brown*, see Tushnet, Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936–1961, supra note 21, at 192–93.

[75] For my analysis of the idea of political or constitutional orders, see Mark Tushnet, The New Constitutional Order 1, 8 (2003) (defining "constitutional order") [hereinafter Tushnet, The New Constitutional Order].

[76] For an overview of recent scholarship on American political development from the perspective sketched here, see Karen Orren & Stephen Skowronek, Regimes and Regime Building in American Government: A Review of the Literature of the 1940s, 113 Pol. Sci. Q. 689 (Winter 1998–1999).

[77] I should emphasize that my concern here is with the Supreme Court as an institution, not with the self-conscious understandings of particular justices. Calling the Supreme Court a collaborator in the maintenance of the New Deal constitutional order is therefore not inconsistent with the fact that Chief Justice Earl Warren, a Republican, led the Court during the civil rights era. Still, I think it worth noting that Warren and Dwight Eisenhower, the President who appointed him, came from the wing of the Republican party that accepted the New Deal constitutional order relatively early, rather than from the Robert Taft wing, which resisted that order.

[78] The study of American political development focuses on examining the historical development of the basic institutions of American government and politics, and typically focuses on identifying periods in which individual leaders, usually Presidents,

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stitutional arrangements, and each has a distinctive set of substantive commitments. On the institutional level, for example, the New Deal constitutional order gave the President a leading role in initiating legislation, interest groups a distinctive role in inducing Congress to adopt the President's program, and interest groups and highly educated professionals distinctive roles in staffing and administering the bureaucracies used to distribute the benefits of government programs to the main elements in the New Deal political coalition. Substantively, the New Deal constitutional order was progressive and liberal in the conventional sense.

The Supreme Court's collaboration with the New Deal constitutional order occurred primarily in its articulation of that order's substantive liberalism—as indeed one might expect, given the relative power of courts and legislatures to develop institutions directly. Rosenberg's alternatives—the Dynamic and the Constrained Courts—overlook the possibility that, sometimes, the Supreme Court might not be constrained by Congress and the President, but might do what it could to support the political order to which the political branches were committed. Perhaps, as Rosenberg might be read to suggest, what the Supreme Court could do was limited to the articulation of the substantive values characteristic of that political order. Yet, articulation of principles is not trivial. Presidents who initiate transformations in the political order have to articulate the principles that lead them to think that the institutions they face must be transformed, because those institutions impede the implementation of those values and because voters care about values and what the government does, not about institutional arrangements themselves. These Presidents and their successors can always use help in the value-articulation task.

Rosenberg's analysis of *Brown*'s direct and indirect effects suggests an interesting possibility about the way we should understand the construction of constitutional orders. Such orders have institutional and substantive commitments; they are created and maintained. I have argued that *Brown* is better understood as contributing to the maintenance of the New Deal's substantive commitments and to their extension a decade later to the Great Society's equality

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have attempted to put in place important innovations in government structure. See Orren & Skowronek, supra note 76, at 692–702.

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agenda than as Rosenberg's emphasis on its contribution to institutional arrangements ranging from school desegregation itself to the expansion of voting rights. Perhaps more important, my account suggests that we should consider the different ways that different institutions—the Presidency, Congress, the courts—contribute at different times to the maintenance (and even, perhaps, to the creation) of new constitutional orders. Such a more differentiated analysis provides a way of reconciling Rosenberg's evaluation of the role of courts generally, and of *Brown*'s effect specifically, with the critical responses to his work.

III. A TROUBLED LEGACY?

Constitutional orders are not only created and maintained. They decay as well. The best account of *Brown*'s legacy probably should emphasize the way in which *Brown* first deepened the New Deal—and then the Great Society—and afterwards contributed to the erosion of the New Deal-Great Society political order.

Brown deepened the New Deal-Great Society order substantively and institutionally. Equality was of course the central theme in *Brown*, and equality became the central theme in the liberalism of the 1950s and 1960s. As Professor Morton Horwitz concluded, "[t]he Warren Court's inclusive idea of democracy was built on the revival of the Equal Protection Clause in *Brown*. It then spread beyond race cases to cover other outsiders in American society: religious minorities, political radicals, aliens, ethnic minorities, prisoners, and criminal defendants."[79]

The Burger Court, and indeed to some degree the Rehnquist Court, continued to implement the Warren Court's "inclusive" vision by extending the Equal Protection Clause's special coverage to women as well.[80] Writing specifically about the Warren Court, Horwitz does not emphasize the obvious point that the inclusive idea of democracy was characteristic, not alone of the Warren Court, but also of Congress and the Presidency during the Great

[79] Morton J. Horwitz, The Warren Court and the Pursuit of Justice 115 (1998).

[80] See, e.g., Frontiero v. Richardson, 411 U.S. 677, 690–91 (1973) (invalidating a statute that gave larger benefits to male members of the armed forces and their families than to female members and their families); Reed v. Reed, 404 U.S. 71, 74 (1971) (invalidating a statute that gave preference in administering estates to men).

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Society era. The Civil Rights Act of 1964, the Voting Rights Act of 1965, and innumerable other statutes and administrative policies reflected the Great Society's substantive liberalism, of which *Brown* was an early—and limited—statement.

Institutionally, *Brown* contributed to the deepening of the New Deal-Great Society constitutional order by cementing the attachment of African-Americans to the Democratic Party, an attachment that Roosevelt's policies had initiated.[81] The more extensive substantive agenda of equality contributed to the accretion of additional equality-oriented groups to the Democratic party, most importantly the organized women's movement. The Voting Rights Act led to substantial increases in the number of African-American voters in the South, which weakened the place economic conservatives held in the Democratic Party.

Republicans saw their opportunity precisely in these developments. Relatively early on Barry Goldwater and then Richard Nixon understood the possibilities presented by the accretion of African-Americans to the Democratic party in the South: As those new voters supported Democrats, conservative whites looked for a new political home. The Republican Party's so-called Southern strategy gave it to them. And, as against the New Deal and Great Society vision of equality, the new Republican Party offered a more conservative vision. The "activist" Warren Court became only an example, although probably the central one in many presentations of the new conservative vision, of an overreaching government that had to be brought under control by an invigorated populace.

Historian James Patterson offers a balanced account "of the many disappointments and triumphs surrounding Brown."[82] Significantly, though, his phrasing directs attention first to the disappointments, reflecting the decay of the New Deal-Great Society constitutional order of which *Brown* was such an important part. His summary chapter began by describing the effects of ending affirmative action at the University of Texas, and continued by observing that schools in Summerton, South Carolina, and Topeka,

[81] See, e.g., Nancy J. Weiss, Farewell to the Party of Lincoln: Black Politics in the Age of FDR (1983) (describing the erosion of African-American support for the Republican Party during Roosevelt's Presidency).

[82] Patterson, supra note 5, at 206.

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Kansas, where two of the five cases decided in 1954 originated, remained quite segregated—or, depending on the meaning one gives to the word segregation, remained racially identifiable. Patterson observes that "[a] number of scholars kept the faith in court action that optimists had expressed immediately after *Brown*," but that "[m]any Americans in the 1990s . . . shared the gloom" of some of those who had participated in the litigation.[83] The gloom arose from the weakness of the civil rights movement, the rise of challenges to affirmative action, and the continuing disparity in resources available to schools attended predominantly by African-Americans. There was little movement "toward greater interracial mixing," Patterson writes, and some movement toward resegregation in neighborhoods and, of course, in the public schools as well:[84]

> What especially troubled advocates of desegregated education at the turn of the century was their sense that federal court decisions, including those from the Supreme Court, were closing the door to virtually all strategies aimed at elevating the value of racial balance in the schools.[85]

Patterson's negative evaluation continues with a discussion of gaps between the scores of whites and African-Americans on standardized tests and of proposals to reform education in ways that might contribute to closing the gaps. But, Patterson notes, the political resources for such reforms seemed absent: "Since the 1960s, . . . no substantial lead for change in race relations has come from the federal government."[86]

Emphasizing, as I have, that *Brown* was an important statement of American ideals, Patterson notes large changes in race relations since *Brown*: "mass migrations out of the poverty-stricken rural South, the inspiring civil rights movement, strong and well-enforced federal civil rights laws, significant economic growth, wide expansion of public education, more liberal white attitudes,

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[83] Id. at 210.

[84] Id. at 211.

[85] Id. at 213. Patterson's book was published before the Supreme Court endorsed the "diversity" rationale for affirmative action in higher education in *Grutter v. Bollinger*, 539 U.S. 306, 327–33 (2003), a decision that presumably will have some effects on the ability of public school boards to engage in race-conscious action in elementary and secondary schools.

[86] Id. at 219.

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[and] memorable court decisions."[87] But, like Rosenberg, Patterson questions, "to what extent was *Brown* responsible for these considerable improvements?"[88] Patterson endorses "a cautiously positive appraisal,"[89] that the answer—in my terms, not his—was rather a lot, but not as much as some enthusiastic defenders of the Warren Court assert.

Yet, just before that conclusion, Patterson raises a question that persists: "Was it appropriate that nonelected, life-tenured justices and judges—or appointed federal bureaucrats—should so greatly affect the lives of a democratic people?"[90] There is some tension between the implicit premise of that question—that the courts and bureaucrats did indeed greatly affect peoples' lives—and the more measured assessment of *Brown*'s "troubled" legacy that Patterson provides.[91]

Patterson's emphasis on the role of courts and bureaucrats resonates with important themes of the Republican Party's challenge to the New Deal-Great Society constitutional order. *Brown* was ambiguous about whether it required merely desegregation, that is, the elimination of race as a criterion for assigning children to schools, or integration, that is, the presence of children in schools and perhaps classrooms in rough proportion to their presence in the community.[92] Southern resistance to desegregation led the Supreme Court to become impatient. In 1968 the Court insisted that the time for deliberate speed had ended. Schools that had discriminated had to develop desegregation plans that "promise[d] realistically to work, and . . . to work now."[93] The requirement of plans that "worked" moved the Court very close to requiring integration.

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[87] Id. at 220.

[88] Id. at 220–21.

[89] Id. at 223 (presenting Professor Jack Greenberg's assessment).

[90] Id. at 222.

[91] I note that *Brown*'s legacy might be troubled in two quite opposed senses. The legacy might be troubled because the nation did not fulfill the promises *Brown* held out. It might also be troubled because the nation's responses to *Brown* produced conflict and unsettlement among the people. Patterson's rhetorical choices, I think, give the latter sense more weight than the former.

[92] For a discussion of *Brown*'s ambiguity, see Mark Tushnet, The Supreme Court's Two Principles of Equality: From *Brown* to 2000, *in* From the Grassroots to the Supreme Court: Explorations of *Brown v. Board of Education* and American Democracy (Peter Lau ed., forthcoming 2004).

[93] Green v. County Sch. Bd. of New Kent County, 391 U.S. 430, 439 (1968).

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That movement was confirmed in the Court's endorsement of busing remedies in desegregation cases[94] because such remedies made most sense where the goal was to achieve rough proportionality in the racial composition of every school in a district.

Busing remedies were enormously controversial. The controversy intensified as the courts turned their attention to segregation in the North.[95] Before the late 1960s, white Northerners could believe that overcoming the legacy of segregation would not impose any costs on them. That belief became impossible to sustain as desegregation litigation moved north. White Northerners, beginning to be disillusioned by the fiscal consequences and tax burdens of the Great Society's social programs, were ripe for a shift in political allegiance.

The Burger Court, whose conservatism reflected the moderate conservatism of the Nixon Republican Party, expressed some ambivalence about what the courts could do. It rejected the view that district courts could order remedies that reached beyond the boundaries of districts that had themselves discriminated in student assignments in the service of developing a plan that "worked" to achieve integration.[96] It imposed essentially procedural requirements that had to be satisfied before courts could order busing and similarly extensive remedies, but then was relatively relaxed in finding that those procedural requirements had been satisfied.[97] It approved "educational" remedies, that is, judicially imposed requirements of enhancements to schools' academic programs.[98]

The Burger Court, though, was not the vehicle for major change in desegregation law because through most of its existence the Great Society order was decaying but it had not been replaced by another constitutional order. Ronald Reagan's election in 1980 be-

[94] See, e.g., Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

[95] For a prize-winning treatment of the controversy over desegregation and busing in Boston, see J. Anthony Lukas, Common Ground: A Turbulent Decade in the Lives of Three American Families (1986).

[96] Milliken v. Bradley, 418 U.S. 717, 748–49 (1974).

[97] Compare Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 420 (1977) (holding that the district court's findings of several constitutional violations were insufficient to support a systemwide remedy), with Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 541–42 (1979) (upholding a system-wide remedy when, after remand, the district court relied on the school board's failure to remedy the persisting effects of segregatory decisions taken before and after 1954).

[98] Milliken v. Bradley, 433 U.S. 267, 281–83 (1977).

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gan a new transformation in the U.S. constitutional order. As with *Brown*, the Supreme Court collaborated in the articulation of the principles animating that order. As I have described elsewhere, those principles called for less ambitious aspirations for government.[99]

The Supreme Court did not take the lead in articulating principles for the Reagan revolution's constitutional order, nor did it do much in the way of maintaining new institutions. The Rehnquist Court supported the Reagan revolution once it took hold, although with even fewer efforts to articulate principles that might guide the new constitutional order than *Brown* and later desegregation decisions' articulation of principles that supported the New Deal and Great Society orders.

The Supreme Court decisions on race-related issues in the Rehnquist years have two features. First, the Rehnquist Court has enthusiastically endorsed the withdrawal of lower courts from the task of supervising desegregation. Emphasizing that state laws requiring segregation had been invalidated in *Brown*, and expressing skepticism about the continuing effects of intentionally discriminatory actions by schools boards in the absence of statutory directives, the Court held that district courts should stop supervising districts if the judges were persuaded that the school boards were "unlikely [to] return to [their] former ways."[100] It allowed courts to withdraw from supervising desegregation orders step-by-step: Even if school boards had not achieved full compliance with every aspect of a desegregation order, district courts could stop insisting on compliance with other aspects of their orders if, again, they were satisfied that the school boards were not going to revert to unconstitutional behavior.[101]

By the end of the twentieth century, few school districts remained subject to close judicial supervision over the aspects of their programs that implicated race.[102] Yet schools, particularly

[99] Tushnet, The New Constitutional Order, supra note 75, at 2.

[100] Bd. of Educ. of Okla. City Pub. Schs. v. Dowell, 498 U.S. 237, 247 (1991).

[101] Freeman v. Pitts, 503 U.S. 467, 490–92 (1992).

[102] See Wendy Parker, The Decline of Judicial Decisionmaking: School Desegregation and District Court Judges, 81 N.C. L. Rev. 1623, 1629 (2003) (summarizing the author's study of desegregation cases in fifty-three districts, which showed that "defendants win when they are sued for traditional school desegregation issues" and that "the process of school desegregation cases . . . minimizes the role of the judiciary").

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those in cities and suburbs, remained obviously racially identifiable, in the jargon of students of segregation. *Brown*, and more important, the Great Society, may have been committed to an ideal of equality that envisioned racial integration in the public schools. The Rehnquist Court was not. Consistent with the conservatism of the constitutional order of the period, the Rehnquist Court never repudiated the ideal of equality. The Rehnquist Court's decisions in desegregation cases neither identified large principles nor articulated strong defenses of some vision of the kind of relations in a multicultural America that the Constitution required or even encouraged. The majority opinions were technical, focusing on the scope of the federal judicial power to order remedies for identified constitutional violations and expressing concern for judicial micromanagement of state and local government policy. Instead, it might be said to have taken to heart Senator George Aiken's reputed advice on how the United States could extricate itself from the war in Vietnam: It declared victory and went home.

In addition, the Rehnquist Court shifted its attention away from the issues that had been at the heart of desegregation litigation in earlier years. Cases involving claims that school systems discriminated against African-Americans occupied a smaller part of the Court's docket—and a smaller part of public attention—than cases involving claims that schools and governments discriminated against whites through their affirmative action programs. The Burger and Rehnquist Courts rejected arguments for affirmative action based on claims of distributive justice or overcoming the legacy of discrimination. The Rehnquist Court did endorse affirmative action in education, and perhaps government employment, because of the educational and social benefits flowing from racial diversity in the nation's institutions of higher education.[103]

In all this, the Rehnquist Court was once again a collaborator with the political branches. Reagan's election, the Republican victories in the congressional elections of 1994, and Bill Clinton's Presidency confirmed that the legacy of race discrimination was no longer a matter of high priority for the existing political order. Despite the efforts of Justices Antonin Scalia and Clarence Thomas in several affirmative action cases to get the Court to commit itself to

[103] Grutter v. Bollinger, 539 U.S. 306, 327–33 (2003).

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the proposition that the Constitution really was color-blind, the Rehnquist Court's withdrawal from the field of desegregation litigation came with no large pronouncements from the Court itself about what equality truly means. It presented its decisions as rather technical ones about the scope of the power of federal courts to issue injunctions that had significant effects on the ability of state and local governments to determine their own programs—important issues in one sense, but not principles that, when articulated, would explain to the Republican Party's supporters exactly why they should remain committed to that party's programs.

CONCLUSION

Brown v. Board of Education remains one of the defining moments in Supreme Court history.[104] One reason for this, I have argued, is that the case brings to our attention features of the U.S. political system that have endured to the present: the structures that underlie the way in which litigation can advance rights, and the relationship between the courts and other political institutions in the long-term arrangements of institutions and values that constitute the successive constitutional orders in U.S. history. *Brown* is important, then, not only because of what it meant for the constitutional status of African-Americans, but also because of what it can tell us about the U.S. Constitution's operation over time.

[104] In the twentieth century, *Brown*, *Roe v. Wade*, 410 U.S. 113 (1973), and *Lochner v. New York*, 198 U.S. 45 (1905), set out the boundaries of all serious discussions of the Court and its role in the U.S. political system.

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