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The Hollow Hope
*Can Courts Bring About
Social Change?*



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The Dynamic and the Constrained Court

What is the role of U.S. courts in producing significant social reform? When and under what conditions will U.S. courts be effective producers of significant social reform? When does it make sense for individuals and groups pressing for such change to litigate? What kinds of effects from court victories can they expect? Which view best captures the reality of American politics? Given the alleged success of the social reform litigation of the last four decades, and Americans' attachment to the Dynamic Court view, it is tempting to suggest that it *always* makes sense for groups to litigate. On the other hand, our attachment to the vision of the Constrained Court, as well as a knowledge of legal history, can suggest that courts can *never* be effective producers of significant social reform. But "always" and "never" are claims about frequency, not conditions. To fully understand the role of the courts in producing significant social reform, we must focus on the latter.

Many scholars have turned their attention to the questions this litigation activity raises. However, their findings remain unconnected and not squarely centered on whether, and under what conditions, courts produce significant social reform. Some writing has focused on the determinants of winning court cases rather than on the effects of court decisions. Galanter (1974), for example, asks "why the 'haves' come out ahead" and suggests that the resources and experience available to established and on-going groups provide an advantage in litigation. Similarly, Handler (1978), while exploring outcomes as well as the resources available to litigants, stresses the latter too. While these and similar works provide interesting theories about winning cases, that is a different question from the effects courts have on political and social change.

On the outcome side, there are numerous individual studies. Unfortunately, they tend to focus narrowly on a given issue and refrain from offering

hypotheses about courts and change.¹ More self-consciously theoretical case studies have examined admittedly non-controversial areas (Rebell and Block 1982), the need for federal pressure to improve race relations (Hochschild 1984), or have suggested so many hypotheses (one hundred and thirty-five of them) as to be of little practical help (Wasby 1970, 246–66). Finally, the extensive law review literature on institutional reform either lacks evidence or focuses on individual cases with little or no attempt to generate hypotheses.² While much of this work is well done, it does not address the larger question.

In the bulk of this chapter, I flesh out the two views. My aim is to make each view plausible, if not enticing. Then, critically examining evidence for their plausibility, I develop a set of constraints and conditions under which courts can produce significant social reform. These suggest that both views oversimplify court effectiveness.

Structural Constraints: The Logic of the Constrained Court View

The view of courts as unable to produce significant social reform has a distinguished pedigree reaching back to the founders. Premised on the institutional structure of the American political system and the procedures and belief systems created by American law, it suggests that the conditions required for courts to produce significant social reform will seldom exist. Unpacked, the Constrained Court view maintains that courts will generally not be effective producers of significant social reform for three reasons: the limited nature of constitutional rights, the lack of judicial independence, and the judiciary's inability to develop appropriate policies and its lack of powers of implementation.

The Limited Nature of Rights

The Constitution, and the set of beliefs that surround it, is not unbounded. Certain rights are enshrined in it and others are rejected. In economic terms, private control over the allocation and distribution of resources, the use of property, is protected (Miller 1968). "Rights" to certain minimums, or equal shares of basic goods, are not. Further, judicial discretion is bound by the norms and expectations of the legal culture. These two parameters, believers in the Constrained Court view suggest, present a problem for litigators pressing the courts for significant social reform because most such

1. For example, see the studies excerpted and compiled in Becker and Feitler (1973). A more theoretical work, although unfortunately not focused on important political and social change, is Johnson and Canon (1984).

2. For representative examples, see Aronow (1980); Eisenberg and Yezell (1980); Monti (1980); Note (1980); Note (1975).

litigation is based on constitutional claims that rights are being denied.³ An individual or group comes into a court claiming it is being denied some benefit, or protection from arbitrary and discriminatory action, and that it is entitled to this benefit or that protection. Proponents of the Constrained Court view suggest that this has four important consequences for social reformers. First, they argue, it limits the sorts of claims that can be made, for not all social reform goals can be plausibly presented in the name of constitutional rights. For example, there are no constitutional rights to decent housing, adequate levels of welfare, or clean air, while there are constitutional rights to minimal governmental interference in the use of one's property. This may mean that "practically significant but legally irrelevant policy matters may remain beyond the purview of the court" (Note 1977, 436). Further, as Gordon (1984, 111) suggests, "the legal forms we use set limits on what we can imagine as practical outcomes." Thus, the nature of rights in the U.S. legal system, embedded in the Constitution, may constrain the courts in producing significant social reform by preventing them from hearing many claims.

A second consequence from the Constrained Court perspective is that, even where claims can be made, social reformers must often argue for the establishment of a new right, or the extension of a generally accepted right to a new situation. In welfare rights litigation, for example, the Court was asked to find a constitutional right to welfare (Krislov 1973). This need to push the courts to read the Constitution in an expansive or "liberal" way creates two main difficulties. Underlying these difficulties is judicial awareness of the need for predictability in the law and the politically exposed nature of judges whose decisions go beyond the positions of electorally accountable officials. First, the Constitution, lawyers, judges, and legal academics form a dominant legal culture that at any given time accepts some rights and not others and sets limits on the interpretation and expansion of rights. Judicial discretion is bound by the beliefs and norms of this legal culture, and decisions that stray too far from them are likely to be reversed and severely criticized. Put simply, courts, and the judges that compose them, even if sympathetic to social reform plaintiffs, may be unwilling to risk crossing this nebulous yet real boundary.⁴ Second, and perhaps more important, is the role of precedent and what Justice Traynor calls the "continuity scripts of the law" (Traynor 1977, 11). Traynor, a justice of the California Supreme Court for twenty-five years, Chief Justice from 1964 to 1970, and known as a judge open to new ideas, wrote of the "very caution of the judicial process" (1977, 7). Arguing that

3. Sometimes, however, court cases deal not in the language of constitutional rights but in the world of statutory interpretation. While many of the constraints suggested below are applicable here as well, when elected officials have acted to produce significant social reform, the conditions under which courts operate are dramatically changed.

4. As Diver (1979, 104) puts it, a "judge's actions must conform to that narrow band of conduct considered appropriate for so antimonitorian an institution."

"a judge must plod rather than soar," Traynor saw that the "greatest judges" proceed "at the pace of a tortoise that steadily makes advances though it carries the past on its back" (1977, 7, 6). Constrained by precedent and the beliefs of the dominant legal culture, judges, the Constrained Court view asserts, are not likely to act as crusaders.

Third, supporters of the Constrained Court view note, as Scheingold (1974) points out, that to claim a right in court is to accept the procedures and obligations of the legal system. These procedures are designed, in part, to make it difficult for courts to hear certain kinds of cases. As the Council for Public Interest Law (CPL) puts it, doctrines of standing and of class actions, and other technical doctrines can "deter courts from deciding cases on the merits" (CPL 1976, 355) and can result in social reform groups being unable to present their best arguments, or even have their day in court. Once in court, however, the legal process tends to dissipate significant social reform by making appropriate remedies unlikely. This can occur, McCann (1986, 200) points out, because policy-based litigation aimed at significant social reform is usually "disaggregate[d] . . . into discrete conflicts among limited actors over specific individual entitlements." Remedial decrees, it has been noted, "must not confuse what is socially or judicially desirable with what is legally required" (Special Project 1978, 855). Thus, litigation seldom deals with "underlying issues and problems" and is "directed more toward symptoms than causes" (Harris and Spiller 1976, 26).

Finally, it has long been argued that framing issues in legally sound ways robs them of "political and purposive appeal" (Handler 1978, 33). In the narrow sense, the technical nature of legal argument can denude issues of emotional, widespread appeal. More broadly, there is the danger that litigation by the few will replace political action by the many and reduce the democratic nature of the American polity. James Bradley Thayer, writing in 1901, was concerned that reliance on litigation would sap the democratic process of its vitality. He warned that the "tendency of a common and easy resort" to the courts, especially in asking them to invalidate acts of the democratically accountable branches, would "dwarf the political capacity of the people" (Thayer 1901, 107). This view was echoed more recently by McCann, who found that litigation-prone activists' "legal rights approach to expanding democracy has significantly narrowed their conception of political action itself" (McCann 1986, 26). Expanding the point, McCann argued that "legal tactics not only absorb scarce resources that could be used for popular mobilization . . . [but also] make it difficult to develop broadly based, multiissue grassroots associations of sustained citizen allegiance" (McCann 1986, 200). For these reasons, the Constrained Court view suggests that the nature of rights in the U.S. constrains courts from being effective producers of significant social reform. Thus,

Constraint I: The bounded nature of constitutional rights prevents courts from hearing or effectively acting on many significant social reform claims, and lessens the chances of popular mobilization.

Limits on Judicial Independence—The Institutional Factor

As the colloquy between Justice Jackson and U.S. Attorney Rankin illustrates, reformers have often turned to courts when opposition to significant social reform in the other branches has prevented them from acting. Thus, much significant social reform litigation takes place in the context of stalemate within, or opposition from, the other branches. For courts to be effective in such situations, they must, logically, be independent of those other branches. Supporters of the Constrained Court view point to a broad array of evidence that suggests the founders did not thoroughly insulate courts or provide them with unfailing independence.⁵

To start, the appointment process, of course, limits judicial independence. Judges do not select themselves. Rather, they are chosen by politicians, the president and the Senate at the federal level. Presidents, while not clairvoyant, tend to nominate judges who they think will represent their judicial philosophies. Clearly, changing court personnel can bring court decisions into line with prevailing political opinion (and dampen support for significant social reform).⁶ Thus, the Constrained Court perspective sees the appointment process as limiting judicial independence.

Judicial independence requires that court decisions, in comparison to legislation, do not invariably reflect public opinion. Supporters of the Constrained Court view note, however, that Supreme Court decisions, historically, have seldom strayed far from what was politically acceptable (McCloskey 1960, 223–24).⁷ Rather than suggesting independence, this judicial unwillingness to often blaze its own trail perhaps suggests, in the words of Finley Peter Dunne's Mr. Dooley, that "th' supreme court follows th' illection returns" (Dunne 1901, 26).⁸

5. For a clear theoretical discussion of the notion of judicial independence, see Shapiro (1981), chapter 1.

6. In terms of producing significant social reform, the appointment process may be overemphasized. To the extent that the Constrained Court view is correct, appointing judges intent upon significant social reform won't lead to greater court contributions to it because the other structural constraints render courts impotent as producers of significant social reform. Thus, the appointment process only serves a negative role.

7. More specifically, comparing the Court's opinions with those of the public on issues in 146 decisions over the years 1935–1986, Marshall found consistency nearly two-thirds of the time (Marshall 1989, chap. 4). In the period 1969–84, all but two of the years of the Burger Court, the Court's opinions were consistent with the public's over 70 percent of the time (Marshall 1985).

8. In the wake of Mr. Dooley's comments, after the Supreme Court abruptly switched sides and upheld New Deal legislation, Felix Frankfurter wrote the following to Justice Stone: "I must confess I am not wholly happy in thinking that Mr. Dooley should, in the course of history turn out to have been one of the most distinguished legal philosophers" (quoted in O'Brien 1985, 22).

In at least two important ways, the Constrained Court view suggests, Congress may constrain court actions. First, in the statutory area, Congress can override decisions, telling the courts they misinterpreted the intent of the law. That is, Congress may rewrite a provision to meet court objections or simply state more clearly what it meant so that the courts' reading of the law is repudiated.⁹ Second, although Congress cannot directly reverse decisions based on constitutional interpretations, presumably untouchable by the democratic process, it may be able to constrain them by threatening certain changes in the legal structure. A large part of the reason, of course, is the appointment process. But even without the power of appointment, the Court may be susceptible to credible threats against it. Historical review of the relations of the Court to the other branches of the federal government suggests that the Court cannot for long stand alone against such pressure. From the "Court-packing" plan of FDR to recent bills proposing to remove federal court jurisdiction over certain issues, court-curbing proposals may allow Congress to constrain courts as producers of significant social reform (Nagel 1965; Rosenberg 1985; cf. Lasser 1988).

American courts, proponents of the Constrained Court view claim, are particularly deferential to the positions of the federal government. On the Supreme Court level, the solicitor general is accorded a special role. The office has unusual access to the Court and is often asked by the Court to intervene in cases and present the government's position. When the solicitor general petitions the Court to enter a case, the Court almost invariably grants the request, regardless of the position of the parties.¹⁰ The government is also unusually successful in convincing the Court to hear cases it appeals and to not hear those it opposes.¹¹ The solicitor general's access to the Court carries over to the winning of cases. Historically, the solicitor general (or the side the government is supporting when it enters a case as *amicus*) wins about 70 percent of the time (Scigiano 1971; Ulmer and Willison 1985). It appears that the federal government has both extraordinary access to and persuasive abilities with the Court (Ducat and Dudley 1985; Dudley and Ducat 1986).

9. Modern examples include *Grove City College v. Bell* (1984), which limited the funding cut-off provisions of Title IX. In the spring of 1988 Congress, over President Reagan's veto, enacted the Civil Rights Restoration Act which overruled the decision. A similar case occurred with *General Electric v. Gilbert* (1976), where the Supreme Court held that an employer's diversity plan that excluded pregnancy from its coverage did not violate Title VII of the 1964 Civil Rights Act. Congress responded in 1978 by amending the law to prohibit such exclusion. More generally, in the period 1944–60, Congress rewrote courts' decisions fifty times (Wasby 1978b).

10. In the years 1969–83, the solicitor general petitioned to enter 130 cases without the consent of the parties. The Court granted access in 126 of those cases (97 percent) (Ulmer and Willison 1985).

11. While the Court agrees to hear, on average, about 7 or 8 percent of cases appealed to it (13 or 14 percent not including petitions from prisoners), the solicitor general's petitions are accepted almost three-quarters of the time. When the solicitor general opposes an appeal, the Court rarely accepts the case, doing so, for example, in only 4 percent of the cases during the 1969–83 period (Ulmer and Willison 1985).

That does not comport with notions of independence and a judicial system able to defy legislative and political majorities. Thus, the Constrained Court view's adherents believe,

Constraint II: The judiciary lacks the necessary independence from the other branches of the government to produce significant social reform.

Implementation and Institutional Relations

For courts, or any other institution, to effectively produce significant social reform, they must have the ability to develop appropriate policies and the power to implement them. This, in turn, requires a host of tools that courts, according to proponents of the Constrained Court view, lack. In particular, successful implementation requires enforcement powers. Court decisions, requiring people to act, are not self-executing. But as Hamilton pointed out two centuries ago in *The Federalist Papers* (1787–88), courts lack such powers. Indeed, it is for this reason more than any other that Hamilton emphasized the courts' character as the least dangerous branch. Assuaging fears that the federal courts would be a political threat, Hamilton argued in *Federalist* 78 that the judiciary "has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments" (*The Federalist Papers* 1961, 465). Unlike Congress and the executive branch, Hamilton argued, the federal courts were utterly dependent on the support of the other branches and elite actors. In other words, for Court orders to be carried out, political elites, electorally accountable, must support them and act to implement them. Proponents of the Constrained Court view point to historical recognition of this structural "fact" of American political life by early Chief Justices John Jay and John Marshall, both of whom were acutely aware of the Court's limits.¹² President Jackson recognized these limits, too, when he reputedly remarked about a decision with which he did not agree, "John Marshall has made his decision, now let him enforce it."¹³ More recently, the unwillingness of state authorities to follow court orders, and the need to send federal troops to Little Rock, Arkansas, to carry them out, makes the same point. Without elite support (the federal government in this case), the Court's orders would have been frustrated. While it is clear that courts can stymie change (Paul 1960), though

12. Having been the nation's first Chief Justice, Jay refused the position in 1801, telling President Adams that he lacked faith that the Court could acquire enough "energy, weight and dignity" to play an important role in the nation's affairs (quoted in McCloskey 1960, 31). And *Marbury v. Madison*, if nothing else, demonstrates Marshall's acute awareness of the Court's limits.

13. Supposedly made in response to the Supreme Court's decision in *Worcester v. Georgia* (1832).

ultimately not prevent it (Dahl 1957; Nagel 1965; Rosenberg 1985), the Constitution, in the eyes of the Constrained Court view, appears to leave the courts few tools to insure that their decisions are carried out.

If the separation of powers, and the placing of the power to enforce court decisions in the executive branch, leaves courts practically powerless to insure that their decisions are supported by elected and administrative officials, then they are heavily dependent on popular support to implement their decisions.

If American citizens are aware of Court decisions, and feel duty-bound to carry them out, then Court orders will be implemented. However, proponents of the Constrained Court view point out that survey data suggest that the American public is consistently uninformed of even major Supreme Court decisions and thus not in a position to support them (Adamanay 1973; Daniels 1973; Dolbeare 1967; Goldman and Jahnige 1976). If the public or political elites are not ready or willing to make changes, the most elegant legal reasoning will be for nought.

This constraint may be particularly powerful with issues of significant social reform. It is likely that as courts deal with issues involving contested values, as issues of significant social reform do almost by definition, they will generate opposition. In turn, opposition may induce a withdrawal of the elite and public support crucial for implementation. Thus, proponents of the Constrained Court view suggest that the contested nature of issues of significant social reform makes it unlikely that the popular support necessary for implementation will be forthcoming.

A second claim made by proponents of the Constrained Court view about courts effectively implementing decisions is that the legal system is a particular type of bureaucracy that has few of the advantages and many of the disadvantages of the ideal Weberian type. For example, important components of the Weberian bureaucracy include a hierarchical command structure, a clear agenda, little or no discretion at lower levels, stated procedures, job protection, positions filled strictly by merit, area specialization, and the ability to initiate action and follow-up. While on the surface the U.S. judicial system is hierarchical, has stated procedures, and provides job protection, closer examination under a Constrained Court microscope complicates the picture. For example, although orders are handed down from higher courts to lower ones, there is a great deal of discretion at the lower levels. Decisions announced at the appellate level may not be implemented by lower-court judges who disagree with them or who simply misunderstand them. Similarly, procedures designed to prevent arbitrary action may be used for evasion and delay. Further, unlike the ideal bureaucratic type, courts lack a clear agenda and any degree of specialization. Rather, judges and clerks go from case to case in highly disparate fields. This means that area expertise and planning, often crucial in issues involving significant social reform, are seldom present, making it uncertain that the remedy will be appropriate to the problem. In

terms of initiation and follow-up, the nature of the legal bureaucracy puts barriers in the way of courts. For example, courts cannot initiate suits but must wait for litigants to approach them. Because stated procedures must be followed, because courts have small staffs, and because the legal system requires individuals rather than courts to initiate proceedings, appellate courts may never know whether their decisions have been implemented. Follow-up is difficult because it may be years by the time appellate judges discover an incident (or pattern) of non-implementation, through a case working its way up to them. Finally, the insulated "above politics" position of courts limits judges in cutting deals and actively politicking in support of a decision. The distance between the ideal Weberian bureaucracy and the American judiciary is so large, proponents of the Constrained Court view might argue, that even if courts actively promote significant social reform, they cannot easily achieve the results their decisions command.¹⁴

Through the eyes of the Constrained Court view, the decentralized nature of the judicial system may constrain courts from producing significant social reform for several reasons. In a nutshell, the structure of courts opens the possibility for bias and misinterpretation to influence lower-court decisions. Further, the entrepreneurial nature of many lawyers makes it difficult for groups seeking significant social reform through the courts to present a coherent strategy. And the nature of the legal bureaucracy makes delay endemic. These claims merit brief attention.

The American judicial system vests considerable discretion in lower-court judges. Only rarely do appellate courts issue final orders. In almost all cases, they remand to the trial court for issuance of the final order. This leaves lower-court judges with a great deal of discretion. The objective judge will conscientiously attempt to follow the higher court's orders. However, misinterpretation of those orders, especially if they are vague, is possible. Further, the biased judge has a myriad of tools with which to abuse discretion. These include the "delay endemic to legal proceedings" (CPL 1976, 355), narrow interpretation, and purposeful misinterpretation. In this kind of case, litigants must follow procedure and re-appeal the case to the higher court for help, further delaying change.

This structural aspect of the American judicial system, those in the Constrained Court camp argue, may pose a particular problem for litigants seeking significant social reform. Bias and misinterpretation aside, it may be difficult for groups seeking reform to present a coherent strategy. Access to the legal system can be gained in any one of hundreds of courts (in the federal

¹⁴. In an empirical study of four important cases, Horowitz supports this line of reasoning and concludes that effective implementation aimed at reforming institutions requires information and knowledge that judges don't have and political compromises that they ought not to make. See Horowitz (1977), especially chapters 2 and 7. Interestingly, a much less elaborate version of this argument was made in 1963 (Friendly 1963, 791-92). For a critical review of Horowitz, see Wasby (1978a).

system) by any one of hundreds of thousands of lawyers. In particular, as Cowan (1976), Tushnet (1987), and Wasby (1983, 1985) note, interest groups planning a litigation strategy may find themselves faced with a host of cases not of their doing or to their liking. There is no way to prevent other lawyers, individuals, and groups from filing cases. And if these cases are not well-chosen and well-argued, they may result in decisions that wreak havoc with the best-laid plans. Thus, groups are sometimes on the defensive, forced to disassociate themselves from the legal arguments of purported allies and sometimes even to oppose them.

Although in practice federal judges have life tenure, this does not mean they are free from constraints. In asking for significant social reform, litigants are asking judges to reform existing institutions. However, judges may be unwilling to take on this essentially non-judicial task. To the extent that lower-court judges are part of a given community, ordering massive change in their community may isolate them and threaten the respect of the court. Also, the judicial selection process for lower federal court judges, is designed to select people who reflect the mores and beliefs of the community in which the court sits (Chase 1972). Therefore, adherents to the Constrained Court view argue, it is unlikely that lower-court judges will be predisposed to support significant social reform if the community opposes it.

The opportunity for delay that is built into the judicial bureaucracy constrains courts in several ways. First, through constant appeals, motions, and the use of other procedures, parties under court order to implement significant social reform can gain time. For example, when threatened with a lawsuit over prison conditions, a state corrections director replied: "a lawsuit is twenty-six months away. We could buy some time" (Cooper 1988, 259). Second, parties opposed to change can initiate their own lawsuits, using the courts to challenge and invalidate legislative, administrative, or other judicial action. In the environmental field both Wenner (1982, 1988) and Hays (1986) note that industry has systematically relied on courts to delay change. For those opposed to reform, delay can allow for changes in political and economic conditions, leading to reversals of the ordered reform. Thus, the opportunity for delay inherent in the legal bureaucracy, believers in the Constrained Court view argue, makes courts poor institutions for producing significant social reform.

A further obstacle for court effectiveness, assert believers in the Constrained Court view, is that significant social reform often requires large expenditures. Judges, in general prohibited from actively politicking and cutting deals, are not in a particularly powerful position to successfully order the other branches to expend additional funds. "The real problem" in cases of reform, Judge Bazelon wrote, "is one of inadequate resources, which the courts are helpless to remedy" (Bazelon 1969, 676). While there may be exceptions where courts seize financial resources, they are rare precisely be-

cause courts are hesitant to issue such orders which violate separation of powers by in effect appropriating public funds. Even without this concern, courts "ultimately lack the power to force state governments [or the federal government] to act" (Frug 1978, 792) because if governments refuse to act, there is little courts can do. They are unlikely to hold governors, legislators, or administrators in contempt or take other dramatic action because such action sets up a battle between the branches that effectively destroys any chance of government cooperation. Thus, judges are unlikely to put themselves in such no-win situations. Further, the "limits on government resources are no less applicable in the courtroom than outside of it" (Frug 1978, 788). As Frug asserts, "the judicial power of the purse will, in the final analysis, extend no further than a democratic decision permits" (Frug 1978, 794).

The claims of the Constrained Court view about the judiciary's lack of tools, and its dependence on others to implement its decisions, can be illustrated by one kind of significant social reform, the wholesale reshaping of bureaucracies. Recent work suggests that courts encounter particular difficulties when they try to reshape highly complicated institutions and bureaucracies.¹⁵ For example, Frug contends that given the number of variables involved, these kind of institutions are "too complex to be administered under court orders" (Frug 1978, 789). Even supporters of the competence of courts note the importance of the complexity of large organizations to court effectiveness (Note 1977), and realize that litigation in such cases requires "some relatively elaborate rearrangement of the institution's mode of operation" (Eisenberg and Yeazell 1980, 468). More specifically, successful reshaping requires the acquiescence, if not the support, of administrators and staff. This presents several problems. First, without the support of political leaders, there is little incentive for administrators to risk their jobs to implement court orders. In the Alabama mental health litigation, for example, the acting superintendent of the Partlow facility was fired for cooperating with the plaintiffs during the remedy hearings (Cooper 1988, 195). In such cases, staff will be especially reluctant to help implement changes. In addition, rigid insistence on conformity to rules such as court orders "breeds distrust, destruction of documents, and an attitude that 'I won't do anything more than I am absolutely required to do'" (Christopher Stone, quoted in McCann 1986, 229-30). In other words, changes required by outsiders, such as courts, may be "strongly resisted" (Special Project 1978, 837) by administrators and staffs, who, as one study suggested, "have a practically limitless capacity to sabotage reform" (Diver 1979, 94). And if administrators and staffs don't act voluntarily, there is little judges can do. While courts do have the power to cite recalcitrant bureaucrats for contempt, the use of such coercive power tends to make martyrs out of resisters and to strengthen the resolve of others

15. Gollam and Fremouw (1976); Harris and Spiller (1976); Kadner and Fishman (1978); Note (1977); Special Project (1978).

to prevent change (Diver 1979, 99; Special Project 1978, 839). Thus, both administrators and staffs have to be won over by the judge for courts to be effective, and judges may not be in a very good position to receive such support. Such rearrangement is difficult for courts, the logic of the Constrained Court view suggests, because they lack the resources to gain adequate understanding of the intricacies of reform and the tools to insure compliance.

Another aspect of the Weberian ideal type involves specialization and expertise. It is plausible that courts' remedial decrees would be more effective if they took into account "the internal and external factors affecting bureaucratic behavior" (Note 1980, 537). Yet, even proponents of court competence realize that "no single judge" has "the resources, inclination, or the time to pursue this sort of detailed and extensive analysis" (Aronow 1980, 759). This analysis has been seconded by several activist judges. Judge Frank M. Johnson, for example, has written that "judges are trained in the law. They are not penologists, psychiatrists, public administrators, or educators" (Johnson 1981, 274). Similarly, Justice Traynor has pointed out that such analysis pulls judges far from their training: "A judge is constrained by training, experience, and the office itself not to undertake responsibilities that belong to the legislature" (Traynor 1977, 8). This means, Constrained Court view supporters claim, that judges often have incomplete knowledge of the resources available or of the power dynamics of the institution or bureaucracy that appears before them. A common result is that judicial reform decrees may lack a realistic sense of available resources. For example, in the *Wyatt* case, one of the principal attorneys for the plaintiffs demanding reform of Alabama's mental health facilities concluded that the standards adopted by the court required "staffing of the institutions with more professionals than there are in the State of Alabama" (Halpern 1976, 85). Similarly, Yudof suggests that "lawyers and judges frequently fail to distinguish between altering the behavior of an individual and altering the behavior of an institution" (Yudof 1981, 444). Thus, it has been suggested that "the realities of the institutional reform suit correspond neither to the talents of most judges nor to the attributes of traditional adjudication" (Kirk and Babcock 1981, 317).

If may also be the case that the effective implementation of significant social reform requires long-term planning and serious consideration of costs. Courts, it has been suggested, are not constituted to be effective at either of these. Judges, McCann suggests, are "largely bound to episodic case-by-case remedies for complex social problems at odds with the long-term supervisory capacities necessary for effective means-oriented planning" (McCann 1986, 226). Further, if "taking political reform seriously requires taking economics seriously as well" (McCann 1986, 164), then litigation may provide little help for two reasons. First, litigation, by its piecemeal nature, "discourages a comprehensive economic orientation" (McCann 1986, 168). Second, of course, judges are not trained economists, and litigators are limited to legal, rights-

oriented forms of argument, not economic analysis. Courts, it can be argued, are not structured to produce significant social reform. Thus, proponents of the Constrained Court view propose,

Constraint III: Courts lack the tools to readily develop appropriate policies and implement decisions ordering significant social reform.

To sum up, the Constrained Court view holds that litigants asking courts for significant social reform are faced with powerful constraints. First, they must convince courts that the rights they are asserting are required by constitutional or statutory language. Given the limited nature of constitutional rights, the constraints of legal culture, and the general caution of the judiciary, this is no easy task. Second, courts are wary of stepping too far out of the political mainstream. Deferential to the federal government and potentially limited by congressional action, courts may be unwilling to take the heat generated by politically unpopular rulings. Third, if these two constraints are overcome and cases are decided favorably, litigants are faced with the task of implementing the decisions. Lacking powerful tools to force implementation, court decisions are often rendered useless given much opposition. Even if litigants seeking significant social reform win major victories in court, in implementation they often turn out to be worth very little. Borrowing the words of Justice Jackson from another context, the Constrained Court view holds that court litigation to produce significant social reform may amount to little more than "a teasing illusion like a munificent bequest in a pauper's will" (*Edwards v. California* 1941, 186).

Court Effectiveness: The Logic of the Dynamic Court View

The three constraints just presented are generated from the view of courts as unable to produce significant social reform. That view appears historically grounded and empirically plausible. Yet, on reflection, it has two main difficulties. First, it seems to overstate the limits on courts. After all, since the mid-twentieth century or so courts have been embroiled in controversies over significant social reform. Many lawyers, activists, and scholars have acted or written with the belief that the constraints are weak or non-existent and can easily be overcome. Indeed, the whole modern debate over judicial activism makes no sense if the Constrained Court view is correct. If courts are as impotent as the constraints suggest, then why has there been such political, academic, and judicial concern with the role of courts in modern America? Theory and practice are unaligned if the Constrained Court view is entirely correct. Second, examined carefully, its claim is that courts are *unlikely* to produce significant social reform; it does not deny the possibility. However, that doesn't help us understand when, and under what conditions, courts can

produce significant social reform. The Constrained Court view is not the complete answer.

The Dynamic Court view may help. It maintains that courts can be effective producers of significant social reform. Its basic thrust is that not only are courts not as limited as the Constrained Court view suggests, but also, in some cases, they can be more effective than other governmental institutions in producing significant social reform. As Aryeh Neier puts it, "[s]ince the early 1950s, the courts have been the most accessible and, often, the most effective instrument of government for bringing about the changes in public policy sought by social protest movements" (Neier 1982, 9). The constraints of the Constrained Court view, then, may oversimplify reality.

Political, Institutional, and Economic Independence

Proponents of the Dynamic Court view argue that the Constrained Court view entirely misses key advantages of courts. At the most fundamental level, key to the Dynamic Court view is the belief that courts are free from electoral constraints and institutional arrangements that stymie change. Uniquely situated, courts have the capacity to act where other institutions are politically unwilling or structurally unable to proceed. For example, one of the great strengths of courts is the ability to act in the face of public opposition. Elected and appointed officials, fearful of political repercussions, are seldom willing to fight for unpopular causes and protect the rights of disliked minorities. Courts, free of such electoral accountability, are not so constrained. From civil rights to women's rights, from protecting the rights of the physically and mentally challenged to ensuring that criminal defendants are treated constitutionally, the courts have acted where other institutions have refused. Justice Brennan, concurring in a 1981 prison reform case, summarized this view: "Insulated as they are from political pressures, and charged with the duty of enforcing the Constitution, courts are in the strongest position to insist that unconstitutional conditions be remedied, even at significant financial cost" (*Rhodes v. Chapman* 1981, 359).

The ability of courts to act is particularly clear with issues of significant social reform. With such issues, entrenched interests often have the institutional base to prevent change in other political bodies. In civil rights in the 1950s, for example, as the colloquy between Justice Jackson and Assistant Attorney General Rankin reflects, the key position of Southern Democrats in Congress virtually insured that no civil rights legislation would be forthcoming. If change was to come, proponents of the Dynamic Court view argue, it could come only from the courts. Similarly, examining school desegregation in the years 1968–72, Hochschild argues that "were it not for the courts, there would be little reduction in racial isolation [in the public schools]" (Hochschild 1984, 134). And with re-apportionment, legislators from mal-apportioned districts had no incentive to reform the electoral system and vote

themselves out of office, until the courts acted. In other words, the Dynamic Court view proposes that courts are free from the obstacles that lead to "a partial failure of executive or legislative government institutions to do their jobs in a satisfactory and legal way" (CPL 1976, 208).

A similar argument applies to bureaucratic and institutional change. Proponents of the Dynamic Court view suggest that insulation, institutional inertia stemming from routinized procedures, and group pressure make it difficult for non-judicial institutions to reform themselves. Looking at "entrenched bureaucracies," environmental lawyer Victor Yannaccone saw "self-perpetuating, self-sufficient, self-serving bureaus [which] are power sources unto themselves, effectively insulated from the people and responsible to no one but themselves" (Yannaccone 1970b, 185). Where there is little incentive to change, it is only an outside force such as a court, uninvolved in daily operations, that may have the will to force change. Organizations contemplating reform also must confront the desires of their constituencies. "In the face of pressures from many diverse constituencies and interests," Aronow writes, "it is unlikely that even public institutions headed by cooperative administrators will reform themselves without the outside coercive force of the backers, and the like, whose cooperation is essential for getting work done, for the simple reason that courts are not structured to need or maintain such ongoing relations. Courts do not depend on carefully worked out institutional arrangements because they do not specialize in any one area. Unlike bureaucracies and large institutions, the parties they deal with vary from case to case. Here, too, courts are uniquely situated."

The "inadequacy" of the political process is an essential basis for the Dynamic Court view because "policy formulation in our society is too often a one-sided affair—a process in which only the voices of the economically or politically powerful are heard" (CPL 1976, 8). In the legislative and executive branches, not all affected interests are heard and not all voices carry the same weight. The predictable result of this systematic exclusion of the "public" is that "government agencies cannot adequately represent all facets of the public interest" (CPL 1976, 172). However, courts, it is contended, can rectify this exclusion because, "unlike the hierarchical statist view of entrenched elite rule, the judicial view guarantees the independence of citizen groups contending for influence within the adversary process" (McCann 1986, 116). Neither access nor influence depends on connections or position. Access to all affected interests is guaranteed by judicial rules, and influence depends on strength of argument, not political position. As William F. Butler of the Environmental Defense Fund put it, "all it takes is one person with a good legal argument that can convince a judge and that's that" (quoted in

McCann 1986, 208). The judiciary, with "no corrupting links to anyone," affords "equality of both access and influence to citizens" more "completely" than any "other institutional form" (McCann 1986, 118, 116). And this means that it is able to respond to social reform claims of ordinary citizens where other institutions are not (Sax 1971, 57, 112, 231). As Justice Neely of West Virginia puts it, American courts alleviate the "more dangerous structural deficiencies of the other institutions of democratic government" and thus are the "central institution in the United States which makes democracy work" (Neely 1981, xiii, xi).

The underlying claim here of the Dynamic Court view is that access and influence are not dependent on economic and political resources. The kind of professional lobbying that is required to be effective in influencing bureaucracies or enacting legislation is not necessary for winning court cases. Groups lacking key resources can use courts not only directly to change the law but also to strengthen their voices within the other branches of government and authoritatively present their positions. Thus, proponents of the Dynamic Court view claim, courts offer the best hope to poor, powerless, and unorganized groups, those most often seeking significant social reform.

The judicial process may also provide a powerful forum for gathering and assessing information. In contrast to legislative and bureaucratic proceedings, wide participation in legal proceedings makes it likely that the full range of relevant information will be brought to bear on the final decree. Where crucial information is being withheld, or is hard to obtain, the judicial process of discovery, supported by the coercive powers of the court, may help bring it to light. Further, the adversarial process insures that information will be rigorously assessed before it takes the status of "fact." Thus, as Chayes points out, the information that the Court has "will not be filtered through the rigid structures and preconceptions of bureaucracies" (Chayes 1976, 1308). Judges, then, are in a strong position to act. As Cavanaugh and Sarat put it, it is "difficult to see how any other institutional actor [than the judge] is better equipped to become informed of the ramifications of comparable decisions" (Cavanaugh and Sarat 1980, 381–82).

Influence accompanies access in legal proceedings because judges must respond to legal arguments and provide reasons for their opinions. Unlike in other institutions, arguments cannot be ignored or dismissed without discussion. Judges, in contrast to elected or other appointed officials, cannot easily duck the tough issues. Further, judges are limited by the Constitution, statutes, and precedent in the kind of responses they can make. A judge's dislike or disapproval of actions provides insufficient grounds to support a legal decision. This means, of course, that the positions of unpopular and politically weak groups, denied access to and influence with administrative, executive, and legislative branches, must be taken seriously by the courts.

To sum up, proponents of the Dynamic Court view assert that courts have

the ability to act when other institutions won't, because judges are electorally unaccountable and serve with life tenure. Unencumbered by electoral commitments and political deal-making, and protected from recrimination, they can act to fulfill the constitutional mandate. Thus, as Fiss puts it, courts can produce significant social reform because the judicial office is "structured by both ideological and institutional factors that enable and perhaps even force the judge to be objective—not to express his preferences or personal beliefs, or those of the citizenry, as to what is right or just, but constantly to strive for the true meaning of the constitutional value" (Fiss 1979, 12–13). Courts, then, can provide an escape from the pathologies of rigid bureaucracies, ossified institutions, and a reluctant or biased citizenry.

Courts as Catalysts—Indirect Effects of the Dynamic Court

In striving for the "true meaning of the constitutional value," courts base decisions on principle. Unlike legislatures or executives, courts do not act out of calculations of partisan preference. This means, proponents of the Dynamic Court view suggest, that courts can point the way to doing what is "right." They can remind Americans of our highest aspirations and chide us for our failings. Courts, Bickel suggests, have the "capacity to appeal to men's better natures, to call forth their aspirations, which may have been forgotten in the moment's hue and cry" (Bickel [1962] 1986, 26). For Rostow, the "Supreme Court is, among other things, an educational body, and the Justices are inevitably teachers in a vital national seminar" (Rostow 1952, 208). Bickel agrees, viewing courts as "a great and highly effective educational institution" (Bickel [1962] 1986, 26). In the Dynamic Court view, the courts have important indirect effects, educating Americans and heightening their understanding of their constitutional duty.

Court decisions also have indirect effects, proponents of the Dynamic Court view suggest, through dramatizing issues and spurring action. Courts can provide publicity for issues and serve as a "catalyst" for change (Halpern 1976, 75). Where the public is ignorant of certain conditions, and political elites do not want to deal with them, court decisions can "politicize issues that otherwise might have remained unattended" (Menti 1980, 237). This may put public pressure on elites to act. Indeed, litigation may "often" be "the best method of attracting public attention to institutional conditions and of publicly documenting abuses" (Neier 1982, 29). By bringing conditions to light, and showing how far from constitutional or statutory aspirations practice has fallen, court cases can provide a "cheap method of pricking powerful consciences" (Note 1977, 463).¹⁶ Thus, litigation "serves as a catalyst, not a usurper, of the legislative process" (Sax 1971, 157). This ability to dramatize may be particularly effective with custodial institutions such as hospitals, prisons and Scheingold (1974, 9).

ons, and mental institutions where court cases have brought inhumane conditions to light.¹⁷ As Sax puts it, "courts can be used to bring matters to legislative attention, to force them upon the agendas of reluctant and busy representatives" (Sax 1971, xviii).

In addition, court action may invigorate and encourage groups to mobilize and take political action (Scheingold 1974, 131, 148; McCann 1986, 108). In both civil rights and women's rights, for example, the federal courts are often seen as having served this role. As Yannaccone told a conference audience:

Every piece of enlightened social legislation that has come down in the past 50 or 60 years has been preceded by a history of litigation (applause) in which trial lawyers somewhere around the country have forcibly focussed the attention of the legislature on the inadequacies of existing legislation (Yannaccone 1970a, 77).

Thus, proponents of the Dynamic Court view assert that judicial decisions have important extra-judicial effects.

Another way in which courts may indirectly produce significant social reform is by facilitating negotiations. As an external force unbothered to involved interests, courts are free to act. They can provide a neutral forum where parties can work out their differences. Also, the threat of litigation can serve as a "basic political resource" (Grossman and Sarat 1981, 89). That is, rather than expend money, time, and energy defending against a lawsuit and countering the publicity it generates, parties may find it more palatable to negotiate. Without the threat of lawsuits, Cavanagh and Sarat suggest, many institutions would "never get to the bargaining table" (Cavanagh and Sarat 1980, 405). Where institutions are incapable of internal reform, and there is an ineffective public or interest group-pressure, courts may provide a powerful indirect effects. Their politically neutral position allows them to teach Americans about the meaning of their constitutional obligations. Court decisions can change opinions, generate media coverage, and inspire action. They can provide the necessary nudge to start the reform process. In other words,

Evolving Procedures

Much of the Constrained Court view's plausibility comes from Constraint III, the courts' supposed lack of implementation powers. Contrary to this view, however, proponents of the Dynamic Court view assert that not only are courts in a unique position to act, but they also have the "demonstrated ability to evolve new mechanisms and procedures" to cope with the complexities of significant social reform litigation (Cavanagh and Sarat 1980, 373).

One such mechanism is court appointments of special masters to fill in many of the courts' structural weaknesses. Special masters can survey and gather information, talk with interested parties, hold hearings, conduct investigations, draft and float potential remedial decrees, and generally serve as the eyes and the ears of the judge (Aronow 1980). In other words, they can perform many duties helpful to finding an agreeable solution, duties that would appear unseemly if performed by the judge. They are able to do this, Aronow maintains, while retaining "court-like detachment and independence" (Aronow 1980, 766). Aronow and others argue that to the extent that courts have lacked tools to effectively implement remedial decrees in the past, the problem is well on the way to being solved.

Other changes, it is suggested, that have allowed courts to overcome the obstacles suggested by the Constrained Court view include the court's retention of jurisdiction, the creation of monitoring commissions, and the active engagement of the judge (Chayes 1976; Fiss 1979). These steps are designed to allow the court to closely follow the implementation process. If court decrees are not being implemented, or if unforeseen circumstances render parts of decrees inappropriate, these mechanisms allow for speedy correction. For example, if judges retain jurisdiction, then any of the parties can immediately return to court if the decree is not being implemented or if changing circumstances require its modification. Similarly, monitoring commissions can inform the judge of implementation progress and alert the court to the need for further action. And, of course, the mere availability of these tools can influence the behavior of the parties. With these kind of tools readily at hand, possibly recalcitrant parties may think twice before violating remedial decrees. Even with the uncertainties of institutional reform litigation, courts can create effective tools.

Empirical Support

Several recent studies provide empirical support for many of the Dynamic Court view's claims. Hochschild, for example, concludes that in the case of educational institutions, "many criticisms of judges' capacity to reform institutions are unsubstantiated" (Hochschild 1984, 140). A similar defense of judicial competence is reached by Cavanagh and Sarat in their study of cases dealing with debtors and tenants, intimate or ongoing relationships, and reform of large and complex institutions (Cavanagh and Sarat 1980). Understanding the Dynamic Court claim to be that courts are least likely to be successful in such cases, they find courts competent and effective in dealing with them. Similarly, a 1982 study by Rebell and Block examined sixty-five randomly selected federal court cases dealing with education during the years 1970-77 (Rebell and Block 1982). They found that "basic compliance with court orders predominated overwhelmingly over instances of either intentional or unintentional noncompliance" (Rebell and Block 1982, 65). The authors

17. Halpern (1976, 75); Harris (1976, 57); Neier (1982, 29); Note (1975, 1349-50).

went on to examine educational issues in New York and Colorado in which both courts and state legislatures were active. Comparing the capacity of the two institutions, they found that courts were in many ways better equipped to be effective than were the state legislatures. They concluded: "Our data largely rebutted the criticism that the judiciary lacks the resources, expertise, or comprehensive perspective needed to implement educational reform successfully" (Rebell and Block 1982, 210).¹⁸

The Dynamic Court view provides a powerful alternative to the view of courts as the "least dangerous branch." Pointing to pathologies in the other branches, it places courts in a unique position to act. Acknowledging, perhaps, that the Constrained Court view was accurate at the Founding and for part of American history, it maintains that great change has occurred over the last few decades and that courts now have the tools to effectively produce significant social reform. Unlike the Constrained Court view, it is congruent with judicial activism and the modern use of the courts to produce significant social reform. While courts cannot solve all problems, the Dynamic Court view does see them as powerful and effective, unconstrained by the concentrations of power and bureaucratic inertia that stymie self-initiated change in the other branches.

Empirical Problems

Yet for all their plausibility and surface appeal, and their seemingly accurate description of recent litigation, attempts to ground the Dynamic Court view empirically are not entirely satisfying. Unfortunately, studies of the sort referred to above neither completely validate it nor are particularly helpful in constructing hypotheses about courts' effectiveness in producing significant social reform. Often, they either focus on unrepresentative time periods, or on unimportant and noncontroversial cases, or they overstate their findings. In addition, many of the studies that support the Dynamic Court view are theoretical rather than empirical. They mistake what conceivably could happen with what actually has happened. Further, the empirical studies tend to examine only one case. The problem here, from the Constrained Court perspective, is that given the constraints on judges imposed by court rules and the legal culture, it is the rare judge who will become so actively engaged. Although the Dynamic Court view may be correct, the empirical evidence offered in its support does not seal the case.

Without going into much detail, there are several problems with the studies mentioned above. Hochschild's study, for example, picks a short and unrepresentative four-year period in which to assess claims of judicial competence (see chapter 2). Cavanagh and Sarat, on the other hand, pick cases that don't address the issue of court effectiveness in reforming institutions.

18. For case-study literature that explicitly tests and rejects Donald Horowitz's argument that was part of Constraint III, see Fair (1981); Reedy (1982); Youngblood and Folse (1981).

Their evidence is based on cases made difficult not by the resistance of complex institutions but by individuals in complex and emotionally difficult situations. When they do discuss institutional reform cases (what they call extended impact cases), their discussion is theoretical rather than factual.

Somewhat similarly, Rebell and Block's often revealing study excludes cases that involved desegregation. As a result, in their words, "many of the remedial tasks presented by our sample of educational policy cases were relatively straightforward" (Rebell and Block 1982, 212). For example, 42 percent of the cases dealt with "[r]egulation of student appearance, speech, and conduct" (Rebell and Block 1982, 21), hardly the kind of issues that require wholesale rearrangement of institutions. Not surprisingly, although they found compliance in most of their cases, those requiring complex and far-reaching decrees were exceptions (Rebell and Block 1982, 66). Even in their skewed sample, courts did not do very well in overcoming Constraint III. In the cases studied, for example, they report that "not all potentially affected groups seek to participate, and even these groups who do participate do not present a broad spectrum of strongly diverse perspectives to the courts" (Rebell and Block 1982, 39–41). Further, they found judges, who faced with issues of analyzing social facts, in most instances utilized "avoidance techniques" so as not to deal with the information (Rebell and Block 1982, 50). Consequently, "in only 19 [of 65 cases] did the courts scrutinize social fact evidence in order to reach their conclusions" (Rebell and Block 1982, 53). Their study, then, tells us little about the competency of courts to address and reform institutions in non-trivial ways.¹⁹

With special masters, again, actual case studies do not bear out claims on behalf of the Dynamic Court view. For example, introducing an edited compilation of seven studies of school desegregation, Kalodner concludes that "Masters have seldom if ever been effective in the effort to find a solution that is both acceptable and constitutional" (Kalodner 1978, 9). Reviewing the use of masters in six school desegregation cases, Kirp and Babcock explicitly reject Aronow's optimistic conclusions (Kirp and Babcock 1981, 395). Fi-

19. Rebell and Block's findings about the comparative role of courts and legislatures are also not entirely on point. Focusing on hearings and debates, they found legislatures' fact-finding and analytic abilities to be limited when compared to the courts. However, unlike in courts, much of the gathering and assessment of evidence, and much of the persuasion and analytic reasoning, does not take place on legislative floors. Often, it occurs in offices, over the telephone, and in meetings with various interested parties. Judges are generalists and all the information they are likely to have comes from briefs and oral argument. Legislators, on the other hand, build up expertise in select areas. Committee members are often equally or better informed about the ramifications of proposed legislation, its factual and legal basis, and alternatives to it, than are witnesses appearing before them. Committee hearings and floor debates are much less attempts at fact-gathering and persuasion than they are forums for position-taking and record-building. In other words, comparing the actual conduct of a court case with a legislative hearing or debate is to misconstrue the nature of the legislative process. Thus, Rebell and Block are ironically correct when they conclude, for example, in their Colorado legislature study, that legislative hearings "primarily served a showcase function" (Rebell and Block 1982, 194).

nally, a lengthy and detailed study of institutional reform litigation points out that under court rules the use of special masters must "be the exception and not the rule. Consequently, there cannot be reference to masters as a matter of course" (Special Project 1978, 808). While special masters may be helpful in some cases, overall their record of use appears of limited effectiveness. And the crucial question of under what conditions special masters will be effective is left unanswered.

The Dynamic Court view, then, though in large part an effective retort to the unbending constraints of the Constrained Court view, does not get us very far in understanding the conditions under which courts can produce significant social reform. While its logic of independence and equal access makes good sense, its lack of generalizable empirical support is unhelpful. In sum, while courts may be more effective in producing significant social reform than the constraints of the Constrained Court view allow, the Dynamic Court view does not definitively demonstrate when, and under what conditions, court efficacy can be found.

Conditions for Court Efficacy

The thrust of the Dynamic Court view is that its competitor oversimplifies reality by underestimating court effectiveness. However, it appears that the Dynamic Court view likewise oversimplifies, by overstating court effectiveness. Further, the views appear to be in conflict. For example, the Dynamic Court view proposes court action in the face of hostile or inert political institutions while the constraints of the Constrained Court view tell us that in such situations success is least likely. Along with conflict, however, each view appears to convey something of the truth. On an intuitive level, opposition from political elites is not conducive to court effectiveness. On the other hand, judicial isolation from many pressures allows courts to act when other institutions wish to but cannot. Surely it is naive to expect courts to be able to solve political and economic problems that the other branches cannot. But it appears equally short-sighted to deny that since mid-century courts have played an important role in producing significant social reform. It may well be that while each view captures part of the truth, neither is fine-grained enough to capture the conditions under which courts can effectively produce significant social reform.

Combining the two views may point the way to finally understanding these conditions. For example, there would be no conflict between the two views if courts were effective producers of significant social reform when there was general political and popular support for change but institutional blockage. That is, there may be conditions under which the constraints of the Constrained Court view, even if generally correct, can be overcome and courts can produce significant social reform. In the remaining part of this

chapter, I suggest that this is the case; the constraints of the Constrained Court view generally limit courts, but when political, social, and economic conditions have become supportive of change, courts can effectively produce significant social reform.

Winning court cases is, of course, the first step toward courts producing significant social reform. In order to maximize chances of winning, the rights constraint must be gradual. Since judges are gradualists, small changes must be argued for before big ones. Although this requires a lengthy strategy for change, unless litigators can find strong precedents on which to base their claims, Constraint I suggests that cases demanding significant social reform will be losers.

Overcoming the judiciary's unwillingness to step far from the political mainstream is also difficult. When, however, there is political support for significant social reform, litigation may make sense. Unfortunately, there are no hard-and-fast rules for determining the existence of such support. However, there are several circumstances that provide good evidence that court decisions ordering significant social reform will be well received. One such circumstance is when legislation supportive of significant social reform has been enacted and courts are asked to interpret it. Another is when the executive branch is supportive of the claims of reformers. Cases in which the federal government is willing to appear as *amicus* on the side of significant social reform may be good opportunities for litigation. The appearance of the federal government not only reassures the court that the reform demanded has support, but also suggests that the executive is at the very least not opposed to implementing an affirmative decision.²⁰ A more nebulous bit of evidence is congressional support for interests similar to those reform litigators are suggesting. If legislation is being seriously considered, or debated, dealing with similar issues, courts need not fear adverse reactions from the Congress. At these times legal arguments are most likely to overcome Constraint II and find a receptive judicial audience.²¹

Even if the rights that significant social reform litigators are demanding are well-grounded in precedent, and there is elite support for such outcomes, there still remains the courts' lack of implementation powers (Constraint III). In many ways this is the most difficult constraint to overcome. For court decisions supporting significant social reform to be effective, a myriad of people need to be supportive. If there is political and popular support, Constraint III can be overcome. When there is such support, the people who need to change their behavior to make the decision a reality may be willing to do

²⁰ Government support in litigation does not guarantee such support in implementation. Civil rights is a perfect example. See discussion in chapters 2 and 3.

²¹ Public opinion surveys most likely do not provide sufficient evidence of elite political support because public support does not necessarily translate into such elite support.

so. Often, many people will be already so acting and all court action does, in effect, is to remove any threat of legal action against them.²² Somewhat more subtly, it is in these conditions that many of the claims of the Dynamic Court view may be validated. For example, when strong or widespread opposition to court orders is missing, parties to controversies may be more likely to respond to efforts at serious negotiation. Under such conditions, court orders may serve to overcome inertia and prod parties to the bargaining table. Similarly, when elite and public opinion generally supports court decisions, they may be effective in mobilizing people to effectively implement the decision. When public opinion has started to change, or is open to the possibility of change, it is possible that court opinions can help speed that change along. As Rebell and Block put it, "in situations where the parties (and the public) are inclined to cooperate (or at least to avoid strong resistance), courts are capable of fashioning effective relief" (Rebell and Block 1982, 214). Coercive powers won't be necessary, for the willingness to change will predate court action. Courts, then, may be effective producers of significant social reform when their decisions are announced in a political context of broad elite and popular support for the issue or right in controversy. Thus, when there is a general political climate in favor of significant social reform, Constraint III can be overcome.

Overcoming the three constraints will not automatically lead to significant social reform. As proponents of the Dynamic Court view argue, strategically placed elites, inert bureaucracies, and special interests may work to prevent change. Thus, in addition, certain conditions must be present. The first condition under which court decisions requiring significant social reform are likely to be implemented is when incentives are offered along with the decision. If there is some reward for implementation, those whose cooperation is essential may be willing to go along. The type of inducement can vary. One of the oldest, and most effective, inducements is money. Where, for example, on a national level, Congress provides money to those states, institutions, or bureaucracies which implement court decisions, local politicians is fierce, of course, money may be of little help. But the less opposed the key parties are, the more the temptation of government dollars may overcome resistance to implementing court opinions.

Money is not the only form of inducement. Both elites and the public may be willing to implement court decisions if the benefits of so doing are clear. Benefits may include actions of private parties. For example, development of court decisions. Here, too, if opposition to court-ordered change 22. It is not clear in such cases that the courts are producing significant social reform. Rather, it seems, they are merely allowing reform behavior to continue.

is strong, parties whose cooperation is essential may be willing to forgo the benefits. Again, inducements work only when parties have at least some willingness to go along. Thus,

Condition I: Courts may effectively produce significant social reform when other actors offer positive incentives to induce compliance.

The other side of benefits is, of course, costs. If the refusal to implement court decisions has high costs, implementation will be more likely. In cases of significant social reform, courts, acting alone, may not have sufficient tools to provide benefits, or impose costs, that would serve to induce compliant behavior (Constraint III). However, if the failure to implement decisions results in legislative or administrative action that imposes costs, then court decisions have a better chance of being implemented. This requires political support for the decisions, in the form of action imposing costs for non-compliance, and a belief on the part of key actors that implementing the decision is less objectionable than bearing the costs of non-implementation. Here, too, the loss of money, either public or private, as a result of non-implementation, can be an effective inducement. Thus,

Condition II: Courts may effectively produce significant social reform when other actors impose costs to induce compliance.

Another condition that may allow courts to produce significant social reform is when decisions can effectively be implemented through the market, side-stepping Constraint III. That is, if existing institutions do not have to change for change to occur, such change is more likely. If individuals or groups are both free and able to create their own institutions to implement court decisions, then the inability of courts to effectively reform existing institutions will not prevent change from occurring. In effect there will be two sets of institutions in existence; an older set that refuses to implement the decision and a newer one that does implement it. Court decisions of the significant social reform type will be implemented, in other words, if supporters can create institutions to do so. When the courts either refuse to allow market forces to act, or when, as in school desegregation, there is no realistic market alternative, this condition is not relevant. Thus,

Condition III: Courts may effectively produce significant social reform when judicial decisions can be implemented by the market.

A final condition that allows courts to be effective producers of significant social reform occurs when officials and administrators use court orders as a tool for leveraging additional resources, or as an excuse or cover for acting. One way in which this can be done is by affected officials relying on court orders to request increased funding from the legislature. Court orders, Diver suggests, give a manager "a powerful ally in his unending quest for additional

funds" (Diver 1979, 71; Stickney 1976, 33; Note 1980, 517). While administrators may resent court attempts to challenge their professional judgment and interfere with the running of their institutions, they may see a silver lining in the clouds. For example, Dr. Stonewall Stickney, Commissioner of the Department of Mental Health for the State of Alabama, and the named defendant in a massive suit against the state in Judge Johnson's court (*Wyatt v. Stickney*), wrote to his counsel: "At present the court appears to be our only avenue to adequate funding" (Stickney 1976, 36). Similarly, Justice Powell, concurring in *Milliken v. Bradley* (1977, 293), saw that the parties to the case "have now joined forces apparently for the purpose of extracting funds from the state treasury." Where defendants are willing to reform their institutions, they can parlay court orders into demands for additional funding.

In a related way, court orders can be used to leverage other resources. "It is perhaps the case," a law-review note suggests, that state administrators can "rely on the courts to pressure the legislatures and impose needed reforms" (Note 1977, 430). While it is of course possible to ignore such pressure, there are costs involved. The appearance of violating a court order is not one legislators usually relish. Thus, a court order can provide "sympathetic operating officials a powerful lever with which to pry loose cooperation from intransigent policymakers" (Diver 1979, 81, emphasis added). Such orders can also be used to entice resisting staff members and others to support reform. In the Alabama mental health litigation, for example, Dr. Stickney found that the court's orders enabled him to "stand up" to staff members, members of the community, and politicians who objected to actions he took as "Superintendent" (Note 1975, 1368). Sympathetic and reform-minded administrators, while nominally the defendants, can use court intervention to implement reforms they have been unable to convince others to go along with.²³ Court orders give *administrators who wish to make reforms* an additional tool for obtaining the necessary support and resources.

Finally, court orders can simply provide a shield or cover for administrators fearful of political reaction. This is particularly helpful for elected officials who can implement required reforms and protest against them at the same time. This pattern is often seen in the school desegregation area. Writing in 1967, one author noted that "a court order is useful in that it leaves the official no choice and a perfect excuse" (Note 1967, 361). While the history of court-ordered desegregation unfortunately shows that officials often had many choices other than implementing court orders, a review of school desegregation cases did find that "many school boards pursue from the outset a course designed to shift the entire political burden of desegregation on the

urged on school administrators to win their support for desegregation. Incorporating reforms in court orders offers them a chance to make changes they have been unable to win approval for on their own (author's conversation with Gary Orfield).

"courts" (Kalodner 1978, 3). This was also the case in the Alabama mental health litigation where "the mental health administrators wanted [Judge] Johnson to take all the political heat associated with specific orders while they enjoyed the benefits of his action" (Cooper 1988, 186). Thus,

Condition IV: Courts may effectively produce significant social reform by providing leverage, or a shield, cover, or excuse, for persons crucial to implementation who are *willing to act*.

Before summing up, it is important to assess what the conditions suggest about the role of the courts in the American political system. They suggest that court decisions are neither necessary nor sufficient for producing significant social reform. They are not necessary because much reform takes place outside of the judicial system and because courts lack independence (Constraint II). They are not sufficient because courts lack effective tools for implementation (Constraint III) and require the existence of particular conditions (Conditions I-IV). Without the presence of at least one of the conditions, court decisions will not produce significant social reform. On the other hand, if Constraints I and II and III are overcome, and at least one of the conditions is present, then courts may effectively produce significant social reform.

Returning to the two views of the role of the courts that framed this chapter, this analysis suggests that the Constrained Court view more closely approximates the role of the courts in the American political system. While the conditions suggest that courts can be effective producers of significant social reform, capturing part of the Dynamic Court view, they also suggest that this occurs only when a great deal of change has already been made. For only when there has been political, social, and economic change will Constraints I, II, and III be overcome and at least one of the conditions be present. Overall, then, the conditions and constraints suggest that U.S. courts, and their role in the American political system, are much less exceptional than is generally thought.²⁴

To sum up, the discussion suggests that the conditions enabling courts to produce significant social reform will seldom be present because courts are limited by three separate constraints built into the structure of the American political system:

- 1) The limited nature of constitutional rights (Constraint I);
- 2) The lack of judicial independence (Constraint II);
- 3) The judiciary's lack of powers of implementation (Constraint III).

24. In his classic historical study of the Supreme Court, McCloskey, too, concludes that the Court has been effective only when it has "operated near the margins rather than in the center of political controversy, when it has nudged and gently tugged the nation, instead of trying to rule it" (McCloskey 1960, 229). See also Handler (1978); Grossman (1970). Where this work differs from those cited is that it shows why this is the case.

However, when certain conditions are met, courts can be effective producers of significant social reform. These conditions occur when:

- 1) Overcoming Constraint I, there is ample legal precedent for change; *and,*
- 2) Overcoming Constraint II, there is support for change from substantial numbers in Congress and from the executive; *and,*
- 3) Overcoming Constraint III, there is either support from some citizens, or at least low levels of opposition from all citizens; *and,* either
 - a) Positive incentives are offered to induce compliance (Condition I); or,
 - b) Costs are imposed to induce compliance (Condition II); or,
 - c) Court decisions allow for market implementation (Condition III); or,
 - d) Administrators and officials crucial for implementation are willing to act and see court orders as a tool for leveraging additional resources or for hiding behind (Condition IV).

It is now time to turn to the data and see how well the views, constraints, and conditions fare.

PART 1

Civil Rights

Introduction

" . . . in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal." (*Brown v. Board of Education* 1954, 495)

With these words Chief Justice Earl Warren, speaking for a unanimous Supreme Court, sounded the death knell for legal segregation of the public schools in the United States. *Brown* overturned nearly sixty years of Court-sanctioned segregation, effectively reversing the infamous separate-but-equal doctrine (*Plessy v. Ferguson* 1896). In holding that state-enforced segregation on the basis of color deprives individuals of the equal protection of the laws guaranteed by the Fourteenth Amendment, the Supreme Court "quite simply, buried Jim Crow" (Aleinikoff 1982, 923). *Brown* was followed by decisions banning racial segregation in public parks and recreation facilities, in intrastate and interstate commerce, in courtrooms, and in facilities in public buildings.¹ Thus, *Brown* is invariably seen as "a revolutionary statement of race relations law" (Carter 1968, 237) through which the Supreme Court "blazed the trail" of civil rights (Spicer 1964, 176). Being "nothing short of a reconsecration of American ideals" (Kluger 1976, 710), *Brown* "profoundly affected national thinking and has served as the principal ideological engine" of the civil rights movement (Greenberg 1968, 1522). For five de-

1. Public Parks and Recreation facilities: *Mayor and City Council of Baltimore City v. Dawson* (1955) (memorandum decision) (public beaches and bathhouses); *Holmes v. City of Atlanta* (1955) (memorandum decision) (public golf course); *New Orleans City Park Improvement Association v. Detrige* (1958) (memorandum decision) (public golf courses and other facilities); *Wright v. Georgia* (1963) (public parks); *Watson v. Memphis* (1963) (public parks). Transportation: *Gayle v. Browder* (1956) (memorandum decision) (intrastate); *Boydton v. Virginian* (1960) (interstate); *Turner v. Memphis* (1962) (airports). Courtrooms: *Johnson v. Virginia* (1963) (per curiam). Facilities in Public Buildings: *Derrington v. Plummer* (1956) (cafeteria in courthouse); *Burton v. Wilmington Parking Authority* (1961); *Brown v. Louisiana* (1966) (libraries). Other cases in which the Supreme Court banned segregation include *McLaughlin v. Florida* (1964) (sexual relations); *Loving v. Virginia* (1967) (marriage).

cades, *Brown* has been the "symbol" of the courts' ability to produce significant social reform (Neier 1982, 57), the "principal inspiration to others who seek change through litigation" (Greenberg 1974, 331). As Wilkinson puts it, "*Brown* may be the most important political, social, and legal event in America's twentieth-century history" (Wilkinson 1979, 6). It has served, Robert Cover tells us, as a "paradigmatic event" (Cover 1982, 1316).

It is hard to avoid being caught up in the rhetoric of the Court's words and the praise it evoked. History, too, seems to bear this out. For ten years after *Brown* Congress and the executive branch did little to promote civil rights. The Court spoke alone. Yet words are not action. Although the conventional wisdom, as cited above, and shared by proponents of the Dynamic Court view, is that the federal courts, through *Brown* and its progeny, played a crucial role in producing both changes in civil rights and an active civil rights movement, truth is not thereby assured. With *Brown* as a paradigm for the Dynamic Court view, it is important to examine *Brown*'s effects.

To do so, I will focus on the consequences of court action in the battle for civil rights. Proponents of the Dynamic Court view assert that, starting with *Brown* and continuing through the desegregation decisions, the courts have been a key institution producing change in civil rights. The Constrained Court view, of course, denies this assertion and calls attention to the broader societal change of which court action is only one small part. In order to test the two views, and the constraints and conditions generated by them, I will concentrate on the 1964 Civil Rights Act, the 1965 Voting Rights Act, and their relative impact as compared to that of the courts. If progress has been made in civil rights,² were Congress and the executive branch helpful backing up to the powerful thrust of the courts or were they the key institutions effecting change? Which institution made a difference? Did it vary over issue (school segregation vs. voting rights vs. segregation in transportation vs. segregation in public places)? Or over time? Was the civil rights movement making the best use of scarce resources by relying heavily on a courts-based strategy?

In charting the influence that court decisions might have, I will examine both the judicial and extra-judicial paths. Examining both paths is important,

² It is incontrovertible that much progress has been made in civil rights in the past several decades. Unfortunately, it is also incontrovertible that racial discrimination is still prevalent in the United States. In speaking of progress, then, I do not wish to de-emphasize the immensity of the task that lies ahead. See, for example, the results of a 1983 study showing how little progress blacks have made in the last twenty years, excerpted in Herbers (1983). Readers should also note the sad irony that twenty-five years after *Brown*, a desegregation suit was filed in Topeka, Kansas. Linda Brown, the original plaintiff, on behalf of her children! And, in December 1989, the U.S. Court of Appeals for the Tenth Circuit held that Topeka had still not done enough to desegregate its schools ("Topeka" 1989, 17).

for extra-judicial effects are a key aspect of the Dynamic Court view. With civil rights, for example, it has often been suggested that the federal courts may have served as agenda-setters, as legitimizers of black protest and neocitizens of white consciences.³ The role of the courts in the civil rights movement may have been to bring to light the existence of discrimination and keep it prominent, changing public opinion about civil rights and forcing action from Congress. That is, without *Brown* there may never have been a 1964 Civil Rights Act, a 1965 Voting Rights Act, or a 1968 Housing Act.

Chapter 2 summarizes judicial, legislative, and executive action in key areas of civil rights. By bringing together all government action dealing with civil rights, it allows the reader to see the whole picture. The discussion also compares the results of actions of the different branches. Chapter 3 applies the two views and the constraints and conditions to these findings. Chapter 4 examines the Dynamic Court view claim of extra-judicial effects and chapter 5 completes this part by exploring other societal factors that supported civil rights.

³ See Kluger (1976, ix) (book about *Brown* as the "resurrection" of America's inner resources) and generally Carter (1968); Greenberg (1968); Spicer (1964). See, generally, almost any serious discussion of courts and civil rights.

2

Bound for Glory? *Brown* and the Civil Rights Revolution

Education—Elementary and Secondary Schools

Court Action

Brown and its companion case, *Bolling v. Sharpe* (1954),¹ were the Court's first modern foray into questions of segregation in the elementary and secondary schools. *Brown* was actually four consolidated cases coming from the states of Kansas (*Brown v. Board of Education of Topeka, Kansas* 1951), South Carolina (*Briggs v. Elliott* 1952), Virginia (*Davis v. County School Board of Prince Edward County, Virginia* 1952), and Delaware (*Gebhardt v. Belton* 1952). Its holding, however, was applicable to all public elementary and secondary schools throughout the nation. At the time of the decision (May 17, 1954), seventeen Southern and Border states,² plus the District of Columbia, maintained segregated elementary and secondary schools by law and four states outside the region—Arizona, Kansas, New Mexico, and Wyoming—allowed local segregation. Eleven states had no laws on the subject and sixteen states had laws prohibiting segregation, though not all were enforced. Thus, twenty-seven states either prohibited segregated schools outright or had no laws dealing with the question while twenty-one states either required or allowed segregated schools.

Brown had taken several years to decide. Originally argued in 1952, it was re-argued in 1953, before a Court presided over by a new Chief Justice, Earl Warren. The decision was announced in May of 1954. The time delay between initial argument and final decision was due to the complexity of the

1. *Bolling* was directed at the schools of the District of Columbia under the control of the federal government. Thus, the holding was based on the Fifth Amendment. In other respects, it was similar to *Brown*.

2. The Southern states: Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, Virginia. The Border states: Delaware, Kentucky, Maryland, Missouri, Oklahoma, West Virginia. These references are used throughout this study.

issues involved and the desire of the new Chief Justice to reach a unanimous decision (Ulmer 1971).³

The National Association for the Advancement of Colored People (NAACP) was euphoric over the unanimous decision. Thurgood Marshall, the chief litigator for the black plaintiffs, told reporters that the Supreme Court's interpretation of the law was "very clear." If the decision were violated anywhere "on one morning," Marshall said, "we'll have the responsible authorities in court by the next morning, if not the same afternoon." When asked how long he thought it would take for segregation to be eliminated from public schools, Marshall replied that "it might be 'up to five years' for the entire country." Finally, "he predicted that by the time the 100th anniversary of the Emancipation Proclamation was observed in 1963, segregation in all its forms would have been eliminated from the nation" ("N.A.A.C.P." 1954, 16).

The decision, however, did not include any announcement as to the appropriate relief for the plaintiffs. This was postponed for reargument due to the "considerable complexity" (*Brown* 1954, 495) of the matter. Reargument lasted for four days in April 1955, and the parties to the case, including the United States, were joined by the attorneys general of Arkansas, Florida, Maryland, North Carolina, Oklahoma, and Texas, as *amicus curiae* pursuant to the Court's invitation in *Brown* (1954, 495–96).

The remedy was announced on May 31, 1955, slightly more than a year after the initial decision and two and one-half years after the initial argument. The Court in *Brown II* (1955) held that, because local school problems varied, federal courts were in the best position to assure compliance with *Brown I*, an end to legally enforced public-school segregation. The cases were reversed and remanded to the lower courts⁴ which were ordered to "take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases" (1955, 301). The phrase "with all deliberate speed" was picked up by commentators, lawyers, and judges as the applicable standard. Thus, the end result of the *Brown* litigation was a unanimous Supreme Court clearly and unequivocally holding that state-enforced segregation of public schools was unconstitutional and ordering that it be ended "with all deliberate speed."

During the years from 1955 through the passage of the 1964 Civil Rights Act, the Court issued only three full opinions in the area of segregation of elementary and secondary schools. It routinely refused to hear cases or curtailed

3. However, Johnson (1979) has found that unanimity does not affect the treatment Supreme Court opinions receive in lower courts. Thus, the effort to achieve unanimity in *Brown* may not have been worth it, particularly if it resulted in compromise over the implementation.

4. The Delaware case, *Gebhardt v. Belton*, was affirmed and remanded to the Delaware Supreme Court for proceedings consistent with *Brown*.

affirmed or reversed lower-court decisions (for a discussion of these cases, see Wasby et al. 1977, 166–73, 192–98). However, in *Cooper v. Aaron* (1958), the first case after *Brown*, the Court spoke strongly. *Cooper v. Aaron* involved the attempt of Governor Faubus and the Arkansas legislature to block the desegregation of Central High School in Little Rock, Arkansas. The Court convened in a special session for only the fifth time in thirty-eight years to hear the case (Peltason 1971, 187). After reviewing the history of attempts to desegregate the public schools in Little Rock, the Court faced the question of whether violence, or threat of violence, in response to desegregation and resulting in turmoil in the school disruptive of the educational process justified the suspension of desegregation efforts for two and one-half years. In answering in the negative, rejecting the school board's claim and reversing the federal district court, the Supreme Court held that the "constitutional rights of respondents [black students] are not to be sacrificed or yielded to the violence and disorder" which was occurring (1958, 16). This was, as the opinion stated, "enough to dispose of the case" (1958, 17), but the Court continued for several pages to underline its determination that *Brown* be followed. It reminded the parties that Article VI of the Constitution makes the Constitution the "supreme law of the land" (1958, 18). Further, the Court unearched *Marbury v. Madison* (1803) and Chief Justice Marshall's words that "[i]t is emphatically the province and duty of the judicial department to say what the law is" (1803, 177, quoted at 1958, 18). The opinion also pointed out that the decision in "*Brown*" was unanimously reached by this Court only after the case had been briefed and twice argued and the issues had been given the most serious consideration." Not stopping here, the justices stressed that twelve justices had considered and approved the *Brown* doctrine (the nine who originally agreed to it and the three who had joined the Court since then) (1958, 19). Finally, in an unprecedented move, all nine justices individually signed the opinion. *Cooper v. Aaron* was a massive and unwavering affirmation that desegregation was the law and must be implemented.

The next full opinion in the elementary and secondary education field came in *Gross v. Board of Education of Knoxville* (1963). At issue was a desegregation plan that included a provision allowing students to transfer from a school where their race was a minority to one where it predominated. This provision was challenged on the ground that since race was the sole criterion of the plan it would perpetuate rather than alleviate racial segregation, denying plaintiffs the right to attend desegregated schools. The Court agreed, unanimously holding the one-way transfer plan to be violative of the Fourteenth Amendment and contrary to *Brown*.

The third decision, *Griffin v. Prince Edward County* was handed down in 1964. The case involved the constitutionality of the closing of Prince Edward County public schools to avoid desegregation and the use of state tuition

grants and tax credits to support private segregated education for white children. The Court unanimously⁵ found both acts unconstitutional, being essentially devices to avoid the constitutional mandate of desegregation, and denying plaintiffs the equal protection of the law.

Brown I and *II* stated the law and stated clearly that steps had to be taken to end state-enforced segregation. *Cooper v. Aaron* emphatically re-iterated it. And *Gross* and *Griffin* unanimously held that patent attempts to avoid desegregation were unconstitutional. The Court had spoken clearly and forcefully.

In the first four years after the passage of the 1964 Civil Rights Act, the Supreme Court remained quiet in the education area. However, the lower federal courts, particularly in the Fourth and Fifth Circuits, became increasingly involved in litigation. In 1965, the Fifth Circuit, in a case from Jackson, Mississippi, upheld desegregation guidelines announced by the U.S. Department of Health, Education, and Welfare (HEW) (to be discussed below). The circuit court "attached great weight to the standards" established by HEW and warned that it would not allow school districts to avoid HEW requirements by obtaining less stringent desegregation orders from local, and friendly, federal district courts (*Singleton v. Jackson Municipal Separate School District* 1965, 731). Similarly, in the *Jefferson County* case, in which a three-judge panel had ordered the defendant school systems to desegregate classrooms, facilities, and staffs by the 1967–68 school year, the Fifth Circuit, quoting *Singleton*, reaffirmed its support for the guidelines (*U.S. v. Jefferson County Board of Education* 1966, 847, 848, 851). The court reiterated its concern that the courts not be used to avoid strict HEW standards and stressed that "affirmative action" had to be taken to create a "unitary, non-racial system" (1966, 862, 878).

The Supreme Court re-entered the field in 1968 and issued, for the first time since *Brown*, a detailed opinion on remedies. *Green v. County School Board of New Kent County, Va.* (1968), involved a freedom-of-choice plan under which no white child had transferred to the "formerly black school" and only about 15 percent of the black children had transferred to the "formerly white school." In a unanimous opinion, written by Justice Brennan, the Court threw out the freedom-of-choice plan and suggested that such plans would be unlikely to meet constitutional standards. Showing a good deal of impatience, the opinion stated that "the burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work now" (1968, 439). In the fall of 1969, in *Alexander v. Holmes County* (1969), the Court continued with its impatience, reinstating a July 1969 Fifth Circuit order requiring thirty Mississippi school districts to desegregate by the start of school in September in accordance with *Green*. In

⁵. Justices Clark and Harlan dissented from the remedy portions of the opinion.

a terse, two-page *per curiam* ruling in October, the Court rejected a delay until December, holding that "continued operation of segregated schools under a standard of allowing 'all deliberate speed' for desegregation is no longer constitutionally permissible." Further, the Court held that school districts were required to "terminate dual school systems at once and to operate now and hereafter only unitary schools" (1969, 19, 20).

Finally, in *Swann v. Charlotte-Mecklenburg Board of Education* (1971), the Court upheld the power of district judges to include busing as part of a remedial decree. Writing for a unanimous Court, Chief Justice Burger held that "once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad" (1971, 15). This included, Burger noted, busing, because "desegregation plans cannot be limited to the walk-in school" (1971, 30).

From 1954 through 1971, the Court remained steadfast in its commitment to end public-school segregation. Repeatedly, it reminded parties before it, and the nation, that segregation violated the Constitution. And, as shall soon be shown, for many of those years it was the only branch of the federal government that acted.

Congressional and Executive Branch Action

Congressional and executive branch action in the area of public-school desegregation was virtually non-existent until the passage of the 1964 Civil Rights Act. In stark contrast to the actions of the Supreme Court in *Brown*, the other two branches of the federal government remained essentially passive.³

In 1957 Congress passed the first civil rights act since 1875. In the education field the act was most notable for its lack of provisions. While an attempt was made to give the Department of Justice the authority to file suits on behalf of individuals alleging segregation in education, it was unsuccessful. The Eisenhower administration opposed the provision because, in the words of Attorney General William P. Rogers, it "might do more harm than good" (quoted in Sarrant 1966, 72).

Congress passed a second civil rights act in 1960. Unlike the 1957 act, this one gave a fair amount of attention to segregation in education, but as with the earlier act, little of substance was enacted. In particular, the Department of Justice was not given the authority to file desegregation suits on behalf of individuals nor was the federal government given the power to cut off funds to school districts refusing to desegregate.⁶ The bill's educational

6. In its first report, the U.S. Commission on Civil Rights (USCCR) had split 3–3 in recommending federal power to cut off funds from segregated institutions of higher learning. One member, Commissioner Johnson, supported such power for secondary and elementary schools as well (USCCR 1959, 328–30).

provisions were aimed at violent interference with court-ordered school desegregation and at providing education for children of military personnel stationed in places where the public schools had been closed to avoid desegregation.

The 1964 act was a major departure from its predecessors. The most sweeping civil rights legislation since the Civil War and Reconstruction era, the act touched many fields. In education, Congress finally empowered the attorney general to bring desegregation suits on behalf of individuals.⁷ Also, Title VI of the act gave the federal government the power to cut off federal funds to school districts that discriminated on the basis of race.⁸ Its key language held:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

The 1964 act, as I will demonstrate shortly, had a major impact on school desegregation.

Until 1964, executive action was little better. Although the president and the administration can be a "particularly powerful agenda setter" (Kingdon 1984, 208), the power and prestige of the presidency was not employed in support of civil rights until the mid-1960s. Little was done by President Eisenhower in the 1950s and only slowly did Presidents Kennedy and Johnson bring their administrations into the civil rights battle. Their actions, or lack thereof, are highlighted in chapter 3.

In the spring of 1965 Congress enacted the Elementary and Secondary Education Act (ESEA), providing federal aid to school districts with large percentages of low-income children. The act was heavily directed at the South (Orfield 1969, 94), and nearly \$1 billion was expended in the first year of operation (Bailey and Mosher 1968, 156). A total of \$1.3 billion was authorized for 1966 (Miles 1974, 148) and in fiscal year 1968 alone, \$1.5 billion of federal money was sent to the states (USCCR 1970, chapter 1).

Title VI required some kind of government response. The task of formulating procedures fell to HEW and, specifically, to the Office of Education. Action became imperative with the enactment of ESEA in the spring of 1965, because there was now a large pot of federal money available to Southern

7. Empowering the attorney general to bring suits had not only been proposed as early as the 1957 act, but also had been recommended by the U.S. Commission on Civil Rights in its 1961 and 1963 reports (USCCR 1961b: 2, 181; USCCR 1963a, 69).

8. A partial fund cut-off had been officially recommended by the U.S. Commission on Civil Rights (1961b: 2, 181) as early as 1961. Also, amendments to congressional legislation requiring non-discrimination in the distribution of federal funds had been introduced since the 1940s. On this point, see discussion in chapter 4.

school districts. While the details of government actions are both fascinating and complicated, brief summary is possible.⁹

HEW acted slowly to implement Title VI. At first, it asked school districts for assurances of non-discrimination. The first regulations, adopted on December 3, 1964, allowed federal aid to school districts that either submitted orders to desegregate and agreed to abide by such orders, or that submitted voluntary desegregation plans. Further, state agencies were instructed not to renew programs or to authorize new ones until the commissioner of education certified that local districts were in compliance with Title VI. These regulations, however, were vague on what was an acceptable voluntary desegregation plan. In April 1965, guidelines were issued that required the opening of all grades to freedom of choice by the start of the 1967 school year.¹⁰ These guidelines were upheld by the Fifth Circuit in *Singleton*, discussed above. The guidelines were again revised and tightened in March 1966, setting standards for acceptable freedom-of-choice plans. The March 1966 guidelines established standards based on the percentage increase in students transferring from segregated schools. In most cases, the guidelines required a doubling or tripling of the percentage of blacks in "formerly white schools" for the 1966–67 school year. It was these guidelines that the Fifth Circuit upheld in the *Jefferson County* case discussed above. Regulations were further tightened in March 1968 when school districts were ordered to submit plans for complete desegregation by the fall of 1968, or, in some cases, the fall of 1969. The Supreme Court, in *Green*, essentially seconded these result-oriented standards that went past freedom of choice. Thus, by the end of the Johnson administration, HEW had come to officially require complete desegregation as a requirement for receiving federal funds under Title VI.

The Nixon administration appeared to back off from this strict requirement. In a July 1969 statement, HEW Secretary Finch and Attorney General Mitchell announced modifications of the guidelines in several important ways (USCCR 1969, Appendix C). Chief among them was rejection of the 1969–70 terminal date for all districts as "arbitrary" and "too rigid to be either workable or equitable." In terms of freedom of choice, a plan that "genuinely promises to achieve a complete end to racial discrimination at the earliest possible date" would be acceptable. In addition, the statement pledged the administration to rely more heavily on "stepped-up enforcement activities of [the Department of Justice]" and to "minimize" the number of HEW fund cut-off proceedings. However, the statement did not purport to change the guidelines. "In general," the administration announced, the "terminal date" for acceptable plans "must be the 1969–70 school year." Also, 9. For more detail, see Orfield (1969, chaps. 2 and 3); Note (1967); USCCR (1970). The summary that follows is based primarily on these sources.

10. Freedom of choice allowed students to attend any school in the district.

the statement pointed to the courts, holding that "policy in this area will be as defined in the latest Supreme Court and Circuit Court decisions." Finally, the statement quoted approvingly the language from *Green*, quoted above, that desegregation plans must work now.¹¹

Enforcement proceedings and fund terminations under Title VI were uncommon but not unheard-of. Although by the early 1970s the federal government had "investigated, negotiated with, and arm-twisted over 3,000 districts" (Hochschild 1984, 28), only a small percentage of these districts ended up in enforcement proceedings or had their eligibility for federal funds terminated. Of the approximately 2,800 school districts in the eleven Southern states, 320 were involved in enforcement proceedings from September 15, 1965, through June 30, 1967. While few districts suffered from fund terminations, the period from the passage of Title VI to the end of the Johnson administration saw over 200 such terminations, slightly more than 7 percent of all Southern districts. While terminations were unlikely, the threat was real.¹²

Results and Comparison

The decade from 1954 to 1964 provides close to an ideal setting for measuring the contribution of the courts vis-à-vis Congress and the executive branch in desegregating public schools. For ten years the Court spoke forcefully while Congress and the executive did little. Then, in 1964, Congress and the executive branch entered the battle with the most significant piece of civil rights legislation in nearly ninety years. In 1965, the enactment of ESEA made a billion dollars in federal funds available to school districts that, in accord with Title VI, did not discriminate. This history allows one to isolate the contribution of the courts. If the courts were effective in desegregating public schools, the results should show up before 1964. However, if it was Congress and the executive branch, through the 1964 Civil Rights Act and 1965 ESEA, that made the real difference, then change would occur only in the years after 1964 or 1965.

"In the problem of racial discrimination," Judge Brown once remarked, "statistics often tell much" (*Alabama v. U.S.* 1962, 586). Due to the herculean efforts of the Southern Education Reporting Service,¹³ supplemented by the U.S. Commission on Civil Rights (USCCR), and later, HEW, fairly good statistics on the progress of school desegregation are available. A summary is

11. It must be noted, however, that in August 1969, the administration petitioned the Fifth Circuit to relax the final date for complete desegregation in thirty Mississippi school districts from September 1, 1969, to December 1, 1969. This action led to the Supreme Court decision in *Alexander v. Holmes County*, discussed in the text.

12. Edelman (1973, 39 n.29); Orfield (1969, 115); USCCR (1974b 3; 128; 1970, 37).

13. The Southern Education Reporting Service described itself as an impartial fact-finding agency led by a board of directors of Southern newspaper editors and educators, and funded with a grant from the Ford Foundation.

Table 2.1
Black Children in Elementary and Secondary School with Whites,
1954-1972, Selected Years

Year	South			South without Texas and Tennessee			Border			Border without D.C.		
	%	#	%	%	#	%	#	%	#	%	#	
1954-55	.001	23	.001	.20	NA	NA	NA	NA	NA	NA	NA	
1955-56	.12	2,782	.002	.47	NA	NA	NA	NA	NA	NA	NA	
1956-57	.14	3,514	.002	.34	39.6	106,878	18.1	35,378				
1957-58	.15	3,829	.005	109	41.4	127,677	25.2	57,677				
1958-59	.13	3,456	.006	124	44.4	142,352	31.1	73,345				
1959-60	.16	4,216	.03	747	45.4	191,114	35.5	117,824				
1960-61	.16	4,308	.02	432	49.0	212,895	38.7	131,503				
1961-62	.24	6,725	.07	1,558	52.5	240,226	42.8	151,345				
1962-63	.45	12,868	.17	4,058	51.8	251,797	43.7	164,048				
1963-64	1.2	34,105	.48	11,619	54.8	281,731	46.2	182,918				
1964-65	2.3	66,135	1.2	29,846	58.3	313,919	50.1	207,341				
1965-66	6.1	184,308	3.8	95,507	68.9	384,992	64.1	275,722				
1966-67	16.9	489,900		71.4	456,258							
1968-69	32.0	942,600		74.7	475,700							
1970-71	85.9	2,707,000		76.8	512,000							
1972-73	91.3	2,886,300		77.3	524,800							

Sources: Southern Education Reporting Service (1967, 40-44); USCCR (1967); U.S. Department of HEW, Office of Civil Rights (*Directory*, 1968, 1970, 1972).

Note: Numbers in the column marked "%" are the percentages of black students, out of all black schoolchildren, attending school with whites.

presented in table 2.1 and figure 2.1 while state breakdowns are in Appendix 1. The table and graph present the number of black children attending public school with whites as well as their percentages out of all black schoolchildren in the seventeen states (and the District of Columbia) which required segregation in public schools at the time of *Brown*. While this way of presenting the numbers does not discriminate between token and substantial integration, and thus suggests more desegregation than actually occurred, it does allow for a time-series comparison.

The Border States and the District of Columbia

The Supreme Court appears to have had an important impact on school desegregation in the six border states and the District of Columbia. Unfortunately, reliable figures are not available until the 1956 school year. However, during the eight school years from the fall of 1956 until the passage of the 1964 act, the number of black children in school with whites rose 15.2 percent (39.6 percent to 54.8 percent) in the region as a whole and 28.1 percent (18.1 percent to 46.2 percent) excluding the District of Columbia. However, the lack of data for the two years immediately following *Brown* may understate

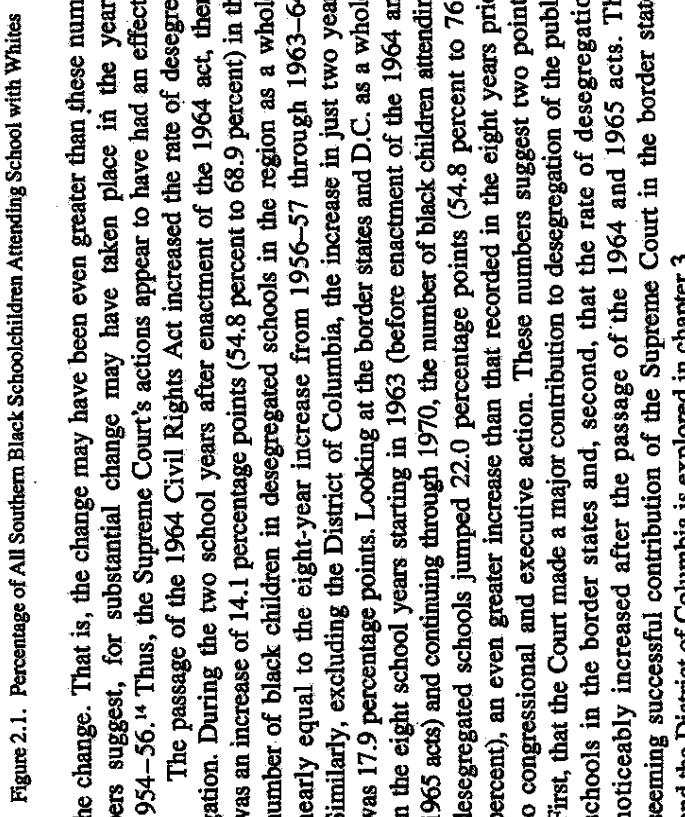


Figure 2.1. Percentage of All Southern Black Schoolchildren Attending School with Whites

the change. That is, the change may have been even greater than these numbers suggest, for substantial change may have taken place in the years 1954-56.¹⁴ Thus, the Supreme Court's actions appear to have had an effect.

The passage of the 1964 Civil Rights Act increased the rate of desegregation. During the two school years after enactment of the 1964 act, there was an increase of 14.1 percentage points (54.8 percent to 68.9 percent) in the number of black children in desegregated schools in the region as a whole, nearly equal to the eight-year increase from 1956-57 through 1963-64. Similarly, excluding the District of Columbia, the increase in just two years was 17.9 percentage points. Looking at the border states and D.C. as a whole, in the eight school years starting in 1963 (before enactment of the 1964 and 1965 acts) and continuing through 1970, the number of black children attending desegregated schools jumped 22.0 percentage points (54.8 percent to 76.8 percent), an even greater increase than that recorded in the eight years prior to congressional and executive action. These numbers suggest two points.

First, that the Court made a major contribution to desegregation of the public schools in the border states and, second, that the rate of desegregation noticeably increased after the passage of the 1964 and 1965 acts. The seeming successful contribution of the Supreme Court in the border states and the District of Columbia is explored in chapter 3.

14. For example, there was no desegregation in the District of Columbia prior to 1954.

The Southern States

Table 2.2 Desegregated School Districts, by Primary Source of Intervention, and by Year of Greatest Desegregation, 1901-1974

Years	Source of Intervention						#	%	Total			
	Courts		HEW		State-Local							
	#	%	#	%	#	%						
1901-53	—	—	—	—	6	2	6	1				
1954-65	12	6	18	12	52	21	82	13				
1966-67	8	4	19	13	45	18	72	12				
1968-69	53	26	42	28	34	13	129	21				
1970-71	107	52	61	49	46	18	214	35				
1972-73	12	6	5	3	38	15	55	9				
1974-75	15	7	7	5	31	12	53	9				
Total	207	101	152	101	252	99	611	100				
Percent of total number of districts	34	25	41									

Source: USCCR (1977a, 26).
Note: Percentages do not equal 100 because of rounding.

The statistics from the Southern states are truly amazing. For ten years, 1954-64, virtually *nothing happened*. Ten years after *Brown* only 1.2 percent of black schoolchildren in the South attended school with whites. Excluding Texas and Tennessee,¹⁵ the percent drops to less than one-half of one percent (.48 percent). Despite the unanimity and forcefulness of the *Brown* opinion, the Supreme Court's reiteration of its position and its steadfast refusal to yield, its decree was flagrantly disobeyed. After ten years of Court-ordered desegregation, in the eleven Southern states barely 1 out of every 100 black children attended school with whites. The Court ordered an end to segregation and segregation was not ended. As Judge Wisdom put it, writing in the *Jefferson County* case, "*the courts acting alone have failed*" (1966, 847; emphasis in original). The numbers show that the Supreme Court contributed virtually *nothing* to ending segregation of the public schools in the Southern states in the decade following *Brown*.

The entrance of Congress and the executive branch into the battle changed this. As figure 2.1 graphically demonstrates, desegregation took off after 1964, reaching 91.3 percent in 1972 (not shown). In the first year of the act, 1964-65, nearly as much desegregation was achieved as during all the preceding years of Supreme Court action. In just the few months between the end of the 1964-65 school year and the start of the 1965-66 year, nearly three times as many black students entered desegregated schools as had in the preceding decade of Court action. And the years following showed significant increases. While much segregation still existed, and still exists, the change after 1964 is as extraordinary as is the utter lack of impact of the Supreme Court prior to 1964. The actions of the Supreme Court appear irrelevant to desegregation from *Brown* to the enactment of the 1964 Civil Rights Act and 1965 ESEA. Only after the passage of these acts was there any desegregation of public schools in the South.

What accounts for the phenomenal increase in desegregation in the post-1964 years, particularly the 1968-72 period? Was it the action of HEW? The courts? Local school officials? All three? Part of the answer may be found in the responses of nearly 1,000 school superintendents to a U.S. Commission on Civil Rights survey of school districts containing at least some minorities (USCCR 1977a).¹⁶ When superintendents reported that "substantial steps to desegregate" had been taken, the survey asked, among other questions, "which was the single most important source of pressure for initiation of

15. Tennessee and Texas had the smallest percentage of black enrollment in public schools of any of the eleven Southern states. Thus, resistance to desegregation may have been weaker.
16. The survey covered 47 percent of all school districts with at least 5 percent minority enrollment and enrollments of 1,500 or more. Seventy-seven percent (996) of the superintendents surveyed responded.

desegregation?" Table 2.2 presents the results. While the survey's coding rules underestimate the effect of HEW,¹⁷ it can be seen that, overall, state-local pressures were mentioned most often, followed by courts and HEW. It can also be seen that while courts were mentioned in only 20 of 154 districts in the years 1954-67, in the 1968-71 period 160 of 343 districts that initiated desegregation pointed to the courts. Those years also recorded 103 mentions of HEW, suggesting that it was quite active too. The survey suggests that while HEW was active, the courts played an important role in desegregation in the 1968-72 period.

In terms of success, the survey found extremely large decreases in segregation between 1968 and 1972 from both court and HEW action and more moderate decreases with local action. It also found that districts desegregating under HEW pressure were less segregated in 1972 than were districts desegregating under court orders (USCCR 1977a, 66). However, districts desegregating under court orders were more segregated to start with, had, on average, higher percentages of minority students, and achieved a somewhat greater decline in segregation than those desegregating under HEW pressure. Yet perhaps because courts faced a tougher task, desegregation in districts under

17. When there was more than one box checked for "primary" pressure, the survey's coding rule was that "courts took priority over HEW" (Appendix A, 118). The commission also suggests that "many districts that describe their desegregation as locally initiated may have been influenced by HEW" (13).

court orders proceeded less smoothly: "school districts that reported school desegregation by court intervention were far more likely to experience disruptions than those that desegregated under HEW or local pressures" (USCCR 1977a, 84).¹⁸

These findings were corroborated by Giles in a study of 1,362 Southern school districts. Comparing actual levels of segregation in school districts under HEW and court enforcement in 1968 and 1970, Giles concluded that "districts under H.E.W. enforcement were significantly less segregated than court-ordered districts in both 1968 and 1970" (Giles 1975, 88). He also found greater decline in desegregation in court-ordered districts than in those under HEW enforcement.

In sum, although Hochschild overstated the case in concluding that "were it not for the courts there would be little reduction in racial isolation" (Hochschild 1984, 134), she did pinpoint a period of court efficacy in civil rights. Chapter 3 explores the reasons why, with particular emphasis on why the Constrained Court view seems to explain the first decade after *Brown* while the Dynamic Court view appears to do a better job explaining the post-1964 findings.

Higher Education

The story of Court and governmental action regarding segregation of public colleges and universities is shorter but similar to that of lower education. In the late nineteenth century Congress, in the second Morrill Act, allowed segregation if separate black institutions were maintained (Orfield 1969, 11). Congressional action was followed, of course, by Supreme Court approval of the separate but equal doctrine in *Plessy v. Ferguson* (1896). However, the Court began to chip away at that doctrine in a number of cases challenging segregation in graduate and professional education.¹⁹ In these cases, states were ordered to admit black applicants to formerly segregated state universities where the state's practice had been to provide them with out-of-state scholarships (*Missouri ex. rel. Gaines v. Canada* 1938), and universities were prohibited from treating black students differently than other students once admitted (*McLaurin v. Oklahoma Board of Regents* 1950). Attempts to set up "separate but equal" black institutions were dealt a death blow in *Sweatt v. Painter* (1950). Sweat, a black applicant, had been denied admission to the University of Texas Law School because of his color. The state courts upheld the denial but ordered Texas to build a state law school for blacks. In a unanimous opinion, the Supreme Court ordered Sweat's admission to the University of Texas Law School, holding, in essence, that although

18. Data on disruptions and violence can be found in USCCR (1977a, 85ff.).

19. The leading cases are *Missouri ex. rel. Gaines v. Canada* (1938); *Sipuel v. Oklahoma Board of Regents* (1948); *Sweatt v. Painter* (1950); *McLaurin v. Oklahoma Board of Regents* (1950).

any new law school would certainly be separate, it would hardly be equal. Chief Justice Vinson wrote: "The University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school" (1950, 634). Although the separate but equal doctrine was not formally rejected, the clear impact of the holding was that lack of equality would compel admission to the previously segregated institution and that proving equality would be a nearly impossible task. It was not long to *Brown*'s declaration that separate educational facilities are inherently unequal.

As with elementary and secondary education, in the years before 1964 Congress and the administration did little to desegregate universities. There was no congressional action until the 1964 Civil Rights Act. President Kennedy, when violence was rampant, did send federal troops to the University of Mississippi in 1963. However, other than utter the occasional platitude, he did little. President Eisenhower had done even less. With the passage of the 1964 Civil Rights Act, however, the executive branch was given the power to bring desegregation suits and cut off federal funds to segregating institutions. Despite these new powers, the Office of Civil Rights (OCR) did little to enforce the act. Until 1968, for example, there was no compliance review program at all for institutions of higher learning (USCCR 1970, 42). Even after that, there were no clear guidelines or any serious attempt to require compliance (USCCR 1974b: 3, chap. 3). By January 1975, for example, there had been only two fund terminations, involving small schools, Bob Jones University and Freewill Baptist Bible College. However, between January 1969 and February 1970, letters requesting desegregation plans were sent to ten states.²⁰ Even with that action, it appeared to some that the Nixon administration was dragging its feet in applying the law. Thus, a lawsuit was brought by the Legal Defense and Educational Fund, Inc. of the NAACP to force the government to act. In *Adams v. Richardson* (1973), decided in early 1973, OCR was ordered to obtain acceptable desegregation plans or commence enforcement proceedings leading to fund terminations.

Results and Comparison

Unlike with elementary and secondary education, few reliable statistics are available for making the comparison in higher education. This qualification being made, it is clear that there was little movement to desegregate universities prior to the 1964 Civil Rights Act. Tables 2.3A and 2.3B summarize the best information available (for state breakdowns, see Appendix 2). Table 2.3A shows that from 1963 to 1966, from before the passage of the 1964 Act to after it, the number of black students attending predominantly

20. The states were Arkansas, Florida, Georgia, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, Pennsylvania, and Virginia.

Table 2.3A Blacks at Southern, Predominantly White Public Colleges and Universities, 1963, 1965, 1966

Year	South		Border	
	# of Students	% of Enrollment	# of Students	% of Enrollment
1963	4,639	NA	NA	NA
1965	12,054	1.9	6,607	2.5
1966	20,788	2.6	14,102	4.9

Sources: Sarratt (1966, chap. 5); Southern Education Reporting Service (1965, 3-25; 1967, 3).

Table 2.3B Percentage of Black Enrollment at Southern, Formerly All-White, Public Colleges and Universities, by State, 1970 and 1978

States	Voting		<i>Court Action</i>
	1970*	1978	
<i>Southern</i>			
Alabama	3.3	10.0	
Arkansas	4.6	10.4	
Florida	2.9	6.0	
Georgia	3.1	10.5	
Louisiana	5.0	11.5	
Mississippi	3.5	9.8	
North Carolina	2.4	6.6	
South Carolina	2.8	9.0	
Tennessee	4.1	9.7	
Texas	4.3	5.3	
Virginia	2.0	5.2	
<i>Border</i>			
Delaware	2.3	3.1	
Kentucky	3.1	5.1	
Maryland	3.9	10.1	
Missouri	2.6	4.5	
Oklahoma	3.8	5.0	
West Virginia	2.3	2.8	

Source: Office for Civil Rights data adapted from Ayres (1984, 125).

*1972 data were used for 17 of the 256 traditionally white campuses. They were located in Florida (3), Georgia (2), Maryland (1), Mississippi (1), North Carolina (1), Oklahoma (1), and West Virginia (8).

white universities in the South increased nearly five-fold. In one year alone, from 1965 to 1966, it increased over 70 percent. In the border states, the number of black students in predominantly white institutions more than doubled from 1965 to 1966. These figures suggest that it was the action of Congress and the executive branch, not the Court, that brought at least some

segregation to higher education. Chapter 3 will explore the reasons behind this finding.

On the other hand, as the 1970 and 1978 data presented in table 2.3B show, while there was change, the overall percentages were small. That is, despite congressional and executive action, and despite Adams, only some progress was made in bringing more than a token number of black students to formerly white public institutions. The response, for example, to OCR's letter to ten states mentioned above was the submission of unacceptable plans from five states and no plans at all from the other five.²¹ Other examples of inaction abound. In December 1985, a federal judge in Alabama, in a suit involving Auburn University, found that "the state of Alabama has indeed operated a dual system of education; that in certain aspects, the dual system still exists" (*U.S. v. Alabama* 1985). These findings, too, will be discussed in chapter 3.

The right to vote has long been denied American minorities. Although the Fifteenth Amendment guaranteed blacks the right to vote, the failure of Reconstruction and its replacement by Jim Crow laws and practices put an effective end to black voting in the South. By 1903, every Southern state had passed legislation limiting the vote.²² Throughout the twentieth century the Supreme Court heard and decided a number of cases in which it held unconstitutional various state attempts to prevent blacks from voting. As early as 1915, the so-called "Grandfather Clause," limiting voters to those who could prove that their ancestors had the right to vote (i.e., whites), was held unconstitutional (*Juinn & Beal v. U.S.* 1915).²³ This, of course, was but one of many different ways states attempted (and succeeded) to disenfranchise blacks.

The best-known Supreme Court cases dealing with voting are the Texas Primary Cases. In Texas, as in the rest of the South, the Democratic primary was the real election, with the general election being merely a required procedural formality. The Democratic parties of all eleven Southern states, aware of the realities of political life, banned blacks from voting in Democratic primaries (USCCR 1968, 7). This exclusion was challenged as violative of the Fourteenth Amendment in *Nixon v. Herndon* in 1927, and the Supreme Court struck it down. Texas responded by enacting legislation giving the state

21. Florida, Louisiana, Mississippi, North Carolina, and Oklahoma did not submit plans. 22. Kousser (1974, 32). For a good history of state action denying blacks the right to vote, see USCCR (1959, 55-97). For a discussion of some of the state tactics employed in the context of why litigation failed to remedy the discrimination, see chapter 3.

23. A similar case, also from Oklahoma, was *Lane v. Wilson* (1939).

executive committee of each party the power to prescribe voting qualifications for its own members. The Democratic Party Executive Committee then required that its members be white. Mr. Nixon again brought suit, challenging this new bar to his ability to vote. In *Nixon v. Condon* (1932), the Supreme Court, citing *Nixon v. Herndon*, struck down the law, holding that the power to determine membership qualifications resides in the party in convention assembled. Thus, executive committee action was state action violative of the Fourteenth Amendment. Undaunted, and relying on the loophole in the *Condon* opinion, the Texas Democratic party in its convention voted to exclude blacks. This exclusion was upheld by the Supreme Court in *Grovey v. Townsend* (1935), where the Court held that since the action had been taken by the "representatives of the party in convention assembled," it was "not state action" (1935, 48) and therefore was constitutional. This position was reversed nine years later in *Smith v. Allwright* (1944), where the Court essentially held that primary and general elections are one process and that denying blacks the right to vote in primaries could be held to be state action. The final Texas Primary Case, *Terry v. Adams* (1953), involved the Jaybird Democratic Association, purportedly a self-governing voluntary private club whose nominees, it just so happened, "nearly always" (1953, 463) ran unopposed in the Democratic primaries. The Jaybirds, of course, denied membership to blacks. The Court, realizing that the Jaybird election was the real election in Texas (1953, 469), accordingly struck down the exclusion.

The Court also acted to invalidate other blatant attempts to disenfranchise black voters. One case came from Tuskegee, Alabama, where the Alabama legislature had redrawn the city boundaries to exclude nearly all black residents. The local newspapers made much of the "joke" that Tuskegee's blacks had suddenly "moved out of town" (cited in Wasby et al. 1977, 225). In *Gomillion v. Lightfoot* (1960), the Court saw past the facially neutral character of the statute and threw out the redistricting plan.

The Court, then, with one exception subsequently reversed, consistently upheld the right of blacks to take part in the electoral process. It continually struck down attempts by state legislatures to prohibit blacks from participating in a meaningful way in the electoral process.

Congressional and Executive Branch Action

Until 1957, congressional and executive branch action in voting discrimination was, as in other civil rights areas, virtually non-existent. As with education, the Supreme Court was left to speak alone.

In 1957, Congress passed its first civil rights act in eighty-two years. The act had several voting rights provisions, the most important of which authorized the Justice Department to initiate suits on behalf of blacks deprived of voting rights. The act also prohibited intimidation of voting in federal elec-

tions, including primaries, and established the Civil Rights Commission with power to gather evidence on violations of voting rights.

In 1960, Congress passed its second civil rights act of the century. Among its voting-rights provisions were the requirements that voting records be preserved for twenty-two months and that the attorney general be given access to them. An important provision allowed for judicial appointment of referees to temporarily replace local registrars. However, the process required before such appointments could be made was cumbersome.²⁴ Thus, both the 1957 and 1960 acts required that courts be a vital part of the process. And little change was made by the 1964 act, which concentrated on other aspects of discrimination.

Finally, in 1965, Congress passed the Voting Rights Act, making a major break with the past. The 1965 act, unlike the prior acts, provided for direct federal action to enable blacks to vote. Federal examiners could be sent to election districts to list eligible voters where tests or devices were required as a precondition for voting or registering and where less than 50 percent of the total voting-age population was registered. The act also suspended all literacy tests in the jurisdictions it covered and directed the attorney general to file suit challenging the constitutionality of the poll tax.²⁵ The 1965 Voting Rights Act, as will be seen shortly, had a major impact on black registration. Eisenhower's reticence in voting rights was slight. Eisenhower's reticence in voting rights area was no exception.

As of 1959, the Eisenhower Justice Department had instituted only three suits under the 1957 act.²⁶ And while the passage of the 1957 and 1960 acts was

important, the Eisenhower administration hardly used them. The Kennedy administration did make use of the powers it had under the 1957 and 1960 acts by filing scores of voting rights suits. However, it failed to push for major modification of the existing statutes. While its record was a vast improvement over that compiled by the Eisenhower administration, the major effort did not come until the Johnson administration and the 1965 Voting Rights Act.

Until 1957 the Court spoke alone in prohibiting racial discrimination in voting rights. Congress joined in with the 1957, 1960, and 1964 acts with small, but growing, executive support. Finally, Congress and the executive branch forcefully acted to prohibit discrimination in voting with the passage and implementation of the 1965 Voting Rights Act.

24. For a good description, see USCCR (1961b: 1, 77-78).

25. The poll tax had been made unconstitutional in federal elections by the enactment of the Twenty-fourth Amendment in 1964. Subsequently, the poll tax was held unconstitutional in state elections as violative of the equal protection clause of the Fourteenth Amendment in *Harper v. Virginia Board Of Elections* (1966).

26. USCCR (1961b: 1, 75). Not surprisingly, the administration lost all three cases.

Table 2.4

Black Voter Registration in the Southern States, 1940–1970,
Selected Years

Year	Estimated # of Black Registered Voters	% of Voting-Age Blacks Registered
1940	250,000	5
1947	595,000	12
1952	1,008,614	20
1956	1,238,038	25
1958	1,266,488	25
1960	1,414,052	28
1962	1,480,720	29.4
1964	2,005,971	40.0
1967	2,903,284	57.6
1968	3,112,000	58.7
1970	3,506,000	66.9

Sources: Garow (1978, 19); Jaynes and Williams (1989, 233); Lawson (1976, 283); Matthews and Prothro (1963a, 27); USCCR (1968, 12, 13, 222, 223).

Note: As the U.S. Commission on Civil Rights states: "Registration figures themselves vary widely in their accuracy." For another set of figures which differ, but present the same general pattern, see Voter Education Project (1966); Waters and Cleghorn (1967).

just after it. As table 2.4 records, the number of registered blacks in the eleven Southern states in this period jumped from approximately 2 million to 2.9 million, an increase of nearly 900,000, or 45 percent. In the first few months after the passage of the act more than 300,000 blacks were registered (Rodgers and Bullock 1972, 30). No other time period shows such an increase. Prior to 1957, when only the Court acted, only 1 out of every 4 blacks was registered to vote in the South where nearly 3 out of every 4 whites were. Nearly three-quarters as many blacks registered to vote merely in the two years after passage of the act as had been registered in all the years prior to 1957. The gains in some states were enormous. Mississippi, for example, showed a nine-fold increase in three years (see Appendix 3 for state figures). There can be no doubt that the major increase in the registration of blacks came from the action of Congress and the executive branch through the 1965 Voting Rights Act.

The best case that can be made for Court influence is that the increases from 1940 to 1956 were due to the holdings of the Texas Primary Cases, particularly *Smith v. Allwright* in 1944 and *Terry v. Adams* in 1953. However, as the U.S. Civil Rights Commission pointed out, the end of World War II brought home many black servicemen who, having risked their lives for America, were determined to exercise the right to vote. Also, the black lit-

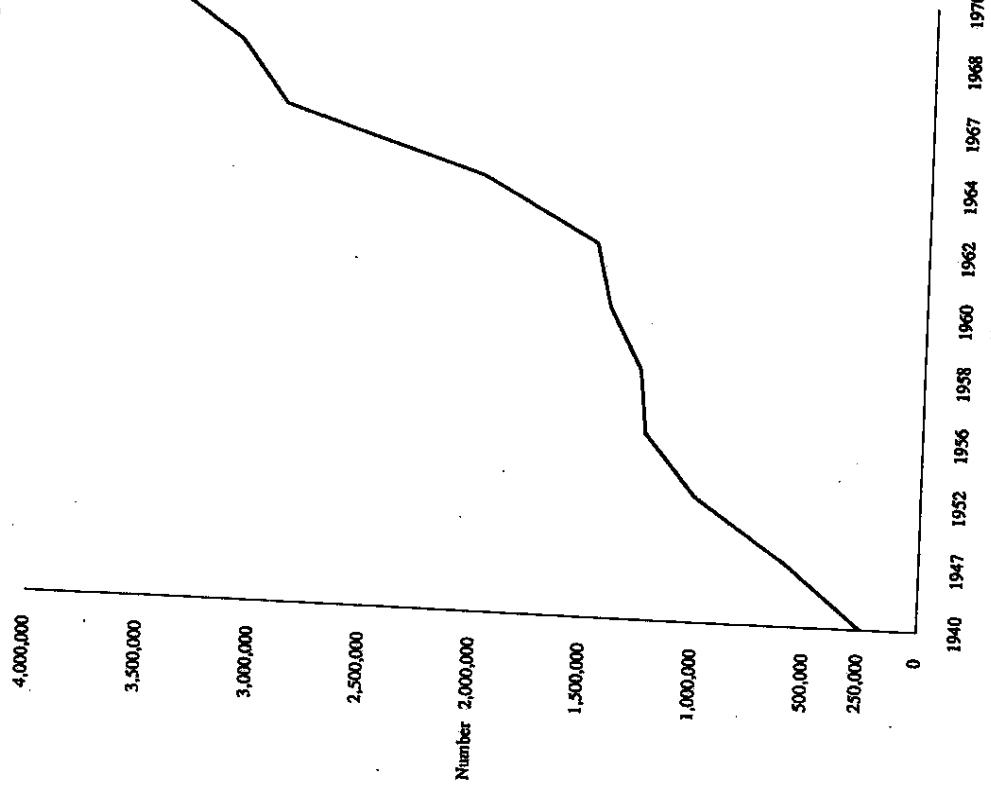


Figure 2.2. Black Voter Registration in the Southern States
Source: USCCR (1968, 12, 13, 222, 223).

Results and Comparison

Voting rights provide a good comparison of the relative contribution of the courts and the other two branches of the government to civil rights. Until 1957, the Court acted alone. It was joined half-heartedly by the other branches in 1957 and strongly in 1965. Figure 2.2 shows the change in the estimated number of black registered voters over the years and table 2.4 contains the raw data. Striking is the large jump in the number and the percentage of blacks registered to vote from just prior to the passage of the 1965 act to

eracy rate had been continually growing, from 33 percent in 1898 to 82 percent by 1960 (USCCR 1961b: 1, 42). And, as chapter 5 details, blacks had been moving in large numbers from the rural South to the urban South, where registration was sometimes possible, and to the North, where there were few, if any, registration barriers. Although the issue of what accounted for the increase in the percentage of blacks registered to vote between 1940 and 1956 is by no means clear, what is clear is that important societal changes were taking place, independently of the Court, that surely affected registration.²⁷ The lack of impact of governmental action prior to the 1965 act can also be seen by the lack of direct results of proceedings initiated with the courts under the 1957 and 1960 acts. In 1963, for example, the U.S. Civil Rights Commission concluded that five years of litigation under the acts had "not provided a prompt or adequate remedy for wide-spread discriminatory denials of the right to vote." It cited the efforts in 100 counties in eight states where, despite the filing of thirty-six voting rights suits by the Department of Justice, registration increased a measly 3.3 percent between 1956 and 1963, from approximately 5 percent to 8.3 percent (USCCR 1963a, 13, 14–15). Another study found that eight years of litigation under the two acts in the forty-six most heavily segregated Southern counties resulted in the registration of only 37,146 blacks out of 548,358 eligibles, a mere 6.8 percent (Note 1966, 1088 n.108). Even administration officials came to the conclusion that litigation was fruitless (Garrow 1978, 34, 67). For example, Deputy Attorney General Katzenbach concluded that the weakness of litigation to produce change "meant essentially that you had to bring a separate lawsuit for each person who was discriminated against, and there were thousands. It would take years to get them registered to vote" (quoted in Hampton 1990, 212). And Attorney General Robert F. Kennedy, testifying before Congress in 1962, noted that the "problem is deep rooted and of long standing. It demands a solution which cannot be provided by lengthy litigation on a piecemeal, county-by-county basis" (U.S. Cong. 1962, 264). These figures and statements provide further evidence that Court action was ineffective in combating discrimination in voting rights.

On the other hand, there is evidence in addition to the figures that suggests the important direct effect of the 1965 act. In July 1966, about one year after the passage of the 1965 act, the Voter Education Project of the Southern Regional Council studied the effects on registration of sending federal examiners to Southern counties. The findings show substantially higher levels of black registration in counties where federal examiners were working than in those where they were not. For example, comparing counties where federal examiners were present to those where they were not, the study found increases in the percentage of blacks registered of 22.6 percent in South Carolina (71.4 percent versus 48.8 percent), 18.3 percent in Alabama (63.7 percent versus 45.4 percent), and 17 percent in Mississippi (41.2 percent versus 24.2 percent) (USCCR 1968, 155). Coupled with the huge increase in black registration immediately after the 1965 act, these figures buttress the attribution of those changes to the 1965 Act (see also USCCR 1965).

In sum, the bottom line in voting is that the actions of the Court contributed little to the increase in black registration. When major change did occur, it was clearly attributable to the actions of Congress and the executive.

Transportation

Court Action

Although arguably less important than the right to a segregated education and the right to vote, racial segregation in transportation deprives individuals of equal treatment. Through a series of cases the Supreme Court strongly reiterated the constitutional prohibition of segregation in interstate and intrastate transportation.

Recent Court history starts in 1941 with *Mitchell v. U.S.*, where U.S. Representative Mitchell, a black from Chicago, traveling in Arkansas as part of an interstate trip, was denied equal accommodation in Pullman cars. The Court found this a violation of the separate but equal standard. A similar finding was made in *Henderson v. U.S.* (1950), where black interstate travelers received discriminatory treatment in a train's dining car. Through these cases the Court made clear that if segregation was maintained, "substantial equality of treatment" (*Mitchell* 1941, 97) was required. However, by this time the separate but equal standard had been weakened in the transportation field. In 1946, in *Morgan v. Virginia*, the Court invalidated as to interstate passengers a Virginia law requiring segregated seating in all passenger motor carriers. By 1960, the Court made clear that this ban on segregation also applied to facilities used in interstate transportation. Specifically, in *Boynton v. Virginia* (1960), the Court held that if bus companies made services available to interstate passengers as a regular part of their transportation, then segregation in the use of the facilities was prohibited. Segregation was also prohibited in intrastate transportation. In *Gayle v. Browder* (1956), arising out of the Montgomery bus boycott, the Supreme Court affirmed (*per curiam*) the lower court's finding that segregated seating violated the Fourteenth Amendment.²⁸ Thus, by 1960, if not earlier, the Supreme Court had "clearly established" (Lusky 1963, 1168) that laws requiring segregation in transportation were prohibited. And in 1962 the Court, showing a good deal of expansion with continuing segregation, cited *Morgan*, *Gayle*, and *Boynton* for

27. This point is expanded upon in chapter 5.

28. See also *Evers v. Dwyer* (1958), involving bus segregation in Memphis.

the proposition that it was "settled beyond question that no State may require racial segregation of interstate or intrastate transportation facilities" (*Bailey v. Patterson* 1962, 33 [per curiam]).

Congressional and Executive Branch Action

In transportation, Congress did not act. The important actor was the Interstate Commerce Commission (ICC). The ICC, with its members appointed by the president, often reflects the concerns of the administration. Thus, not surprisingly, little action was taken by it until the 1960s. In 1941, for example, the ICC upheld the Arkansas law requiring segregation that the Supreme Court invalidated in *Mitchell*. Throughout the 1940s and 1950s, while the Court was prohibiting segregation, the ICC concerned itself primarily with the carriers' economic woes, confining its anti-discrimination efforts to referring complaints to the Department of Justice (Dixon 1962, 214). "It repeatedly sanctioned the Jim Crow practices of Southern rail lines" (Barnes 1983, 70). While it did issue rail and bus regulations in 1955, rejecting the separate but equal standard, the effort was half-hearted (Dixon 1962, 221–22). This changed, however, with the Kennedy administration and the Freedom Rides. The first Freedom Ride, started in early May 1961, reached bloody heights on Sunday May 14 with the fire-bombing of one of the buses outside of Anniston, Alabama, and the brutal attack on the Freedom Riders in Birmingham. Only then did the Kennedy administration act. Late in May Attorney General Robert Kennedy, supported by other cabinet members (USCCR 1963b, 137) petitioned the ICC to adopt more stringent regulations. In September 1961, the ICC issued new and stronger regulations. Thus, until the September 1961 regulations, the brunt of the battle against segregation in transportation was carried by the Court.

Results and Comparison

Segregation in transportation has not been quantified. Numerical measurements do not exist and comparisons cannot obtain the more precise levels reached in education and voting. Instead, reliance must be placed on the fuzzier measurements of impressions. Yet when impressions are clear, and based on reliable sources, a pattern can emerge. And in transportation, the pattern that emerges is the general ineffectiveness of the Court and the effectiveness of the other branches.

Examining the effectiveness of the Court decisions discussed above, Barnes found that "for the average black rail traveler, *Mitchell* changed nothing" (Barnes 1983, 34). Despite Thurgood Marshall's claim that *Morgan* was "a decisive blow to the evil of segregation and all that it stands for" (quoted in Barnes 1983, 50), Barnes found that "Southern bus travel remained segregated" and that "*Morgan* also made little change in railway Jim Crow practices" though it was extended to them by a later federal circuit court decision

(Barnes 1983, 52, 53). In addition, in 1947 the President's Committee on Civil Rights (PCCR) complained that many states were still enforcing segregation laws in interstate commerce in violation of *Morgan* (PCCR 1947, 70). The effect of the intrastate cases was the same. *Gayle*, the Montgomery bus case, "did not close off even direct local segregation" (Wasby et al. 1977, 708). And despite the 1960 *Boynton* case, "Jim Crow persisted in a majority of Southern bus depots and lunch counters" (Barnes 1983, 150). Throughout the 1950s commentators found that the right to non-segregated transportation, as ordered by the Court, was "systematically frustrated" (Lusky 1963, 1168; Dixon 1962a, 213; Wasby et al. 1977, 268–70). These findings were corroborated by the ICC in its preparatory work for the September 1961 regulations. The Commission found that

"in a substantial part of the United States many Negro interstate passengers are subjected to racial segregation in several forms. On vehicles they continue to be subjected to segregated seating based on race. In many motor passenger terminals, Negro interstate passengers are compelled to use eating, restroom and other terminal facilities which are segregated . . ." (quoted in Dixon 1962a, 222)

As late as July 1964, the Southern Regional Council complained that "not yet, for example, has the federal government through its prosecution been able to end finally defiance of the ICC ruling of 1961 regarding bus terminal segregation" (Southern Regional Council 1964, 20). The record seems clear that until the ICC, with administration backing, issued strict guidelines and decided to enforce them, little was accomplished in desegregating transportation.

After 1961, and particularly after the passage of the Civil Rights Act of 1964 (public accommodations sections), segregation in transportation essentially was ended. As with the other fields, this comparison shows that desegregation in transportation was the result not of court action but of the action of the other branches of the federal government.

Accommodations and Public Places

Court, Congressional, and Executive Branch Actions

The actions of all branches of the government were limited in ending segregation in accommodations and public places. However, the Court did act early to ban segregation in public places. A series of cases following *Brown* in the 1950s made clear that its command extended to public recreation areas and private restaurants in public buildings such as courthouses.²⁹ By 1961, this latter holding was extended to apply to virtually any private concern operating on public property. Thus, in *Burton v. Wilmington Parking Authority*

29. For case citations, see the introduction to part I.

(1961), segregated service by a private restaurant situated in a public parking garage and operating under a lease from the Parking Authority was held to be state action violative of the Fourteenth Amendment. The Court also banned segregated service for passengers in interstate commerce in *Boyn顿* (1960). However, these cases did not reach private restaurants and hotels which did not operate in buildings owned by states. The Court entered this area by way of the sit-in cases (discussed in greater detail in chapter 4).

Starting in February 1960 in Greensboro, North Carolina, and quickly spreading throughout the South, sit-ins involved mostly black individuals entering private stores that discriminated against blacks (usually by segregating lunch counters), requesting service, and typically refusing to leave until served. The sit-in demonstrators were often arrested and invariably convicted by state courts. However, the convictions were almost invariably reversed by the Supreme Court.³⁰ In reversing the convictions in such great numbers the Court made it clear that it would not allow state authorities to aid (by arresting *peaceful* demonstrators) private discrimination. Its decisions allowed the sit-in movement to continue at full force (Carter 1968, 241). Yet the Court did not unequivocally find "state action" in these cases. Such a finding (if implemented) would have made private discrimination in public places illegal by making police action to end the demonstrations state action in violation of the Fourteenth Amendment. As Grossman put it, "perhaps it could be said that never had the Supreme Court used so many cases to make so little law" (Grossman 1967, 436). In the public accommodations field, then, the Court clearly extended *Brown's* prohibition of segregation to public recreation facilities, clearly prohibited segregation in private establishments operating in public places, and clearly prohibited segregation in private restaurants regularly serving interstate travellers.

Congress and the executive branch took no action in this field until 1964. The 1957 and 1960 Civil Rights Acts did not address the issue and executive branch action independent of Congress was lacking. This changed, of course, with the 1964 Civil Rights Act, which banned racial discrimination in restaurants and accommodations affecting interstate commerce in Title II, and in public facilities in Title III. With the 1964 act, Congress made up for its past inactivity.³¹

Results and Comparison

As with transportation, here, too, comparisons must be based on impressions. And the general impression provided by commentators is that in the 30. Eighty-one sit-in cases were appealed to the Supreme Court and review was granted in 61, a whopping 75 percent (the usual rate is under 10 percent). Of these, 57 (93 percent) of the opinions favored the demonstrators or movement in one way or another. For a list of the cases, and a discussion from which the figures above are taken, see Grossman (1967).

31. The public accommodations sections of the 1964 Civil Rights Act were held constitutional in *Heart of Atlanta Motel v. U.S.* (1964), and *Katzenbach v. McClung* (1964).

areas where segregation was the law prior to court action, little desegregation was achieved until the enactment of the 1964 act. This result may partly be due to the fact that the Court did not address private discrimination in accommodations. But in areas that the Court did address, little changed until Congress acted. Some evidence for this conclusion is provided by recurring cases. For example, despite clear rulings in the few years following *Brown* that segregation of public places was unconstitutional, as late as 1963 the Court was hearing cases challenging segregation in public parks (*Watson v. Memphis* 1963; *Wright v. Georgia* 1963). That is, its earlier rulings were ignored by state officials, and blacks had been arrested and convicted for entering segregated public parks. In 1956, the Fifth Circuit held it unconstitutional, as violative of the Fourteenth Amendment, for a luncheon room in a courthouse to discriminate on the basis of race (*Derrington v. Plummer* 1956). Yet four years later, in the same circuit, sit-ins occurred at the Montgomery County (Alabama) courthouse to protest racial discrimination in services provided in the courthouse (Pollitt 1960, 323). The passage of Title III of the 1964 act finally put an end to most practices of this type.

In public accommodations and restaurants, the Court did not speak directly. Yet when it did so in the interstate travel area, as in *Boynton*, the freedom rides demonstrated the Court's ineffectiveness. And despite the Court's protection of the sit-in demonstrators,³² segregation continued. In 1961 the U.S. Civil Rights Commission found massive racial discrimination in accommodations and restaurants in the United States (USCCR, State Advisory Commissions 1961; Caldwell 1965). And in *Heart of Atlanta Motel*, the Title II test case, the Court cited evidence from Senate hearings that discrimination remained prevalent and "nationwide" (1964, 252–53). Thus, it again appears that Court action on behalf of blacks challenging segregation was ineffective in ending that segregation. Only when Congress legislated did change occur.

Housing

Court Action

Racial discrimination in housing is one of the most virulent and intratable forms of discrimination. Unfortunately, it is also prevalent throughout America. The Court's first positive contribution to ending housing segregation came in 1948 in the restrictive covenant cases (Vose 1967). Restrictive covenants are clauses in deeds restricting the conveyance of the property to certain groups, usually Caucasians. In the principal case, *Shelley v. Kraemer* 32. Sit-in demonstrators still suffered. Lusky estimates that each demonstrator needed about \$2,000 in cash for bail and fines if he or she wished to contest the sit-in conviction (Lusky 1963, 1180).

(1948),³³ the Court held that judicial enforcement of restrictive covenants constituted discriminatory "state action" prohibited by the Fourteenth Amendment. *Shelley*, procedurally important for its finding of state action, was followed by *Barrows v. Jackson* (1953) where the Court prohibited the granting of damages for the violation of a restrictive covenant, finding that awarding damages for breach of a restrictive covenant would constitute coercion by the state in violation of the Fourteenth Amendment. By 1953 the Court had removed the legal effectiveness of restrictive covenants.

The Court did not hear another housing case until 1967 when it held unconstitutional an amendment to the California constitution, adopted by referendum, prohibiting the state from acting in any way to prevent racial discrimination in the sale, lease, or rental of property. In *Reitman v. Mulkey* (1967) the Court affirmed the holding of the California Supreme Court that the amendment, in the California environment of state laws prohibiting such discrimination, would "encourage and significantly involve the State in private racial discrimination contrary to the Fourteenth Amendment" (1967, 376). The Court made clear that state action in support of housing discrimination, broadly construed, would be struck down.

The final Supreme Court case prior to the effective date of Title VIII of the 1968 Civil Rights Act was *Jones v. Mayer Co.* (1968). The Joneses were refused the purchase of a house solely on the ground that Mr. Jones was black. The Court held this discriminatory, relying on a law passed in 1866 that barred "all racial discrimination, private as well as public, in the sale or rental of property" (1968, 413). In a footnote (1968, 417 n.20) the Court noted the passage of Title VIII but pointed out that for the purposes of the case at hand it did not take effect until 1969.

The Court, then, spoke little in the housing field but did ban state enforcement of restrictive covenants and state action encouraging discrimination. Finally, in 1968, the Court came down firmly in support of open housing.

Congressional and Executive Branch Action

The history of government action in fighting housing discrimination is abysmal.³⁴ The principal government financial agencies responsible for supervising and regulating home-mortgage lenders "endorsed overt racial and ethnic discrimination in mortgage lending" (USCCR 1975d, 41) until passage of the 1968 Fair Housing Law. And since federal funds and influence "permeate the private housing market" (USCCR 1961b: 4, 4), government policies actively contributed to segregation in housing.

33. The second case, *Hurd v. Hodge* (1948), involved the District of Columbia.
34. For a brief history of government action in support of segregated housing, see USCCR (1961b: 4, 9-26).

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The executive branch finally acted in November 1962, when President Kennedy issued Executive Order 11063. The order's broad intent was to prevent racial discrimination in the sale or rental of residential property financed through federal assistance. However, its provisions only covered housing provided through mortgage insurance issued by the FHA or loan guarantees by the VA and federally assisted public housing. Housing financed by mortgage lending institutions (the great bulk of the nation's housing supply) was excluded from the coverage (USCCR 1963a, 102). Further, rather than having federal agencies affirmatively act to prevent discrimination in federally as-

35. See also *Lovin and Sons, Inc. v. Division against Discrimination* (1960, 181), where one large builder of suburban tract housing who openly discriminated admitted that he was "100 percent dependent" on government financing.

sisted housing, reliance was placed on the complaint process as the principal means of compliance (USCCR 1975d, 67). Congress entered the field in both 1964 and 1968. Title VI of the 1964 Civil Rights Act filled in some of the gaps in coverage of the executive order. However, conventionally financed housing was not affected unless it was located in urban areas. In 1968, Congress enacted Title VIII of the 1968 Civil Rights Act. Title VIII prohibited racial discrimination in the sale or rental of all housing, with a few exceptions. Its coverage extended to more than 80 percent of all housing and included conventional mortgages obtained through private lending institutions.

Results and Comparison

It is sad to report that racial segregation in housing has not been eliminated by government action.³⁶ In fact, by the 1970s it appeared to be getting worse as whites fled to the suburbs where blacks could not afford houses or were not allowed to buy in (USCCR 1975d, 13, 119–36). While a large part of the reason may be the failure of the executive branch to implement the laws it had (USCCR 1975d, 79, 171), it is apparent that Court action has had little effect. As early as 1959 the U.S. Commission on Civil Rights noted that despite the "consistent decisions of the Supreme Court," segregation in housing continued unabated (USCCR 1959, 452–53). Its 1961 report found the same lack of impact from Court action. "What the Supreme Court has declared unconstitutional when attempted through municipal zoning," the report declared, "the private housing industry practiced at will" (USCCR 1961b: 4, 16). Despite the tremendous preparation, time, energy, and money invested in the restrictive covenant cases, as sympathetic a commentator as Clement Vose was forced to conclude that their significance lay in "what went into them rather than in what came out" (Vose 1967, ix). This was corroborated by the Civil Rights Commission, which found that *Shelley* had "little real effect" (USCCR 1975d, 41, 3–4). The point here is that Court decisions prohibiting racial discrimination in housing resulted in no appreciable change in housing discrimination.

Conclusion

The use of the courts in the civil rights movement is considered the paradigm of a successful strategy for social change. The Dynamic Court view is largely based on it. Yet, a closer examination reveals that before Congress and the executive branch acted, courts had virtually *no direct effect* on ending discrimination in the key fields of education, voting, transportation, accom-

³⁶ As recently as February 1985, a nationwide study found massive racial segregation in public housing projects sheltering nearly 10 million people ("Segregation Report" 1985, 15).

3

Constraints, Conditions, and the Courts

At first glance, the finding that courts contributed virtually nothing directly to civil rights in the decade when they acted alone is baffling. After all, courts decided so much. It goes against that part of the American belief system captured by the Dynamic Court view to believe that those decisions had no direct effect. In a nation governed by laws, not people, court decisions are legally and morally binding. At second glance, in the late 1960s and early 1970s, it appears that court decisions did have important direct effects. Does this represent the rebirth of the Dynamic Court view in the midst of the Constrained Court view's apparent triumph? In this chapter, I explore these seemingly contradictory findings. In the first part of the chapter I suggest that the constraints of the Constrained Court view handily explain the lack of court efficacy in producing significant social reform in the years when courts acted alone. The second part of the chapter examines the post-1964 years, particularly 1968–72, and suggests that court effectiveness can be explained by the presence of the conditions derived from the Dynamic Court view! Thus, the chapter suggests that a more subtle understanding of the conditions under which litigation aimed at significant social reform will be effective goes far in explaining the success and failure of judicial attempts to end race-based discrimination.

Overcoming the First Constraint

Civil rights litigators were able to overcome the first constraint by slowly building precedent for change. The National Association for the Advancement of Colored People (NAACP) committed itself to a legal strategy for change early in its history. In October 1930, it hired Nathan Margold, a Harvard-educated lawyer and protégé of Felix Frankfurter, to map out a legal

^{1.} For analytical reasons, the experience of the border states is also examined in the second part of the chapter.

strategy for attacking school segregation. His report, covering 218 legal-size pages, urged a direct attack on “the practice of segregation, as now provided for and administered” (quoted in Tushnet 1987, 28). In the years following the report, the NAACP slowly put together a brilliant legal staff, including Charles Houston and Thurgood Marshall. Slowly and painstakingly, segregation was attacked. The planning that went into some of the cases was remarkable. The successful legal attack on restrictive covenants, for example, involved a concerted effort to build favorable law review commentary, garner support from respected judges dissenting in losing cases, and arrange for opinions from various interest groups (Vose 1967). In other cases, the best support from social science evidence of the day was brought to the courts’ attention. While the press of reality destroyed many possibilities imagined by the planners, and NAACP lawyers were often “doing no more than litigating the cases at the pace imposed by the litigants and the local courts” (Tushnet 1987, 43, 70), a number of precedents were created over the years of the 1930s, 1940s, and early 1950s.² The NAACP worked long and hard to create the kind of precedent and beliefs within the broader legal culture that could allow the Court to strike down segregation. And, of course, their efforts were finally vindicated by the Court in *Brown*.³

Judicial Independence

The second constraint of the Constrained Court view is the judiciary’s lack of independence (Constraint II). Supporters of the Constrained Court view maintain that the judiciary requires elite support, and that strong congressional or executive opposition to court decisions, statutory or constitutional, can result in attacks on the courts which limit what they can accomplish. There is a good deal of evidence that in the years leading up to *Brown* the Court had elite support. After *Brown*, however, that support disintegrated.

In the years leading up to *Brown*, the Court was aided by several factors. The rhetoric of the Cold War, for example (examined in chapter 5), highlighted racial discrimination as a blight on American democracy in its fight against communism. In addition, starting with *Shelley v. Kraemer* in 1948, the U.S. entered many of the cases as *amicus curiae*, essentially supporting

^{2.} These include *Missouri ex. rel. Gaines v. Canada* (1939)(law school); *Sipuel v. Oklahoma Board of Regents* (1948)(law school); *Shelley v. Kraemer* (1948)(housing); *Sweatt v. Painter* (1950)(law school); *McLaurin v. Oklahoma Board of Regents* (1950)(graduate school); *Henderson v. U.S.* (1950) (transportation).

^{3.} The NAACP was helped by a number of additional factors. Specifically, starting with *Shelley v. Kraemer* in 1948, the U.S. entered many of the cases as *amicus curiae*, essentially supporting the NAACP. Also, in *Brown*, Justice Frankfurter gave Philip Elman, the principal author of the government’s brief in the case, confidential information about his views and those of his colleagues. This information allowed Elman to tailor the government’s brief (Elman 1987; Taylor 1987, 1, 28, 29).

the NAACP. The government's presence in these cases could have suggested to the Court that decisions ordering an end to segregation would be supported by the federal government. Thus, in the years leading up to *Brown* the Court's lack of meaningful independence was overcome.

The First Decade after *Brown*

In the years following *Brown*, however, that support was withdrawn. Court decisions in free speech and subversion, criminal procedure, and, of course, desegregation, enraged many members of Congress and a concerted attack on the Court was launched. Over fifty Court-curbing bills were introduced into Congress as an alliance of segregationists, cold warriors, and right-to-work advocates teamed up to curb the Court (Murphy 1962). In the summer of 1957, a bill drafted by the Justice Department limiting the Court's opinion in *Zenka v. U.S.* (1957) was enacted and a bill removing Supreme Court jurisdiction in five areas dealing with subversion was introduced. With civil rights specifically, there was the Southern Manifesto (discussed below) and the overall lack of administrative support.

Perhaps in response, in the late 1950s and early 1960s, Court action appeared to back away from the kind of decisions that had so angered Congress.⁴ In the area of desegregation, the Court appeared to heed these attacks by avoiding major civil rights decisions until well into the 1960s. In education of 1958. After the crisis passed, there was silence again until 1963. And, of course, despite *Brown*, public schools in the South remained pristinely white, with only one in a hundred black children in elementary and secondary school with whites by 1964, a decade after the ruling. Only after there was a major change in the congressional climate with the passage of the 1964 Civil Rights Act did the Court re-enter the field. As Wasyly et al. (1977, 107) put it, after *Brown*, "either overreacting or feeling badly burned by the lesson, the justices beat an unseemly retreat from the public school education field which was to last, with a few exceptions, over a dozen years."

The same pattern appears in other civil rights areas. With housing, de-

⁴. Important cases include *Beilan v. Board of Education* (1958), upholding the discharge of a public school teacher for refusing to tell school authorities whether he had worked for a Communist organization years earlier; *Lerner v. Casey* (1958), upholding the firing of a New York City subway conductor for invoking the Fifth Amendment when asked by the city if he was currently a member of the Communist party; *Uphaus v. Wyman* (1959), and *Barenblatt v. U.S.* (1959), upholding contempt convictions for refusing to answer questions posed by a New Hampshire investigatory committee and the House Un-American Activities Committee, respectively; the *Kongsgberg v. California* (1961) and *In re George Anastaplo* (1961), upholding exclusions from the California and Illinois bars, respectively, for refusing to answer questions about political beliefs. All of these decisions reversed, either explicitly or implicitly, earlier decisions that had angered many members of Congress. For more detail see Murphy (1962); Rosenberg (1985).

Challey v. Kraemer (1948), from 1953 to 1967 the Court did not hear housing cases. Some of its refusals to hear cases, such as *Cohen v. Public Housing Authority* (1959), and *Barnes v. City of Gaithersburg* (1959), had the effect of upholding segregation. More generally, in *Rice v. Sioux City Memorial Park Cemetery* (1954), decided after *Brown*, an equally divided Court issued a *per curiam* opinion upholding a restrictive covenant limiting burial of Caucasians. In *Dawley v. City of Norfolk, Virginia* (1959), the Court refused to hear the dismissal of a case challenging segregated restrooms in a courthouse. The result, of course, was to leave the courthouse restrooms segregated. Another denial of *ceteriorari*, *In re Girard College Trusteeship* (1958), had the effect of allowing a segregated school administered by the state to remain segregated by substituting private trustees. And the Court simply avoided any anti-miscegenation cases until the 1960s because, in the words of Philip Elman, a former clerk to Justice Frankfurter and for many years in charge of the solicitor general's civil rights docket in the Supreme Court, "the timing was all wrong" (Elman 1987, 846).

The point this history makes is, I think, accessible. In the wake of congressional hostility the Court did not vigorously follow the logic and power of *Brown*. While not backtracking, and although reiterating the constitutional demand to end segregation in the opinions it did issue, it avoided cases and sidestepped issues. Only after the passage of the 1964 Civil Rights Act did the Court re-enter the field with vigor.

Political Leadership

For courts to effectively produce significant social reform, Constraint III suggested, the active support of political elites was necessary. It was condemned that courts, lacking the power of "either the sword or the purse," were uniquely dependent upon the actions of political leaders. Without support from them, the Constrained Court view claimed that little would happen. And that is precisely the case in the decade following *Brown*.

National Leaders

On the executive level, there was little support for the Court until the Johnson presidency. President Eisenhower was one of America's most popular presidents. A World War II hero, he was reputedly offered the presidential nomination of both parties. Yet he steadfastly refused to commit his immense popularity or prestige in support of desegregation in general or *Brown* in particular. Only once in his eight years as president did Eisenhower take executive action to desegregate schools. That was in January 1954 when he issued an executive order banning segregation in schools located on military bases. Further, with the exception of the Little Rock crisis, the president did not involve himself or the executive branch in efforts to achieve compliance

with court-ordered desegregation. With one exception,⁵ the Eisenhower Justice Department intervened in desegregation suits as a friend of the court only when specifically invited or asked by the court. In general, President Eisenhower did little. As Roy Wilkins, executive secretary of the NAACP put it, "if he had fought World War II the way he fought for civil rights, we would all be speaking German today" (Wilkins 1984, 222).

President Eisenhower never publicly committed himself to support the *Brown* decision.⁶ As rumors spread that he opposed the decision, he did nothing to counter them.⁷ When asked in a news conference in 1958 if he had endorsed a slower approach to school desegregation than the Court's, he characteristically refused "to give an opinion about my conviction about the Supreme Court decisions." He went on to say:

I might have said something about "slower," but I do believe that we should—because I do say, as I did yesterday or last week, we have got to have reason and sense and education, and a lot of other developments that go hand in hand as this process—if this process is going to have any real acceptance in the United States. (News conference of August 27, 1958, cited in Peltason 1971, 48)

As Peltason wittily put it, Eisenhower's position was: "Thurgood Marshall got his decision, now let him enforce it" (Peltason 1971, 54). Thus, it is fair to conclude that President Eisenhower and his administration gave little support to school desegregation in particular, and civil rights in general.⁸

President Kennedy was openly and generally supportive of civil rights matters until pressured by events to do so. The administration's "most visible and most significant civil rights activities were responsive, reactive, crisis-managing, violence-avoiding" (Navasky 1977, 97). It did not rank civil rights as a top priority⁹ and President Kennedy, like Eisenhower before him, was "unwilling to draw on the moral credit of his office to advance civil rights" (Navasky 1977, 161). For example, the response to the Freedom Rides (discussed in chapter 4) was not to protect American citizens doing nothing more than attempting to sit where they wished on Greyhound and Trailways buses and to use non-segregated terminal facilities, as mandated by Supreme Court rulings. Rather, Attorney General Robert Kennedy asked that the rides be

5. The Justice Department voluntarily intervened on behalf of the local school board in Hoxie, Arkansas, in 1956.

6. In October 1963, nearly three years after he left office, Eisenhower for the first time publicly endorsed Brown as "morally and legally correct" (quoted in Sarrant 1966, 50).

7. Burk (1984, 192) reports that during the 1956 campaign Eisenhower told Emmet John Hughes, "I am convinced that the Supreme Court decision set back progress in the South at least fifteen years." He also told Arthur Larson, "I personally think that the decision was wrong."

8. For other examples of Eisenhower's refusal to back civil rights, and for further discussion, see Lichtenberg (1979, 121–26); Navasky (1977, 294).

9. As late as January 1963, President Kennedy stated that civil rights was not among his top priorities (Harding 1979, 59; Sorenson 1965, 471; Fleming 1965, 930).

because the president was going to Europe on "a mission of great importance" and wanted to avoid actions that brought "discredit on our country" (quoted in Goldzman 1961, 5). No attempt was made to involve the FBI in the kind of apprehension-and-arrest actions for civil rights violations that was common with other violations of law. Indeed, most civil rights activists in the South came to view the FBI as, at best, passive and, at worst, an ally of racist Southern police forces (Teachout 1965, 59).¹⁰ The only "major" action taken by the Kennedy administration in school desegregation was a decision by the U.S. Department of Health, Education, and Welfare (HEW) to cut off funds to local school districts that forced children living on military bases to attend segregated public schools. The administration refused to extend the ruling to cover students living off military bases (Orfield 1969, 30, 31). And HEW delayed until 1962 before taking any action to ban segregation programs it financed (Orfield 1969, 52). Although candidate Kennedy had promised that an active president "could integrate all federally assisted housing with a stroke of the Presidential pen," it took over a year and a half and an "Ink for Jack" campaign that flooded the White House with ink bottles before a "watered-down, non-retroactive order" was issued (Navasky 1977, 97). Like the Eisenhower administration, the Kennedy administration rarely went to court in school cases. In 1963, the U.S. Commission on Civil Rights (USCCR) reported the Department of Justice entered only one school desegregation case (USCCR 1967, 42). Caution marked the Kennedy approach.

In terms of legislation, the Kennedy administration's approach to civil rights was marked by caution as well. "The one thing Kennedy did not want," the Whalen report, "was civil rights legislation" (Whalen 1985, 15). The bill Kennedy finally introduced in 1963 was weaker than even Eisenhower's weak 1957 bill, and the administration fought attempts to strengthen the bill. As Dr. Martin Luther King, Jr., told an interviewer, "had he [Kennedy] lived, there would have been continual delays, and attempts to evade it at every point, and water it down at every point" (Branch 1988, 922). It wasn't until the violence at Birmingham and the resulting political pressure that Kennedy became more supportive of civil rights legislation. Until June of 1963 with the proposal that eventually became part of the 1964 Civil Rights Act, President Kennedy acted cautiously in his support of civil rights.¹¹

10. It must not be forgotten that Dr. King's phone was tapped and that the FBI attempted to break up his marriage, drive him insane, and destroy his leadership. Eugene Patterson, as editor of the *S. Petersburg Times* (Florida), reports that an FBI agent twice pressured him to print material from FBI wiretaps that allegedly recorded King's involvement in extra-marital sexual affairs. According to Patterson, the FBI approached other Southern editors as well (Patterson in Raines 1977, 368–70). See, generally, Garrow (1981). It turns out, too, that the FBI kept a confidential file on members of the Supreme Court. It wiretapped or monitored conversations involving four justices, including Chief Justice Warren, and employed informants on the Court staff ("F.B.I. Kept Secret File on the Supreme Court" 1988, 14).

11. The Voter Education Project is not an exception to this characterization. Although the administration was instrumental in channelling approximately \$870,000 to civil rights groups to

Brown and its progeny were not supported by other national leaders until late in the Kennedy administration. In March 1956, Southern members of Congress, virtually without exception,¹² signed a document entitled a "Declaration of Constitutional Principles," also known as the Southern Manifesto. Its 101 signers attacked the *Brown* decision as an exercise of "naked power" with "no legal basis." They pledged themselves to "use all lawful means to bring about a reversal of this decision which is contrary to the Constitution and to prevent the use of force in its implementation" (*Cong. Rec.* 12 March 1956: 4460 (Senate), 4515–16 (House)). This unprecedented attack on the Court demonstrated to all that pressure from Washington to implement the Court's decisions in civil rights would not be forthcoming.

State Leaders

If national political leaders set the stage for ignoring the courts, local politicians acted their part perfectly. A study of the 250 gubernatorial candidates in the Southern states from 1950 to 1973 revealed that after *Brown* "ambitious politicians, to put it mildly, perceived few incentives to advocate compromise" (Black 1976, 299). This perception was reinforced by Arkansas Governor Orval Faubus's landslide reelection in 1958, after the events in Little Rock, demonstrating the "political rewards of conspicuously defying national authority" (Black 1976, 299). Throughout the South, governors and gubernatorial candidates called for defiance of court orders.¹³ Among the most outspoken, although there was no dearth of candidates, was George Wallace of Alabama. In his inaugural address in January 1963, Governor Wallace declared: "I draw the line in the dust and toss the gauntlet before the feet of tyranny and I say segregation now, segregation tomorrow, segregation forever" (quoted in USCCR 1969, 2). On various occasions he characterized federal judges as "a bunch of atheistic pro-Communist bums" and "bearded beatniks and faceless, spineless, power-hungry theorists and black-robed judicial anarchists." Not to be outdone, Governor Ross Barnett of Mississippi pledged that "Ross Barnett will rot in a federal jail before he will let one nigra cross the sacred threshold of our white schools" (quotes from Sarratt 1966, 7). Any individual or institution wishing to end segregation pursuant to court

increase black registration in the South, the apparent aim was to end civil rights demonstrations and marches that received publicity and pressured and embarrassed the administration. Indeed, the money was expressly not to be used for direct action, creating great debate among some groups over whether or not to join the project. For confirmation of this interpretation see Branch (1988, 478–79); Carson (1981, 38); Forman (1972, 264–65, 269); Haines (1988, 155, 156); Meier and Radwick (1973, 173–75); Navasky (1977, 21); Watters and Cleghorn (1967, 46–47).

¹² The only Southern senators not to sign the Manifesto were Johnson of Texas and Kefauver and Gore of Tennessee. And two North Carolina congressmen who refused to sign, Charles B. Deane and Thurmond Chatham, lost their seats.

¹³ For a brief review of their actions, see Sarratt (1966, 1–27). For a state-by-state discussion of candidates and campaigns, illustrated with appropriate quotations, see Black (1976, chapters 4, 5, 7, 8).

e.g., that is, to obey the law as mandated by the Supreme Court, would incur wrath of state political leaders and quite possibly national ones. The best could hope for was a lack of outright condemnation. Political support for segregation was virtually non-existent.

At the prodding of state leaders, state legislatures throughout the South passed a variety of pro-segregation laws. By 1957, only three years after *Brown*, at least 136 new laws and state constitutional amendments designed to preserve segregation had been enacted (Orfield 1969, 17–18). These laws, and hundreds of similar ones passed after 1957, are categorized and presented in Appendix 4. As the Southern saying went, "as long as we can legislate, we can segregate" (Rodgers and Bullock 1972, 72).

In the field of education, a variety of laws were passed. Virginia, at the behest of the Byrd machine that ran state politics, achieved "some prominence as a showplace for segregation devices" (USCCR 1963c, 41). It closed schools, operated a tuition grant scheme, suspended compulsory attendance laws, and built private segregated schools (Gates 1962; Muse 1961). Other states were not far behind, and their creativity in finding ways to avoid the law was seemingly inexhaustible. In Louisiana a law was passed denying promotion or graduation to any student of a segregated school. Georgia deprived policemen of their retirement and disability if they failed to enforce the state's segregation laws. Mississippi simply made it illegal to attend a desegregated school (Sarratt 1966, 39). In 1960–61 alone, the Louisiana legislature met in one regular and five extraordinary sessions to pass ninety-two laws and resolutions to maintain segregated public schools (Sarratt 1966, 30).

To expect individuals and institutions to follow court orders, even Supreme Court orders, in the face of this kind of hostility is to expect the impossible.¹⁴ A separate tack taken by state legislatures was to attack the NAACP, seeking to prevent it from operating within the state. Every Southern state except North Carolina adopted anti-NAACP laws (American Jewish Congress 1957). Some states merely went after members, forbidding them to hold state or local government jobs (South Carolina) or to teach (Louisiana). One of the cruder attacks came from Texas, where the state produced documents purporting to be a contract between the NAACP and Sweat (the plaintiff in *Sweat v. Painter*) binding the NAACP to pay Sweat \$11,500 for the right to use him as the principal plaintiff in a suit against the University of Texas (Murphy 1959b, 376). Other states required the NAACP to turn over its membership lists to state authorities. Still others set up little un-American activities committees and attempted to link the NAACP with communism, as well as obtain membership lists. A final set of attacks involved refurbishing the

¹⁴ Action was also taken on the local level. A particularly outrageous example comes from Drew, Mississippi, where an ordinance was enacted requiring that all civil rights workers in Drew at dusk be taken into "protective custody" (i.e., jailed) for the night. The ordinance was enacted and implemented during the summer of 1964 (Wilson 1965).

common-law crimes of chancery, barratry, and maintenance.¹⁵ The aim of these laws was to prevent NAACP lawyers from advising clients of their rights and providing free counsel. Action against the NAACP hampered its recruiting and fund-raising and forced it to spend precious funds and energy to defend itself. Alabama, for example, kept the NAACP in court for eight years over its right to operate in the state (Birky and Murphy 1964, 1019). During the course of the litigation NAACP membership in Alabama dropped from 27,309 to 29, and its estimated loss of revenue, excluding court costs, was \$200,000 (Scheingold 1974, 174).

A third type of legislation passed by state legislatures involved statutes non-discriminatory on their face but intended to be administered in a discriminatory fashion. As the first generation of facially discriminatory laws were struck down by the federal courts, Southern legislatures increasingly turned to this tactic (Lusky 1963, 1170–71). While courts might find discrimination here, too, the burden of proving that the law was administered in a discriminatory manner rested on the plaintiff. And if the application of a law was found discriminatory in one jurisdiction within a state, that holding might not be binding on the rest of the state. By passing facially neutral statutes and leaving their administration to local officials, state legislatures could ensure that segregation would be preserved.

One example of this comes from the field of higher education. As was discussed earlier, a series of Supreme Court decisions required that qualified blacks be admitted to graduate and professional schools in their native states. If outright segregation didn't work, the states could rely on segregated elementary and secondary schools to limit the pool of potential qualified black applicants, and on newly established "neutral" health, safety, moral, and age requirements to maintain segregation. Thus, it was easy to create barriers to black applicants through denial of admission based on lack of qualification, or through expulsion after admittance. In this regard, early black applicants such as Gaines (Missouri), Sweat (Texas), Hawkins (Florida), Frazier (North Carolina), and Lucy (Alabama), all of whom were ordered admitted by the Supreme Court, were either never admitted, admitted and promptly expelled, or admitted and flunked out. Similarly, after six years of "desegregation" at the University of Texas Law School, fewer blacks were enrolled than in the first year of desegregation (Parham 1957, 177).

Voting provides another area where this type of action was successfully employed. Traditionally, good character and literacy tests, neutral on their face, were administered in a discriminatory fashion to ensure that blacks

¹⁵ These common-law crimes seek to insure that only parties genuinely aggrieved are involved in litigation. They prohibit, respectively, a "bargain by a stranger with a party to a suit" for money, "frequently exciting and stirring up quarrels and suits," and "officious intermeddling in a suit which in no way belongs to one." See *Black's Law Dictionary* (1979).

and not register. The U.S. Civil Rights Commission also found the following discriminatory applications of non-discriminatory laws in the voting field equivalent: omission of registered blacks from voter lists; exclusion of blacks from precinct meetings; failure to provide sufficient voting facilities in black wards; refusal to assist or permit assistance to illiterate black voters; inaccurate or erroneous instructions to black voters; disqualification of blacks' ballots on technical grounds; denial of equal opportunity to vote absentee; discriminatory location of polling places; segregated voting facilities; closing registration offices when blacks tried to register; discriminatory provision of mobile voting units. When blacks attempted to run as candidates, discriminatory administration of neutral laws resulted in the following: abolition of the office; extension of the term of the white incumbent; substitution of appointment for election; increase in filing fees; raising of requirements for independent candidates; increase in property qualifications; withholding information on how to qualify; withholding or delaying required certification of nominating petitions. And finally, of course, there are the time-honored practices of gerrymandering, county consolidation, switching to at-large elections, and the like, which all can act to deprive blacks of any political representation (USCCR 1968, 1975a). As Lawson puts it, "sadly for the blacks who expected political freedom [from court decisions] . . . they found instead the familiar surroundings of second-class citizenship" (Lawson 1976, 115).

The lack of political leadership portrayed in the last few pages makes it no wonder that the courts contributed little directly to civil rights in the years they acted alone. The only way to overcome such opposition is from a change of heart by electors and by national political leaders. Thus, when the Congress passed the 1964 Civil Rights Act and the 1965 Voting Rights Act, and the executive branch intervened, change occurred. Without that intervention, it was an "unfair contest" (Peltason 1971, 45), with black plaintiffs and court decisions destined to be on the losing side. Without leadership at the top, the courts are no match for national, state, and local officials (USCCR 1975b). The tools available to political leaders in the United States system mean that without support from the leaders change will not occur.

This structural constraint on court effectiveness has been rediscovered in recent years. Justice Clark, speaking of the Court, remarked, "we don't have money at the Court for an army and we can't take ads in the newspapers, and we don't want to go out on a picket line in our robes" (quoted in Kluger 1976, 706). An unidentified Justice was reported to have explained the Court's refusal to hear an anti-miscegenation case (*Naim v. Nairn*) in the year following Brown with the following statement: "One bombshell at a time is enough" (quoted in Washby et al. 1977, 141). Social scientists, too, have rediscovered that Court decisions are not self-implementing (Becker and Feeley 1973;

Johnson and Canon 1984; Wasby 1970). And finally, even some lawyers are beginning to realize that winning a case is only the first step, and often the easiest, in effecting change (Carter 1980, 21–28). The courts depend on the other branches for support. When they don't receive that support, as in civil rights until 1964, their decisions will not be implemented, given any degree of opposition. For a decade after *Brown*, Constraint III prevented the legally victorious litigators from achieving reform.

Social and Cultural Constraints

Another aspect of the Constrained Court claim is that court decisions require popular as well as elite support to be successfully implemented. Law and legal decisions operate in a given cultural environment, and the norms of that environment influence the decisions that are made and the impact they have. In the case of civil rights, decisions were announced in a culture in which slavery had existed and apartheid did exist (Myrdal 1962; Woodward 1974). Institutions and social structures throughout America reflected a history of, if not a present commitment to, racial discrimination. Cultural barriers to civil rights had to be overcome before change could occur. And courts, the Constrained Court view suggests, do not have the tools to do so. This is well illustrated in the decade after *Brown*.

Private Groups

One of the important cultural barriers to civil rights was the existence of private groups supportive of segregation. One type, represented by the Ku Klux Klan, White Citizens Councils, and the like (described in McKay 1956, 1062–63 n.423; Anthony 1957), existed principally to fight civil rights. Either through their own acts, or the atmosphere they helped create, violence against blacks and civil rights workers was commonplace throughout the South. Spectacular cases such as the murder of Medgar Evers, the attacks on the Freedom Riders, the Birmingham church bombing that killed four black girls, and the murder of three civil rights workers near Philadelphia, Mississippi, are well known. But countless bombings and numerous murders occurred throughout the South (Peltason 1971, 5; Southern Regional Council 1964, 7–17). During the summer of 1964 in Mississippi alone there were 35 shootings, 65 bombings (including 35 churches), 80 beatings, and 6 murders (Garrow 1978, 21; McAdam 1988, 257–82). It was a brave soul indeed who worked to end segregation or implement court decisions.

Another tactic used by white groups to fight civil rights was economic coercion. A classic example comes from Yazoo City, Mississippi, in the summer of 1955. There, the White Citizens Council, as a “public service,” took out a newspaper advertisement listing the names of the fifty-three blacks who signed a petition supporting desegregation of the city’s schools. They also

printed their names on placards and posted them in every store in town and in the cotton fields. Of course not all of the South was as severely segregated as the Mississippi delta, but since whites controlled the economy throughout the South, this sort of blacklisting was extraordinarily effective (Sarrant 1966, 501–2; Peltason 1971, 58, 60).¹⁶ In fact, so effective was this sort of intimidation that as late as 1961 *not a single* desegregation suit in education had been filed in Mississippi (Peltason 1971, 99). And economic intimidation and coercion were applied to all kinds of civil rights actions, including, for example, attempting to register to vote (USCCR 1959, 55–106; USCCR 1961b, vol. 1; USCCR 1963a, 15).

More sophisticated forms of intimidation were also practiced by white groups. In Louisiana, for example, the Association of Citizens’ Councils published a pamphlet entitled “Voter Qualification Laws In Louisiana. The Key To Victory In The Segregation Struggle.” It noted that Louisiana was “in a life and death struggle with the Communists and the NAACP to maintain segregation” and instructed registrars on how to prevent blacks from registering. It was used by state officials to instruct registrars in 1959 (USCCR 1959, 101).

A totally different kind of private group resisted civil rights by simply ignoring court decisions and going about their business as if nothing had changed. Public carriers, for example, even when owned by non-Southerners, looked to the “segregationist milieu” in which they operated and thus took a “narrow view of desegregation decrees, implementing them minimally, if at all” (Barnes 1983, 196, 195). A principal example is real estate brokers and boards. At one point, for example, the National Association of Real Estate Brokers advised its members not to pay any attention to fair-housing laws (Westin 1964, 37). Local organizations, such as the Gross Pointe Brokers Association (Michigan) refined their discrimination to a complex point system. A broker who violated this system, by following the law, was required to forfeit his commission and was liable to expulsion (USCCR 1961b: 4, 126). Indeed with real estate brokers the U.S. Commission on Civil Rights found that discrimination was “often the rule rather than the exception” (USCCR 1961b: 4, 123) and that the “forces promoting discrimination in housing hold powerful” (USCCR 1975d, 168).

A related example is the tremendous growth of all-white private schools in the South after *Brown* (USCCR 1967, 70–79). In Louisiana, for example, there were sixteen white private schools in existence prior to *Brown*, but in the decade or so after *Brown* fifty-three new all-white private schools were opened (USCCR 1967, 71–2).¹⁷ While the creation and existence of all-white private schools does not, in most cases, deny blacks the opportunity to have a desegregated school, two of the fifty-three signers withdrew their names from the petition.

16. All but two of the fifty-three signers withdrew their names from the petition.
17. I assume these figures do not include Catholic schools.

gregated public education, it does add another segregated institution to society. The clear impetus behind the creation of private schools was to preserve segregation.

Finally, and perhaps most poignantly, even the organized legal profession attacked the Court. The attack came not only from the American Bar Association, from which Chief Justice Warren resigned in disgust, but also from both the National Association of State Attorneys General and the Conference of State Chief Justices. Although these attacks on the Court were not limited to its civil rights decisions, as Pollak points out, they were "precipitated by the school segregation decisions" (Pollak 1957, 433). It is clear that there were strong cultural barriers to ending desegregation.¹⁸

Local Action and Resistance

The cultural biases against civil rights that pervaded private groups also pervaded local governments. Court-ordered action may be fought or ignored on a local level, especially if there is no pressure from higher political leadership to follow the law and pressure from private groups not to. It was common to find that where bus companies followed the law and removed segregation signs in terminals, state and local officials put them back up (Dixon 1962, 213–14). Similarly, little desegregation of public facilities was achieved until pressure was brought to bear, usually through demonstrations (Rodgers and Bullock 1972, 57). In education, as has been demonstrated, local school officials took no action to obey court orders until the pressure from Washington grew strong enough. In fact, in the five Deep South states, as a matter of principle no school-board member or superintendent openly advocated compliance with the Supreme Court decision (Sarrant 1966, 99–100). And despite *Cooper v. Aaron*, and the sending of troops to Little Rock in 1957, as of June 1963, only 69 out of 7,700 students at the supposedly desegregated, "formerly" white, junior and senior high schools of Little Rock were black (Brink and Harris 1963, 41).¹⁹

Local resistance to civil rights has been particularly effective in maintaining segregated housing. Through the use of the power of eminent domain, zoning and re-zoning, local review, and site location, local officials and individuals have been able to continue segregation (USCCR 1975d,

18. The failure of many national leaders supportive of civil rights to recognize this point highlights their naive view of the role of courts. Justice Frankfurter, in a letter to a friend around the time of *Cooper v. Aaron* (1958), wrote: "it is the legal profession of the South on which our greatest reliance must be placed . . . because the lawyers of the South will gradually realize that there is a transcending issue, namely respect for law as determined so impressively by a unanimous Court in construing the Constitution of the United States" (letter to C.C. Burlingham, quoted in Yudof 1981, 450).

19. Thirty-two years after Eisenhower acted, problems still remained. In 1989 the predominantly black Little Rock school district settled (for \$129 million) its lawsuit against the state and two mostly white suburban school districts. The money is to be used for desegregation programs (Daniels 1989, 4).

0–71; 1961b: 4, 132–38). Even if all these maneuvers fail, the time and cost involved makes the effort not worthwhile for the builder. As one builder testified:

We as builders are interested in selling homes, but we cannot possibly go through the extraordinarily expensive process of resistance from some local communities in the cases where we indicate that we are willing to sell regardless of race, color, or creed. (USCCR 1961b: 4, 138)

While this may be less true today in terms of housing intended for the general market, it certainly holds for low-cost public housing. Public resistance, supported by local political action, can almost always effectively defeat court-ordered civil rights.

A final cultural barrier to civil rights involves intensity of feeling. The greater the proportion of blacks in a given area, the stronger seems to be the discriminatory intent of white political officials. Orfield found that congressional resistance to civil rights was most bitter among Southern members of Congress whose districts had high proportions of blacks (Orfield 1969, 278). Similarly, Vines (1964) found that the higher the percentage of blacks in federal judicial districts in the South, the less likely were court decisions to support them. These findings suggest that where civil rights violations are massive, as in regions with large black populations, local white resistance will be strong. Where there is more to lose by the coming of civil rights, those who prospered from segregation will fight hard to maintain it. Thus, where segregation and denial of rights is rampant, all the barriers to effective court-ordered change are intensified.

Finally, it is important to note that poverty and low levels of education make individuals less likely to be aware of court-declared rights and to be willing and able to fight for them. Poor blacks, economically dependent on the whites around them, were in no position to assert their court-ordered rights. Only through massive government intervention could such rights be vindicated. For example, Matthews and Prothro found that the low levels of black registration in the South were partly explained by poverty and lack of education (Matthews and Prothro 1963a, 24, 43; 1963b). No court decision striking down discriminatory registration laws could change that. Only political action such as federal intervention and voter registration campaigns made a difference.

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

The Structural Constraints of Courts

In the preceding pages I have discussed political leadership and cultural and social beliefs as obstacles to court-ordered civil rights. The Supreme

Court, acting alone, could not hope to overcome these constraints. However, they are not specific to courts. They exist as barriers to all change, including that produced by segments of state or national government. I turn now to the particular constraints built into the American judicial system, constraints that made courts singularly ineffective institutions for successfully producing direct change in civil rights.

The Constraints of the Legal Bureaucracy

Proponents of the Constrained Court view suggest that specialization, expertise, and political connections are lacking in courts and are crucial for successful implementation of significant social reform. Given the political and social opposition to civil rights, and the complexity of the issue, the need for such knowledge and skills was high. It appears, however, that courts are not equipped to deal with the complex issues involved in areas such as civil rights. On the one hand, many issues involve a sophisticated understanding of a whole range of social processes. In education these might include the learning process itself, the role of families, and the community view of the schools. As one commentator supportive of civil rights has noted, the courts have "lacked an awareness of the complex, multifaceted processes of education" and have "disregarded the development of children and the perspectives of families and communities" (Lightfoot 1980, 4). Court decisions, then, may not have been implemented or, if implemented, may not have worked, because they were not appropriate to the problem.

Similarly, judges may not be aware of, or able to deal with, the political trade-offs necessary to implement any public policy. Judges are not supposed to telephone politicians, school administrators, local businessmen, or others, and cut a deal. Their decisions, therefore, are likely to overlook political realities that are crucial for implementation. In this regard, the U.S. Commission on Civil Rights found that community preparation and participation in planning, key elements to successful school desegregation, were utterly lacking in court-ordered desegregation plans (USCCR 1959, 309–10). Judge Brown, writing on the record after the issuance of the first HEW guidelines implementing Title VI, summed up these problems:

These executive standards, perhaps long overdue, are welcome . . . [without them] the Federal judge [was put] in the middle of school administrative problems for which he was not equipped. . . . By the 1964 Act and the action of HEW, administration is largely where it ought to be—in the hands of the Executive and its agencies with the function of the Judiciary confined to those rare cases presenting justiciable, not operational, questions. (*Price v. Dennis* *In-Dependent School District* 1965, 1013–14)²⁰

20. Judge Wisdom, writing in 1966, concurred, noting that "most judges do not have sufficient competence—they are not educators or school administrators—to know the right questions, much less the right answers" (*U.S. v. Jefferson County Board of Education* 1966, 635).

Delay

The judiciary, like other large political institutions, is afflicted with many bureaucratic problems. However, as proponents of the Constrained Court new argue, the constraints imposed by the structure and process of the legal bureaucracy make courts a singularly ineffective institution in producing significant social reform. Among these constraints is the inability to respond quickly. The time between the initiation of a suit, the exhaustion of all appeals, and the issuance of a final decree can be years. This is no less the case when judges act in good faith. Delay is built into the judicial system and it serves to limit the effectiveness of courts.

Delay occurs for many reasons. One is overloaded court dockets. During the 1950s and 1960s, the Fifth Circuit, responsible for most of the South, had the nation's most congested dockets (Note 1963, 101). Appeals to that court were naturally delayed. Second, the judicial system allows for many appeals and will bend over backwards to hear a claim.²¹ Numerous appeals can serve as a tactic to delay final decision. Another reason for delay is the complicated nature of many civil rights suits. Questions of whether the suit is properly a class action, whether local remedies have been exhausted, or whether a different court is the more appropriate forum can keep cases bouncing around lower courts for years. Even if a lower court enjoins certain actions as discriminatory, it may stay the injunction pending appeal. Fourth, higher courts rarely order action. Normally, they remand to the lower court and order it to act. The time involved here, even assuming good faith, can add up. Finally, if a final order does not have a direct effect, if the discrimination is not remedied, the plaintiff's only judicial remedy is to return to court and re-start the process.

Opponents of civil rights were well aware of the inherent delays of the judicial system. A popular Southern saying, "litigate and legislate," shows awareness of the slowness of judicial proceedings (quoted in Rodgers and Bullock 1972, 72). Soon after *Brown* was decided, the attorney general of Mississippi (later governor), Coleman, remarked: "We could keep the Court busy for years" (quoted in Sarratt 1966, 181). And years later Judge Wisdom's comment that "we shall not permit the courts to be used to destroy or dilute the effectiveness of the Congressional policy expressed in Title VI,"

21. The story of Clovis Green is instructive. A prisoner most of his adult life, he claims to have filed over 700 appeals. The Supreme Court acknowledged this aspect of the judicial system by finally refusing to waive his court costs (Greenhouse 1983, 10).

(*U.S. v. Jefferson County Board of Education* 1966, 859–60) bears witness to this structural reality. Even if political leaders had no intention of following adverse court decisions, the confrontation could be postponed for years.

Examples of delay in final judgments abound.²² In higher education, the average case took about two and a half years from initial claim to final judgment (USCCR 1961a, 269). Final judgment, of course, did not guarantee admission or, later, graduation. In elementary and secondary education, delays were legion. Among the most noteworthy were *Briggs v. Elliott* and *Davis v. Prince Edward County*, two of the original school desegregation cases, commenced in 1951 and 1952 respectively, which were still being litigated in 1963. Other cases noteworthy for seemingly interminable litigation include *Singleton v. Jackson Municipal Separate School District*, in which approximately thirty opinions and orders were issued over a seven-year period, and *U.S. v. Montgomery County Board of Education* (1969), in which there were seventy-seven docket entries between 1964 and 1969. And the U.S. Commission on Civil Rights found that delay in reaching final decisions in the courts was a major reason for the failure to end discrimination against blacks in the field of voting (USCCR 1963a, 25). Perhaps the most remarkable example is the eight-year effort of Alabama to incapacitate the NAACP. While Alabama eventually lost, it managed to effectively paralyze the NAACP in Alabama for eight crucial years.

In sum, delay is built into the judicial system. Even when all parties act in good faith, judicial proceedings can drag on for years. This structural constraint of courts made them particularly poor institutions for directly affecting civil rights.

Discretion, Interpretation, and Bias

The American judicial system vests considerable discretion in lower-court judges. Only rarely do appellate court judges issue final orders. In almost all cases, they remand to the lower court for issuance of the final decree. This leaves lower-court judges with a great deal of discretion. Review can be gained only on appeal, which further delays final action. This pattern is particularly pronounced in federal-state court relations. Studying this relationship, Beatty found that “one of the most unique characteristics of our dual judiciary is the ability of state courts to avoid, delay or evade the mandates of the Supreme Court” (Beatty 1972, 260). The inability of appellate courts to readily review lower-court action was a principal tool used by some lower courts to delay civil rights (Note 1963, 100).

Discretion is, of course, subjective and it is often difficult to characterize abuses. Different judges react differently to similar cases and this is inevitable. While there is some awareness of the role of discretion in courts, its

²². Note (1963, 94 nn.36–39); Note (1966, 1087–90 nn.107–14); *U.S. v. Jefferson County Board of Education* (1966, 850 n.51).

existence is more often denied or hidden. Haines, for example, writes of New York City's efforts to prepare annual comparisons of how different judges handled similar cases in 1914 and 1915: “The results showing to what extent justice is affected by the personality of the judge were so startling and so disconcerting that it seemed advisable to discontinue the comparative tables of the records of the justices” (Haines 1922, 96). Yet at times the abuse of discretion becomes so obvious that there is no hesitancy to so characterize it.

Many lower-court judges systematically and continually abused their discretion to thwart civil rights. At the height of the 1960 New Orleans school crisis, Congressman Otto Passman, addressing the Louisiana legislature, summed up lower-court reactions: “It is not pleasant to contemplate, but it appears to be true that at least some federal judges take their orders directly from the Supreme Court” (quoted in Sarratt 1966, 246). The awareness of Southern segregationists to fight to vest control of civil rights in lower-court judges. Arguing for South Carolina in *Brown II*, S. E. Rogers asked for district court control, admitting in response to questions that this would result in no desegregation, “perhaps not until 2015 or 2045” (quoted in Peltason 1971, 16). Another attorney, out of court, commented that “local judges know the local situation and it may be 100 years before . . . [civil rights is] feasible” (quoted in Sarratt 1966, 200). On the state-federal level, state court evasion of Supreme Court mandates was “at least twice as high during the 1960s as in either the 1930s or the 1940s” (Beatty 1972, 283). In areas such as civil rights where feelings run high, the discretion accorded lower-court judges virtually insures its abuse.

There are many ways in which discretion can be abused (Murphy 1959a). One, of course, is delay, referred to earlier. Another is outright refusal to follow the law. Lower-court judges routinely upheld statutes designed to evade compliance with Supreme Court mandates. As late as 1966 Judge Scartlett of the Federal District Court for the Southern District of Georgia attempted to reverse *Brown* by declaring that blacks were not intelligent enough to go to school with whites (discussed in *Stell v. Board of Education for City of Savannah* 1967). A third way was to read the cases as narrowly as possible. In *Briggs v. Elliott*, for example, the federal district court held: “The Constitution, in other words, does not require integration. It merely forbids discrimination” (1955, 777). While this was a technically correct reading of *Brown*, its impact was to allow segregation to continue as long as defendants could allege that they were not discriminating, that segregation resulted from the “free choice” of all concerned. Another abuse of discretion, discussed above, was to find that local conditions prevented implementation of the law at the present time. One way in which this was done was for private groups to encourage violence, or at least not discourage it, and then use the violence to show that conditions were not appropriate for civil rights (Peltason 1971,

159). Finally, courts could and did refuse to follow the logic of *Brown* into other areas. While this was legally defensible before the Supreme Court so ruled, it was clearly an abuse of discretion after the Court applied *Brown* across the board.

The tools of abuse of discretion—delay, and narrow interpretation (or purposeful misinterpretation)—can be effectively harnessed by biased judges. Unfortunately, throughout the South there were many biased judges (Peltason 1971; USCCR 1969, 39–46; Note 1963). These were judges who made their decisions based on their own segregationist views and not on the law. And given the structure of the judicial system, such judges could delay civil rights for years.

Southern judges were in a difficult position. The “fifty-eight lonely men” (Peltason 1971) who formed the federal judiciary in the Southern states were required to dismantle a social system they had grown up with and were part of. A non-biased judge who felt duty-bound to follow the law could never forget, Peltason concludes, that “any action of his against segregation will threaten his easy and prestigious acceptance by the community” (Peltason 1971, 9). Even as pro-civil-rights a judge as John Minor Wisdom was sympathetic, finding it “not surprising that in a conservative community a federal judge may feel that he cannot jeopardize the respect due the court in all of his cases” by vigorously supporting civil rights (Wisdom 1967, 419). Even with the best of judges, civil rights cases reflected the “customs and mores of the community” (Wisdom 1967, 418). It is no surprise, then, that study of hundreds of cases in Southern federal district courts found judges influenced by their social and political environment (Vines 1964).

The severity of the problem can best be understood by a few examples.²³ Judge Elliott of the Federal District Court for the Middle District of Georgia did not want “pinks, radicals and black voters to outvote those who are trying to preserve our segregation laws” (quoted in Note 1963, 101 n.71). Federal District Judge Cox, of the Southern District of Mississippi, characterized the freedom riders as “counterfeit citizens from other states deliberately seeking to cause trouble here” (Note 1963, 101 n.71). Speaking from the bench in March 1964, he referred repeatedly to black voter-registration applicants as “a bunch of niggers” who were “acting like a bunch of chimpanzees” (quoted in Southern Regional Council 1964, 19–20).²⁴ Federal Judge Armitstead Dobie of the Fourth Circuit saw civil rights as influenced by “a foreign Communistic anthropologist” (quoted in Peltason 1971, 23), an obvious attack on Swedish sociologist Gunnar Myrdal whose classic work on segregation

²³ In fairness, it must be remembered that there were some outstanding Southern federal judges such as J. Skelly Wright, John Minor Wisdom, Bryan Simpson, and Frank Johnson. On the particularly aggressive record of Judge Johnson, see Hamilton (1965, 76–84); Kennedy (1978; Note 1975); Yarbrough (1981).

²⁴ Both Judges Elliott and Cox, as well as several other openly and avowedly segregationist judges, were appointed by President Kennedy.

in the United States, *An American Dilemma*, was cited in footnote 11 in *Brown*. Judge Dawkins of the Federal District Court in Shreveport, Louisiana, defended his enjoining the U.S. Commission on Civil Rights from holding hearings on alleged voter discrimination in his district in 1959 by stating, “It’s all part of the game” (quoted in Peltason 1971, 133). In the Dallas school desegregation case, started in 1955 and still pending in 1960, in which the federal district court was reversed six times, Judge Davidson complained that the “white man has a right to maintain his racial integrity, and it can’t be done so easily in integrated schools” (quoted in Sarrant 1966, 201). He also warned against the perils of breaching segregation: “When the President’s guard was shot, when the halls of Congress were shot up, they were not from Negroes that were raised in the South. They were from the integrated people of Puerto Rico” (quoted in Peltason 1971, 121).

State judges were, if anything, more biased. Chief Judge J. Edwin Livingston of the Alabama Supreme Court, speaking in 1959 to several hundred students and business leaders, announced: “I’m for segregation in every phase of life and I don’t care who knows it. . . . I would close every school from the highest to the lowest before I would go to school with colored people” (quoted in Peltason 1971, 66). Alabama circuit judge Walter B. Jones wrote a column in the *Montgomery Advertiser* which he devoted to the “defense of white supremacy.” In those pages in June 1958 he told his readers that in the case against the NAACP, over which he was presiding, he intended to deal the NAACP a “mortal blow” from which it “shall never recover” (quoted in Peltason 1971, 65, 67). It is no wonder, then, that despite clear Supreme Court rulings, Alabama was able to keep the NAACP in litigation for eight years. As Leon Friedman, who talked with scores of civil rights lawyers in the South concluded, “the states’ legal institutions were and are the principal enemy” (Friedman 1965, 7).

Biased judges posed a serious obstacle to civil rights in the South. Yet, as the Constrained Court view suggests, the very process by which judges are selected suggests that they will reflect the mores and beliefs of the dominant cultural and political leadership. The existence of biased judges was inevitable. Given the tools of discretion, delay, and interpretation available to judges, resistance to Supreme-Court-ordered civil rights was to be expected. As Judge Wisdom put it, “difficulties in the judicial performance of inferior federal courts are *built into the system*” (Wisdom 1967, 419; emphasis added).

Control and Costs

Bringing a civil rights suit is a complicated matter. Not only are there obstacles of coercion and fear, but also most people are unwilling to rock the boat. Although the NAACP and its Legal Defense And Educational Fund, Inc. (Inc. Fund), were often ready to foot the bill, the amount of preparation necessary for a successful suit, especially given the obstacles discussed, was

enormous. The result of these facts of life is that until the Justice Department began prosecuting civil rights suits (after 1964), few were brought. Writing in 1968, Jack Greenberg of the Inc. Fund reported that although there are about 3,000 school districts in the South, since 1954 the Inc. Fund had been able to handle only about thirty cases (Greenberg 1968, 1539). By 1964, ten years after *Brown*, the vast majority of Southern school districts had neither desegregated nor been confronted with a court challenge.²⁵ In a major study Rights found that of 160 school districts that experienced their greatest reduction in segregation before 1968, only 20 were put under court pressure (USCCR 1977a, 17). And if few cases are brought, the vast majority of jurisdictions will be under no pressure (except the requirement of the law) to protect civil rights. Indeed, the U.S. Civil Rights Commission found that court cases, limited to the jurisdictions in which they were brought, isolated communities from one another, created little pressure for desegregation elsewhere, and made communities easy targets for segregationist violence (USCCR 1959, 309–10). Thus, the need to bring numerous cases to be effective is an obstacle to court-ordered change.

A further obstacle is that it is virtually impossible to control the selection of cases. Cases come up in more of an ad-hoc basis than many people believe. This means that quality preparation cannot be assumed and cases will be lost,²⁶ setting bad precedents. For example, James Nabritt III, at one time associate counsel of the Inc. Fund, admitted that the sit-in cases took the Inc. Fund by surprise and that it never developed a long-range strategy for dealing with them (cited in Grossman 1967, 431). And Tushnet, in his study of the NAACP's litigation strategy, noted the trouble the national staff had in controlling local attorneys. The result, often, was lost cases that reflected badly on the NAACP and did the plaintiffs no good (Tushnet 1987, 53–55).

A co-ordinated court strategy has also proved difficult to achieve.²⁷ Jack Greenberg lamented that seldom do litigators have a substantial ability to influence the development and sequence of cases (Greenberg 1977, 586–87). Thurgood Marshall put it this way: "There's no master plan . . . the cases come to us as they crop up locally. Ha! I wish sometimes we could hand pick them" (quoted in Kraar 1958, 11). Indeed, a study of the Inc. Fund, based on interviews with more than forty attorneys, found that much civil rights litigation was "reflexive," "unplanned," and "impromptu," often based on

25. Orfield (1969) 18.

26. Vines (1964) found that in 291 civil rights cases brought in Southern federal district courts between May 1954 and October 1962, blacks barely won half. Outside of education, they won substantially fewer than half the cases. While a good part of the reason is no doubt bias, part is also due to inadequate resources and preparation.

27. In general, see Hakman (1966). O'Connor and Epstein (1982) have updated and criticized the Hakman study. Their new findings, however, do not affect my point.

"continuous events." The large number of non-Inc.-Fund civil rights litigators, limited resources, and the need to act "defensively" to prevent bad precedents from being set, were all mentioned prominently as important obstacles to successfully planning long-term strategy (Wasby 1985). Tushnet reached the same conclusion, arguing that the NAACP's choices of forum "were more strongly influenced by internal organizational requirements than by elements of a coherent legal strategy" (Tushnet 1987, 51). In particular, in the pre-*Brown* years, the NAACP focused on the upper South largely because of convenience. Thurgood Marshall, although headquartered in New York, was born Baltimore and Charles Houston lived in the District of Columbia, reducing the expenses of travel and lodging for upper South litigation (Tushnet 1987, 67, 69).

A final obstacle, to be only touched on here, is cost. Litigation is terribly expensive. It is estimated that *Brown* cost "well over \$200,000" and Supreme Court cases testing *Brown* averaged between \$15,000 and \$18,000 (Hakman 1966, 21–22 n.18).²⁸ And, of course, price-tags went up considerably in the years following *Brown*. As the U.S. Civil Rights Commission found, the high cost of litigation limited the number of suits that could be brought and thus constrained courts from directly affecting civil rights (USCCR 1963a, 15).²⁹

In sum, the particular configuration of the legal bureaucracy made it difficult for the courts to effectively produce significant social reform. Asked to end discrimination in areas where it was prevalent, but lacking the tools to do the job, the courts were bound to fail.

Conclusion—The Constrained Court and the First Decade After Brown

The courts were ineffective in producing significant social reform in civil rights in the first decade after *Brown* for three key reasons captured in the constraints of the Constrained Court view. First, political leadership at the national, state, and local levels was arrayed against civil rights, making implementation of judicial decisions virtually impossible. Second, the culture of the South was segregationist, leaving the courts with few public supporters.

In response, and after several tries at ordering change, the courts backed off and bided their time, waiting for the political and social climate to change. Third, the American court system itself was designed to lack implementation powers, to move slowly, and to be strongly tied to local concerns. The presence of these constraints made the success of litigation for significant social reform virtually impossible. The fact that little success was achieved should have surprised no one.

28. Hughes (1962, 129) gives a \$100,000 figure for the cost of *Brown*.

29. Tushnet (1987, 82) argues that one of the reasons that the NAACP brought *Brown* was that "litigation was draining the NAACP's resources, with increasingly small returns for the effort. The decision to attack the 'separate but equal' doctrine directly was significantly affected by those organizational factors."

The Johnson administration and the Great Society were committed to ending school segregation. While the Nixon administration backed away from this commitment, it did not do so entirely. Too much bureaucratic structure, and too many expectations, had been created for there to be wholesale reversals in federal pressure to end segregation. Although it took a full ten years after *Brown*, Congress and the executive branch finally came to support civil rights.³¹ Constraints II and III were well on the way to being overcome.

In the wake of this commitment at the federal level, state and local leaders weakened in their opposition. Where once leaders had been adamantly opposed to any desegregation, public opposition became more muted and was sometimes replaced by actual public support for desegregation. Southern reaction to the 1965 and 1966 HEW guidelines was "surprisingly moderate." Political leadership throughout the South stayed quiet or counseled support for the law, and most Southern members of Congress "held their fire" (Orfield 1969, 118, 119). This meant that when pressure from either the courts or HEW was applied, political leaders did not automatically rise to oppose implementation. Black, in his study of gubernatorial candidates, noted that the "differences between the governors' pre-1965 and post-1965 campaign stances are remarkable." Pre-1965, nearly three-fifths of the major candidates supported segregation, while from 1966 to 1973 nearly two-thirds took "innovative stances on segregation" (Black 1976, 290, 150, 152). And, by 1970, Governors Holton of Virginia, Scott of North Carolina, and McNair of South Carolina publicly supported desegregation.

Numerous individual studies stress the presence of supportive political leadership in explaining the acceptance of desegregation. In cities ranging from Berkeley to Minneapolis to New Albany (Mississippi) to Tampa, desegregation worked because local leadership came to support it (USCCR 1976b, Winn 1970b, 4, 5). Conversely, in cities ranging from Atlanta to Boston to Jackson (Mississippi) to Mobile (Alabama), leadership opposition is cited as having doomed desegregation (Winn 1970b, 5; USCCR 1976b; Southern Regional Council 1971, 38–49). In Atlanta in 1970, for example, there was a "collapse of public leadership" in which both city and school officials were unprepared to act and Governor Maddox urged a boycott of schools (Winn 1970a, 4). Thus, despite twelve years of litigation and three hundred "legal moves," a commentator concluded that "Atlanta has no more desegregation than Baltimore, which has never experienced anything like the same pressure" (Bowler 1970, 8).

The evidence from school districts under pressure to desegregate is that supportive leadership on all levels is essential. On the local level, a 1976

³¹ The support was not always as forceful as one might have hoped. As an anonymous author bitterly wrote on the wall of the Council of Federated Civil Rights Organizations (COFO) office in Jackson, Mississippi, in the summer of 1964: "There is a town in Mississippi called Liberty, there is a department in Washington called Justice" (quoted in Burns 1965, 228).

The Post-1964 Years

In the years after 1964, particularly from 1968 to 1972, there was a great deal of change in civil rights. The percentage of black children in elementary and secondary school with whites in the South increased from 1.2 percent in the 1963–64 school year to 91.3 percent in the 1972–73 school year (see table 2.1).³⁰ As chapter 2 detailed, in the years after *Brown* all levels of the federal government became involved in the attempt to end segregation. The question this part of the chapter addresses is what role court action played in bringing about this change. Were courts crucial actors, as proponents of the Dynamic Court view might suggest, or were they peripheral to executive and legislative actions, as Constrained Court view supporters contend? If courts were important, how can the Constrained Court view be powerfully on point in the decade after *Brown* yet be unhelpful in explaining later achievements?

The answer to these questions appears to be that the courts became increasingly more important and effective actors; the political, social, and economic climate changed, allowing the constraints of the Constrained Court view to be overcome. Constraint I was overcome with the victory in *Brown*. In addition, as the political climate changed, and the federal government endorsed civil rights with the passage of legislation in 1964 and 1965, the second constraint was overcome. After 1965 the Court re-entered the civil rights field, upholding congressional action and bringing pressure to bear on recalcitrant institutions.³⁰ Only Constraint III, the implementation constraint, remained. And here, several of the conditions generated from the Dynamic Court view were present, allowing change to occur. Thus, the theoretical framework developed in the first chapter goes a long way in explaining the changes that occurred.

Political Leadership

The political climate for civil rights in the mid-1960s was quite different than in the first decade after *Brown*. The passage of the 1964 Civil Rights Act, the 1965 Voting Rights Act, and the 1965 Elementary and Secondary Education Act, the tightening of Title VI guidelines by HEW, and the commitment of President Johnson to civil rights propelled the executive branch and Congress into the civil rights battle. The "Great Society" was to be open to all, and the executive branch used its new powers to enforce school desegregation. In 1966 alone the Department of Justice participated in 73 school desegregation cases, up from 1 in 1963 and 2 in 1964 (USCCR 1967, 42).

³⁰ The 1964 Civil Rights Act was upheld in *Hearst of Atlanta Motel v. U.S.* (1964) and *Katzenbach v. McClung* (1964). The 1965 Voting Rights Act withstood constitutional challenge in *South Carolina v. Katzenbach* (1966). Pressure was brought to bear on school districts in *Green v. County School Board of New Kent County, Virginia* (1968); *Alexander v. Holmes County* (1969), and *Swann v. Charlotte-Mecklenburg Board of Education* (1971). For additional citations, and case discussion, see chapter 2.

study of twenty-nine school districts by the U.S. Commission on Civil Rights concluded that "perhaps the most important ingredient in successful school desegregation is leadership, both at the community level and in the schools" (USCCR 1976b, 168). A 1969 Southern Regional Council study found local leadership to be a "crucial factor" (Southern Regional Council 1969, 47) and a 1972 report by six groups (including the American Friends Service Committee, the Southern Regional Council, and the Inc. Fund) of forty-three Southern urban school districts elevated these findings to the status of a "truism" ("School Report" 1972, 4). On the state level, the U.S. Commission on Civil Rights found that opposition to local desegregation results in "the encouragement of local officials to act in defiance of the law, and the encouragement of local whites to act to block desegregation themselves" (USCCR 1969, 13). Finally, numerous studies have stressed the importance of national leadership (Southern Regional Council 1969; USCCR 1975b; USCCR 1982). As the U.S. Commission on Civil Rights put it in 1981, "progress in desegregating our nation's schools will not be achieved without the clear support and leadership of government officials at the national, State, and local levels" (USCCR 1981, 1). When there was this leadership support, in the late 1960s and early 1970s, much desegregation occurred.

Social and Cultural Change

Political leaders do not exist in a vacuum. Those who are out of step with large numbers of constituents do not remain in office very long. The fact that political leaders did not oppose desegregation as heartily as before suggests that a change in the social and cultural climate must have taken place. There is a good deal of evidence to suggest that this is the case, particularly in comparison to the actions of private groups discussed in chapter 2. Throughout the South, successful school desegregation was often accompanied by public support from social and civic groups. In reviewing why some Southern communities desegregated successfully in 1970, Winn noted that in "many cases, loose organizations of business and civic leaders played a vital role" (Winn 1970b, 4). In its review of desegregation attempts in twenty-nine school districts, the U.S. Civil Rights Commission concurred, finding that "affirmative leadership by members of business, religious, and social service organizations has contributed immeasurably to community acceptance of desegregation" (USCCR 1976b, 185). The importance of these activities can be seen in the amount of disruption accompanying desegregation. The U.S. Civil Rights Commission, in comparing districts in which there were no serious disruptions on the issue of school desegregation with those districts that suffered from desegregation violence, found that business leaders differed in their support for desegregation by a margin of 38 percent and religious leaders by a margin of 21 percent (USCCR 1976b, 175).

One reason why there was such support may be that racial barriers in

areas of public life had broken down by the late 1960s and early 1970s. The passage of the 1964 Civil Rights Act put an end to legal and blatant segregation in most forms of public life. Desegregating schools was less of a step than it had been earlier. In some cities, desegregation included a black force. In Bogalusa, Louisiana, for example, where school desegregation was achieved, the integrated Crown-Zellerbach plant employed 31 percent of the city's work force. Indeed, the school superintendent pointed to the integrated working conditions as being a helpful factor in the general acceptance of school desegregation ("Beautiful Bogalusa" 1970, 8). By the late 1960s and early 1970s there was not as large-scale or as deep-seated a social-cultural aversion to desegregation as there had been in the pre-1964 years. This constraint limiting court efficacy was removed.³²

Court Orders and Incentives

The argument developed in chapter 1 suggested that if the constraints of Constrained Court view could be overcome by changes in the political, social, and economic climate, and certain conditions were present, courts could effectively produce significant social reform. In particular, Conditions I and II suggested that when non-court actors offer incentives to induce compliance with court orders, or impose costs for failure to do so, court efficacy will be enhanced. In the years after 1964, particularly in the period 1968–72, major incentives were offered to induce compliance. The first of these was money from the federal government.

Financial Inducements

When the federal government made money available to local school districts that desegregated, it loosed a powerful and attractive force on segregated schools. This was particularly true in the South because that region spent less on schools, as measured by the percentage of total personal income spent than any region in the country ("School Support" 1969). Thus, federal dollars had the potential for the largest impact in just the area where segregation was the greatest, the "desperately poor 'Southern districts'" (Orfield 1969, 97). As Commissioner of Education Francis Keppel noted early on, in a memo to HEW Secretary Celebrezze, "Title VI can become . . . a condition necessary for progress in the future" (Memo of April 13, 1965, quoted in

32. Cultural support should not be overstated. When faced with imminent desegregation of the public schools, many whites fled to new private schools. For example, between the 1961 and 1970 school years, there was an increase of 242 percent in the number of non church-affiliated private schools in the Southeast (Terjen 1972, 50–51). Many, if not most of these, were segregated. In the South, 1969 and 1970 saw the largest increase in the opening of new segregated private schools (Terjen 1972, 50), with Mississippi alone witnessing a threefold increase (USCCR 1977c, 52). By the 1972 school year, there were an estimated 535,000 white students in segregated private schools in the South (Terjen 1972, 50). However, as the text makes clear, there was acceptance of the desegregation process. For further reading on private schools, see "Segregation Academies" (1969); Terjen (1973); Yeates (1970).

Orfield 1969, 94). And that is precisely what happened. Tables 3.1, 3.2, and 3.3 present the data.

The tables dramatically demonstrate that the flow of federal dollars increased markedly to the Southern and Border states in the years after Congress acted. Table 3.1 presents the amount of federal dollars received and table 3.2 calculates that amount as a percentage of state education expenditures. As table 3.2 shows, by 1969 federal funds made up between 11 percent and 21 percent of state budgets for public schools in the Southern states. By the beginning of the 1971 school year, the range was from 12.5 percent to nearly 28 percent. Mississippi, for example, was eligible for more federal money in 1965 than the state had spent on its own for education in 1963! (Orfield 1969, 120). On the district level, as table 3.3 suggests, the increase in federal funding was extraordinary, doubling, tripling, and quadrupling in some districts over just a few short years. In some districts, federal aid amounted to one-third or one-quarter of the school budget (Orfield 1969, 108).

Tables 3.2 and 3.3 also present desegregation data. As can be seen, the changes between the mid-1960s and the early 1970s were huge (the reader

Table 3.1 Federal Funds (in Millions) for Public Elementary and Secondary Schools in Southern and Border States, 1963–1972, Selected Years

States	1963–64	1967–68	1969–70	1970–71	1971–72	1972–73
<i>Southern</i>						
Alabama	18.9	78.0	86.5	113.6	117.7	109.0
Arkansas	15.1	45.4	47.8	51.3	64.3	61.6
Florida	37.0	114.8	122.9	141.6	164.1	148.3
Georgia	24.2	87.7	103.0	105.9	132.0	121.2
Louisiana	16.2	67.2	71.0	102.0	110.8	110.6
Mississippi	13.0	56.6	67.0	92.7	98.6	99.4
N. Carolina	24.2	102.1	126.9	133.8	168.8	143.3
S. Carolina	14.5	55.1	67.1	87.5	90.8	100.5
Tennessee	20.5	75.4	79.6	88.9	95.2	100.0
Texas	50.0	159.2	209.9	201.0	290.5	283.3
Virginia	34.0	81.8	117.4	107.2	141.5	133.9
<i>Border</i>						
Delaware	3.1	8.8	10.6	11.7	14.2	14.6
D.C.	12.5	32.9	45.2	27.2	60.2	83.0
Kentucky	14.4	56.0	79.3	88.6	96.3	92.0
Maryland	22.0	64.1	70.1	79.0	90.2	92.6
Missouri	17.6	60.2	61.5	67.5	90.5	91.0
Oklahoma	20.7	48.6	48.7	54.8	65.0	59.4
W. Virginia	7.3	30.7	37.9	50.3	46.4	51.9

SOURCE: U.S. Department of HEW (1973: *Revenues, 1972–73, 1973–74, 1974–75, 1975–76, Statistics, 1963–64, 1965–66, 1967–68, 1969–70, 1971–72*).

Table 3.2 Percentage of Public Elementary and Secondary School Budgets Received from Federal Funds in Southern and Border States, 1963–1971, and Percentage of Blacks in School With Whites, 1964–65 and 1972–73

State	Federal Funds as a % of State School Budgets						% of Blacks in School with Whites
	1963–64	1967–68	1969–70	1970–71	1971–72	1964–65	
<i>Southern</i>							
Alabama	7.6	20.2	18.4	22.5	21.5	.03	83.5
Arkansas	11.1	20.0	18.9	19.0	21.2	.81	98.1
Florida	7.0	12.8	10.7	11.2	12.0	2.7	96.4
Georgia	7.1	13.8	14.3	14.0	15.7	.40	86.8
Louisiana	4.8	12.7	12.0	14.2	14.6	1.1	82.9
Mississippi	8.1	16.8	20.9	28.1	27.8	.02	91.5
N. Carolina	6.1	18.6	16.2	15.8	18.0	1.4	99.4
S. Carolina	7.5	17.5	15.2	19.8	18.7	.10	93.9
Tennessee	8.0	17.8	14.6	15.6	14.7	5.4	89.0
Texas	4.6	11.2	11.5	12.5	7.8	92.8	
Virginia	9.5	12.8	14.1	11.3	14.0	5.2	99.3
<i>Border</i>							
Delaware	4.4	8.6	6.9	7.5	8.4	62.2	98.9
D.C.	15.7	24.4	25.8	16.0	27.1	86.0	64.2
Kentucky	6.5	16.0	17.6	17.2	17.7	68.1	92.6
Maryland	6.0	9.5	8.2	8.0	7.8	50.9	75.9
Missouri	4.3	9.0	7.4	8.0	9.3	42.3	69.4
Oklahoma	10.6	14.6	12.7	12.8	13.5	31.1	100
W. Virginia	5.0	13.6	13.6	16.8	13.7	63.4	98.9

SOURCE: U.S. Department of HEW (1973: *Revenues, 1972–73, 1973–74, 1974–75, 1975–76, Statistics, 1963–64, 1965–66, 1967–68, 1969–70, 1971–72*).

Note: all figures rounded.

may wish to refer back to table 2.1 and Appendix 1 for the full sweep of the change from 1954 to 1972. Certainly, the increase in federal dollars flowing into the Southern and Border states is highly correlated with the increase in the percentage of black children in school with whites. The question, of course, is whether federal funds caused the increase in desegregation. The answer appears to be a clear yes.

Financially strapped school districts found the lure of federal dollars irresistible. To obtain and keep the money, however, they had to desegregate. And once federal money was received, the thought of losing it the next year, reducing budgets, slashing programs, firing staffs, was excruciating. Thus, along with the lure of federal dollars was the threat of having them taken away. HEW did bring enforcement proceedings and did terminate the eligibility of some school districts. School boards throughout the South, "realiz-

Table 3.3 Selected Southern School Districts by Extent of Desegregation and Amount of Federal Funds Received, 1967-1970

District	% Blacks in School with Whites				Federal Funds (in Millions)		
	1967-68	1968-69	1970-71	1967-68	1968-69	1970-71	
Jackson, Miss.	—	5.4	98.6	1.4	2.2	4.0	
Yazoo County, Miss.	1.7	5.5	28.1	.34	—	.67	
Greenville, Miss.	8.7	10.4	100	.69	1.1	1.5	
Birmingham City, Ala.	8.9	15.4	66.5	3.6	3.8	5.5	
Montgomery City County, Ala.	3.2	5.7	92.8	2.7	3.1	5.3	
Pulaski County Special, Ark.	36.8	62.3	100	.92	1.5	2.7	
Rapides Parish, La.	10.4	4.1	73.3	.58	1.6	2.5	
Jefferson Parish, La.	11.7	20.5	80.5	2.3	2.2	3.1	
Caddo Parish, La.	2.7	6.0	55.5	2.6	2.4	3.1	
Calcasieu Parish, La.	8.2	9.5	100	1.3	1.4	2.0	
Dade County, Fla.	48.1	51.3	87.7	26.5	25.5	32.4	
Duval County, Fla.	12.0	23.3	63.0	5.8	5.1	9.3	
Orange County, Fla.	15.4	23.0	83.4	3.1	3.9	5.1	

Sources: U.S. Department of HEW (National Center, 1967, 1968, 1970; Office of Civil Rights, *Directory, 1967, 1968, 1970*).

ing that the loss of monies was intolerable," took some steps to desegregate (Southern Regional Council 1971, 57).³³ As Orfield puts it, "the change [desegregation] would have been *impossible* without the lure of money from the Elementary & Secondary Education Act" (Orfield 1969, 228; emphasis added).

With this background, it should be clear why courts became effective. Put simply, courts could hold up federal funds. While court orders could always be disobeyed, as they were in the first decade after *Brown*, now there were real costs. The federal government was not likely to release federal funds in violation of a court order. Courts, then, because of Title VI and the availability of federal dollars, were in a new position. Provided with non-court-generated incentives, courts had both carrots and sticks to work with. Thus, they were able to contribute to the desegregation of the Southern schools.

Business Inducements

Federal funding was not the only inducement for desegregation in the late 1960s and early 1970s. Another powerful factor at work was the desire of many Southern communities to lure industry and the realization that such moves required good schools and peaceful race relations. A peaceful, desegregated school system was seen as an important component in attracting industry. "Gradually," writes Jacoway, Southern business leaders "came to perceive, dimly at first, that their racism and abdication of leadership were taking a heavy toll; they were losing to other cities the industry they might have had." Thus, she concluded, the "desire to attract new industry and to maintain a progressive image was one very potent force leading to the southern willingness to abandon segregation" (Jacoway 1982, 5, 13). Orfield concluded, "that school Southern 'communities came to realize,'" Orfield concludes, "that school quality strongly influenced plant locations, and thus local prosperity" (Orfield 1969, 209-10, 210). As Patterson put it, "in case after case the business community in the South found it to its own interest to deal with . . . Negro demands" (Patterson 1966, 71; emphasis added).

A few examples illustrate the general pattern. In Yazoo City, Mississippi, first discussed in chapter 2 for the strength of its political, economic, and cultural opposition to desegregation, table 3.3 shows that by the 1970 school year some progress had been made in desegregation. Part of the reason for the change was that the business community came to support desegregation because, in the words of Robert Wheeler, manager of the Chamber of Commerce, "we need good schools if we're going to attract industry" (quoted in Minor 1970, 34). As another report put it, in Yazoo City "pragmatic economics played a leading role in unifying business and civic leaders behind public education" (Winn 1970b, 5). In Louisiana, State School Superintendent William Dodd was told that "it was becoming very difficult to replace employees due to the school situation, and that if the state did not support its public schools, then it would be impossible for large companies to get men with families to move to Louisiana" (Winn 1970b, 5). By the 1972 school year, 83 percent of Louisiana's black students were in school with whites, up from 1.1 percent in 1965 (see table 3.2 and Appendix 1). In Jackson, Mississippi, where by 1970 the amount of federal funds received was nearly triple the amount received in 1967, and 98.6 percent of black students were in school with whites (see table 3.3), business interests switched positions and played a key role in support of desegregation. Part of the reason for the switch were the repeated warnings from Ken Wagner, brought to the city to help plan its economic future, that Jackson faced "financial disaster unless" it improved its schools (Clift 1971, 6). His warnings were repeated in a January 1970

³³ The quote refers specifically to the school board of Clarke County, Georgia, but it is applicable throughout the South.

meeting between executives of Allis-Chalmers and the Jackson Chamber of Commerce, in which one company executive told the Mississippians: "I just can't in good conscience ask these people to move from Wisconsin to Mississippi unless you can prove to me what they know about the Jackson schools isn't so" (Clift 1971, 1; Patterson 1966). In Greensboro, North Carolina, change finally came in 1971 when, as a leader of the Chamber of Commerce said, "we're going to do what's good for business . . . It's a question of economics" (quoted in Chafe 1982, 67). Perhaps the new Southern attitude to desegregation was best summed up by the school-board president of a small town: "None of the whites like it, you understand. But they know we are just going to go out of business if we don't have a quality public school system. Nobody will move a plant in here if they know we don't have a school system" (quoted in Winn 1970b, 4).

Given this hunger for new industry by the under-industrialized South, failure to desegregate had costs. Here, too, courts were given a tool not of their making with which to work. Districts that violated court orders risked not only the loss of federal funds but also the inability to attract new industries. On the other hand, districts that did desegregate, maintained their eligibility for the money and could make a stronger pitch for new industry. Courts were effective in the years 1968–72, then, because a set of conditions provided them with useful tools for gaining compliance. When those conditions and tools were lacking, in the first decade after *Brown*, courts were essentially impotent to produce change.³⁴

Courts as Cover

The brunt of the discussion in the second part of this chapter has been that by the late 1960s and early 1970s a whole host of factors had changed, removing the constraints from court action and providing the conditions under which they could be effective. With these changes, another condition for court effectiveness came into play: courts as cover (Condition IV). Under this condition, courts, by ordering action, allow officials to do what they believe needs to be done without their taking full responsibility for it. In the South, then, school officials and others could desegregate schools, preserve federal funding, attract new business, and still claim that they were forced to act by a distant and uncaring federal bureaucracy. Other changes, too, could be made under the cover of court orders. Courts, in many ways, offered politically exposed officials the best of all possible solutions.

³⁴ An amusing example of an additional incentive that appears to have produced change comes from Columbia, South Carolina, which was on "perennial quest in the 1950s and 1960s for the *Look* magazine All-American City Award." The city knew that any "disorder or disruption . . . might smear the good name of Columbia." And indeed, "progress in race relations was one of the major points Columbia used to win the All-American City Award in 1964" (Lofton 1982, 71, 81).

Evidence of such behavior is impossible to quantify. However, the overall impression of those who have examined the issue is that such behavior was common. Looking over the history of school desegregation, for example, Kalodner suggests that "many school boards pursue from the outset a course designed to shift the entire political burden of desegregation to the courts" (Kalodner 1978, 3). Similarly, the U.S. Civil Rights Commission, in its review of twenty-nine school districts attempting desegregation, found that overall "school desegregation usually requires revamping of a school system. Administrators often take this opportunity to make needed changes in curriculum, facilities, organization, and teaching methodology" (USCCR 1976b, 130). Finally, the Southern Regional Council discovered that Mississippi school officials understood the protective role of courts well: "at least half of the Mississippi school superintendents revealed in private conversation that their jobs were less difficult when the government was firm in demanding complete desegregation" (Southern Regional Council 1969, 37).

It seems fair to suggest, then, that part of the reason that courts were effective in helping to bring about desegregation in the late 1960s and early 1970s was that many crucial actors were willing to act but fearful of the consequences. Under such conditions, courts can be effective. In earlier years, however, when the willingness to act had not been wetted by government dollars, industrial moves, and general societal change, courts could not serve this protective, blame-taking role.

Education in the Border States

The factors outlined above are nicely illustrated by the progress of the border states in desegregating public schools. As table 2.1 shows, these states did respond positively to *Brown*. While desegregation occurred more rapidly after 1964, there was a good deal of change in the decade following *Brown*. As in the South after 1965, political leadership in the border states in the 1950s was either supportive of, or not strongly opposed to, desegregation. Throughout the region elected officials either called for adherence to the law or said nothing. In the key cities of Washington, D.C., Baltimore, Wilmington, St. Louis, and Kansas City, the official attitude was supportive (USCCR 1959, 173; McKay 1956, 1012). In none of the border states were any pro-segregation statutes enacted (Sarratt 1966, 41).³⁵ Maryland even belatedly ratified the Fourteenth Amendment (Sarratt 1966, 41). The contrast between the actions of political leaders in this region and in the eleven Southern states is clear.

Culturally, segregation was breaking down throughout the region. Mu-

³⁵ One law was enacted in Delaware providing that no student could transfer from one school district to another without the consent of both school boards. Its obvious intent was to prevent black transfers to white schools.

nicipal facilities were generally, though not completely, desegregated. This included, in various degrees, transportation facilities, parks, auditoriums, libraries, movie houses, and civil service employment. Many private groups and institutions throughout the region, including churches and school officials, pledged co-operation (USCCR 1959, 173–74; McKay 1956, 1012). “Perhaps the greatest state of readiness could be found within several of the school systems themselves” (USCCR 1959, 174). By 1952 Baltimore had a desegregated public school. In Wilmington, teachers’ organizations and adult education were desegregated, as were school sports (USCCR 1959, 177, 180). In all the border states, desegregation of higher education had begun before 1954, as far back as the 1930s in Maryland and West Virginia (Sarrant 1966, 131–32; USCCR 1961a, 50). It is no surprise, then, that the Delaware Supreme Court banned segregation in the state’s public schools before the U.S. Supreme Court acted (*Gebhardt v. Belton*). Finally, all the border states had small percentages of blacks, with only Delaware (14 percent) and Maryland (17 percent) being above ten percent (figures from 1950 census reported by Lasch 1957, 60). In terms of leadership and the political, social, and cultural climate, the constraints had been weakened if not largely neutralized by the time the Court acted in 1954. Added incentives were not necessary, for there was little in the way of large-scale, hard-core opposition.

Higher Education

As chapter 2 showed, no gains were made in ending segregation in higher education until Congress and the executive branch acted. After that action, as table 2.3A illustrates, there were large increases. However, while change did occur, by 1978 the percentage of black enrollment at formerly segregated Southern public colleges and universities remained low (see table 2.3B). And this was true despite the 1973 District of Columbia Circuit Court decision in *Adams v. Richardson* ordering the Office of Civil Rights to step up its work in higher education (see chapter 2). The question this poses is why was there initially good progress but then little change? The answer, of course, comes from re-examining this history through the lenses of the constraints and the conditions.

The initial change can be explained by the same set of reasons that fit the other areas of civil rights. With congressional and executive action, political opposition was muted or reversed. By the mid and late 1960s, social and cultural opposition had lost much of its bite. And with the threat of termination of federal funds for higher education through programs ranging from the National Science Foundation to the Higher Education Act of 1965, continuing segregation ran risks.

However, the challenges involved in ending segregation in higher education are of a different magnitude than those faced in elementary and secondary education. Public school education is mandatory throughout the U.S.,

providing a large pool of students with whom to work. In contrast, the pool of suitably trained minority students is much smaller in higher education. This is due to economic and social forces beyond the control of courts, as well as current racial discrimination and the lingering effects of past discrimination. Courts lack the tools to deal effectively with these “relatively uncontrollable social and environmental factors” (Ayres 1984, 143). Thus, desegregating higher education presented a more complex set of problems.

In addition, however, the federal government appears to lack the necessary commitment to see further progress. This has resulted in little pressure to achieve substantial desegregation. As chapter 2 discussed, few steps have been taken to monitor higher education and almost no proceedings have been initiated. Indeed, in October 1987, a House subcommittee charged that the executive branch had failed to enforce court orders requiring ten states to desegregate their higher education systems (Williams 1987, 11). As one study concluded, “the lack of support for the *Adams* initiative from the Congress, the Presidency, and substantial elements of the vocal and diffuse public, the lack of inducements and sanctions for higher education, and economic and social forces” have combined to constrain continued progress (Paul 1988, 61).

The progress that did occur in the 1970s appears to have been due more to the initiative of individual state and institutional actors than to the federal government. Both Ayres and Paul conclude, for example, in comparing state successes in desegregation, that “states under federal pressure [to desegregate institutions of higher education] were apparently no more successful than other states’ not facing such pressure (Ayres 1984, 127). Paul’s interviews with Texas officials led her to conclude that the “internal agenda of the higher education institution appears to have played a larger role in determining institutional response to the *Adams* initiative at these schools than any external social agenda, irrespective of the source” (Paul 1988, 56). As Condition IV suggests, administrators and officials willing to act can use court orders to leverage additional resources, institute changes, and make reforms. However, lacking strong federal pressure from the executive branch, and incentives with which to induce behavior, there is little that courts will be able to do. Thus, the changes in desegregation of higher education are well explained by the constraints and conditions.

Conclusion

In explaining the changes that occurred in civil rights in the years after *Brown*, it is clear that paradigms based on court efficacy are simply wrong. It is equally clear that the Constrained Court view captures the key reasons why, despite Supreme Court action, nothing changed in the first decade after *Brown*. These include the lack of political and cultural support for civil rights,

the courts' qualified independence, and the judiciary's lack of implementation tools. After Congress and the executive branch became committed to civil rights, however, political and cultural support became stronger. Further, such support provided incentives that helped courts to overcome their lack of implementation tools. In the years after 1964 and 1965, not only were the constraints neutralized, but several of the conditions generated from the Dynamic Court view were present. This meant that courts could be effective agents for significant social reform.

In sum, an examination of the direct effects of courts in producing significant social reform, in this case civil rights, shows that the theoretical framework of the constraints and conditions successfully explains the varying patterns of judicial efficacy. In contrast, neither view of the Court alone, nor the existing paradigm of *Brown* as the symbol of judicial efficacy, works very well. They are too inflexible to take account of the complexity of events. Courts can matter, but only sometimes, and only under limited conditions.

Planting the Seeds of Progress?

The judicial path of influence is not the only way an institution can take in contributing to civil rights. As the Dynamic Court view suggests, by bringing an issue to light courts may put pressure on others to act, sparking change. Thus *Brown* and its progeny may have been the inspiration that eventually led to congressional and executive branch action and some success in civil rights. According to one commentator, "*Brown* set the stage for the ensuing rise in black political activism, for legal challenges to racial discrimination in voting, employment, and education, as well as for the creation of a favorable climate for the passage of the subsequent civil rights legislation and the initiation of the War on Poverty" (Levin 1979, 80). Indeed, most commentators (and I assume most readers) believe this is the case and hold their belief with "little doubt."¹ As C. Herman Pritchett put it, "If the Court had not taken that first giant step in 1954, does anyone think there would now be a Civil Rights Act of 1964?" (Pritchett 1964, 869).

In this chapter I examine these claims. What evidence exists to substantiate them? How can they be measured? Why are they made so automatically and so frequently? How important was *Brown* to the civil rights struggle? Coming to terms with these questions further highlights the applicability of the Dynamic Court view.²

Theoretical Difficulties

The path of extra-judicial influence is difficult to trace for two major reasons. First, proponents of the Dynamic Court view have never spelled out

1. Lawrence (1980, 49). See, also, for example, Carter (1968, 247); Greenberg (1968, 152); Kluger (1976, 749); Stone et al. (1986, 481); Wasby et al. (1977, 5); Wilkinson (1979, 3-7); Woodward (1974, 139).

2. It must be remembered that even if the Dynamic Court view claim is substantiated, the extra-judicial route of influence is less certain and controllable than the judicial one. Lawyers involved in litigation aimed at producing significant social reform may have little ability to lay out and control the causal forces that may be generated.

in any detail exactly how it works. In attempting to come to terms with it then, it must be filled out. Second, and absolutely crucial, is the question of causation. In the social sciences, unlike the natural sciences, the researcher cannot control the environment so as to disentangle all the factors that alone, or in combination, may have led to, caused, created, or influenced a given outcome. Social scientists do not understand well enough the dynamics of influence and causation to state with certainty that the claims of Court influence (or any other causal claims) are right or wrong. Similarly, social scientists do not understand fully the myriad of factors that are involved in an individual's reaching a political decision. Ideas seem to have feet of their own, and tracking their footsteps is an imperfect science. Thus, even if I find little or no evidence of extra-judicial influence, it is simply impossible to state with certainty that the Court did not produce significant social reform in civil rights.

Acknowledging this limitation that all social scientists face is not the end of the assessment. It is a warning that the assessment will remain uncertain, not a barrier to making it. This is so because, at base, the Dynamic Court view claim of extra-judicial influence is empirical. If the Court was consequential in civil rights, then its influence should be identifiable and measurable. The more places in which it can be identified, the stronger the claim is. On the other hand, the fewer places in which it is found, the less likely it is that the effect of the Court is as powerful as the Dynamic Court view contends.

It is worth pausing for a moment to note the resistance that most people exhibit to an argument questioning the contribution of the Court to civil rights. It seems obvious that since the Court ordered an end to segregation, and some time later, much segregation was ended, the Court must have been causally responsible for the outcome. It is true, of course, that correlation does not equal causation. Merely because event A preceded event B does not necessarily mean that A caused B. Yet in assessing the influence of the Court on civil rights many assume that it was the crucial agent. To fully understand the contribution of the Court, this seeming uncritical inclination to find causation where none may exist must be overcome. It is of course possible that so doing will lead precisely back to the Dynamic Court view and the generally accepted explanation of the Court's causal influence. But if so, the argument will be strengthened, and will be able to defend itself against the charge of uncritical causal attribution.³

This cautionary note, however, does not resolve the problem of how to think about causal influence. Broadly speaking, three types of information must be known. First, the mechanisms or links of influence must be clearly

specified. One needs to be told, for example, that Court decision A influenced President B to win legislation C that improved civil rights. Once the hypothesized links are specified, then, second, the kind of evidence that would substantiate them must be presented. While there are no precise and exact measures that can be applied, there are a number of indicators that can be examined. One is *attribution*. Using the example above, if President B states that action was taken because of Court decision A, that would be good evidence for the link. Similarly, if President B's *actions changed* in such a way as to conform with the Court, regardless of what was said, this might be evidence too. If one of the links involved the public, then *opinion change* would certainly be an important measure. Further, if one of the links involved salience, bringing issues to the forefront of elite and public attention, measures of media coverage could be obtained. Third, other possible explanations for the change must be explored and evaluated. This includes examining the evidence mentioned above in the context of other political, social, and economic factors at work. For it is possible that even though President B acted after Court decision A, the action was taken because of pressure from other actors who acted independently of the Court.

In addition, the passage of time plays a critical role, yet one that is difficult to assess. If A orders B to do X, and B immediately does X, it seems reasonable to credit A with influencing B's actions. However, the more time that elapses between the order and the action, the more tenuous is the causal link. This is principally because the longer the time period, the more room there is for other actors to intervene and influence B. While it might be the case that these actors were themselves influenced by A, this would add another step to the causal chain. A chain is only as strong as its weakest link. These kind of determinations can be made only in the context of the data. Thus, the passage of time forms a backdrop to an evaluation of causal claims.

Turning to the specifics, I have tried to delineate the links that are necessary for the Court to have influenced civil rights by the extra-judicial path. The bottom line, the last link, is that the action of the president and Congress resulted in change. That is, the passage of the 1964 Civil Rights Act and the 1965 Voting Rights Act brought about change. This case was made in chapter 2 and it is assumed to be true throughout this chapter. The key question, then, for the Dynamic Court view's extra-judicial influence claim, is the extent to which congressional and presidential action was a product of Court action.

One hypothesized link postulates that Court action gave civil rights prominence, putting it on the political agenda. The Dynamic Court view maintains that when political institutions are unwilling or unable to deal with certain issues, courts can provide an appropriate forum. Elected and appointed officials, the claim goes, find it politically difficult to ignore issues brought out by Court decisions. Media coverage of civil rights over time could provide good evidence to assess this link.

3. Social psychologists have been intrigued by why people so readily and often incorrectly attribute causation to temporal events. See Jennings et al. (1982, 2:4); Nisbett and Ross (1980, 117); Tversky and Kahneman (1982a, 128; 1982b, 4).

A second link, put quite simply, is that Court action influenced both the president and Congress to act. The Court, in other words, was able to pressure the other branches into dealing with civil rights. With the executive, evidence might be found in what presidents said about civil rights as well as what kinds of bills they had introduced. With members of Congress, one might look to what was said in debates over civil rights legislation and to other indications of congressional concern such as the number of civil rights bills introduced and sponsored. Time, of course, and the general political and social context would overlay this analysis.

A third hypothesized link proposes that the Court favorably influenced white Americans in general about civil rights and they in turn pressured politicians. By bringing the treatment of black Americans to nationwide attention, the Court may have fomented change. Evidence here would include finding that whites knew about what the Court did, that they changed their opinions about blacks, and that changing white opinion affected political elites. The length of time over which any of this occurred and other contextual factors need to be examined too.

A final hypothesized link suggests that the Court influenced black Americans to act in favor of civil rights and that this in turn influenced white political elites either directly or indirectly through influencing whites in general. Evidence for this link might be found in civil rights actions, in the reasons blacks gave for acting, the knowledge they had of the Court's opinions, changes in the size and strength of black civil rights groups, and, as always, the time factor and the political and societal context.

Regardless of the findings of this examination, one additional step is necessary to make believable the causal connection of the Court to congressional and executive action. That, of course, is an examination of the other political, social, and economic factors that could plausibly have influenced the action. While I allude to some of these in this chapter, I postpone the main discussion until chapter 5 and ask the reader to bear with me.

To sum up, in order to assess the claim that the influence of the Court on civil rights followed the Dynamic Court view's extra-judicial path, I have identified necessary links in the causal chain and appropriate places for extra-judicial effects to be found. These include the salience of civil rights as an issue and the actions and attitudes of political elites, of white Americans, and of black Americans. With each of these groups I will look for evidence of the effect of the Court on their attitudes and actions in support of civil rights. If I find such evidence, then the Dynamic Court view will be supported. However, even if I find little or no evidence, this view cannot be totally rejected for the methodological reasons mentioned above. To the extent that I find little or no evidence for the effect, the best I can conclude is that the argument is unproven. But if this is the case, it should serve to shift the burden of proof to the proponents of the claim.

Saliency

When the Supreme Court unanimously condemned segregation in 1954, it marked the first time since 1875 that one of the three branches of the federal government spoke strongly in favor of civil rights on a fundamental issue. An important claim of the Dynamic Court view is that the Court's action put civil rights on the political agenda. "Brown," it is claimed, "launched the public debate over racial equality" (Neier 1982, 241–42). One important way in which the political agenda is created is through the press. John Kingdon, in his study of congressional voting decisions, noted that the "printed and broadcast media are capable of the kind of continuous and prominent coverage of a story which makes it virtually impossible for a congressman to ignore." Further, he suggested that the "mass media may be powerful agenda-setters" with a "substantial impact on the determination of which issues will be seriously considered and which will not" (Kingdon 1981, 284, 223; Lyengar and Kinder 1987). Thus, one important way in which the Court may have given salience to civil rights is through inducing increased press coverage of it and balanced treatment of blacks.

Press Coverage

Overall, there is no evidence of such an increase or major change in reporting in the years immediately following *Brown*. In general, newspaper coverage of civil rights was poor until the massive demonstrations of the 1960s. In the South, for example, a study by the Southern Regional Council (SRC) of "representative" white newspapers concluded that they constituted "the greatest single force in perpetuating the popular stereotype of the Negro." The problem, the SRC found, was that "the average white editor believes, rightly or wrongly, that readers want little mention of the Negro which does not fit in with their own concept of colored persons" (SRC n.d., 2). Numerous studies support this conclusion. C. A. McKnight, executive director of the Southern Education Reporting Service, found that in the years following *Brown* Supreme Court treatment of segregation received "minimum coverage" (quoted in Sarratt 1966, 263). In 1956, Ralph McGill, editor of the *Atlanta Constitution*, chided newspapers for failing to do "a good job of presenting and interpreting the segregation controversy" (quoted in Carter 1957, 4, n.4). This was particularly true in the South, where there was a "paucity" of coverage and where the wire services "seldom reported the story in its full dimensions and meaning" (Watters and Cleghorn 1967, 73 n.10). And *Time* magazine criticized Southern newspapers for doing a "patchy, pussyfooting job of covering the region's biggest running story since the end of slavery" ("The Press" 1956, 76).

More specifically, with desegregation, Meyer found "slipshod, lazy handling" of the "Supreme Court's ruling" (Meyer 1960, 37). There was a "fail-

ure" to report on the thoughts of blacks and there were "few interviews" with black leaders (Meyer 1960, 38-9). In a study of three national, one regional, and eighteen North Carolina papers, at a time when desegregation was "in the news," Carter concluded that "the most striking aspect of newspaper attention to the desegregation issue in the papers studied was the degree of *inattention*" (Carter 1957, 18, 10). Similarly, a study of five white Mississippi papers for selected months in each of the years 1962, 1963, and 1964 found that the papers "either segregated black news or virtually ignored it." And when they did cover civil rights activities, "there were major flaws, the columns" (Hoover 1971, 57, 59). A study of 712 papers with 28 million subscribers found that papers with 50 million civil rights, while the remaining papers printed "erroneous information" and "committed grievous faults" (cited in Meyer 1960, 52-53). In general, the Southern press did not greatly increase or balance its civil rights coverage in response to the Court.

Part of the reason for this limited coverage of desegregation is the nature of press coverage of the Supreme Court. As late as 1964 most of the reporters covering the Supreme Court lacked training for legal reporting. The Supreme Court assignment was usually joined to a number of others such as the Justice Department and the U.S. Court of Appeals for the District of Columbia Circuit. It was not until 1955, for example, that Anthony Lewis started covering the Supreme Court for the *New York Times*. But even after the training and quality of Court reporters improved, newspaper coverage remained poor. Examinig coverage of the reapportionment and prayer decisions of the 1960s, Newland found that headlines were "generally misleading" and that editors had a propensity for "choosing sensational material over more significant cases for reports and blowing up stories to sensational dimensions" (Newland 1964, 29, 33). Newspapers did not appear interested in providing the kind of in-depth and continuous coverage that could have lead to greater public awareness and given civil rights salience. It is no surprise, then, that press coverage of civil rights did not greatly change in the wake of *Brown*.

The most powerful way to determine if there was a sustained increase in press coverage of civil rights in response to *Brown* is to actually count press stories over time. If *Brown* had the impact that the Dynamic Court view predicts, the evidence should show a sustained increase in media coverage of civil rights. The evidence is presented in figure 4.1 and table 4.1. Turning to table 4.1, one can see (column 2) that while press coverage of civil rights, as measured by the number of stories dealing with the issue in the *Reader's Guide To Periodical Literature*, increased moderately in 1954 over the previous year's total, by 1958 and 1959 coverage actually dropped below the level found in several of the years of the late 1940s and early 1950s! The enormous

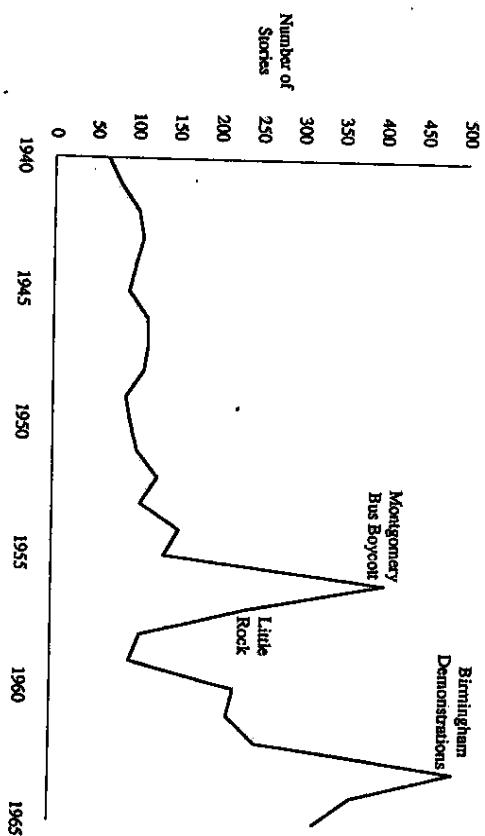


Figure 4.1. Magazine Coverage of Civil Rights, 1940-1965

increases in 1956 and 1957 are most persuasively explained not by Court action but rather by the Montgomery bus boycott, the violence in Clinton, Tennessee, and the presidential election campaign in 1956, as well as the Little Rock crisis in 1957.⁴ In addition, if one examines the magazines in America in the 1950s and early 1960s with the largest circulations, *Reader's Digest*, *Ladies Home Journal*, *Life*, and the *Saturday Evening Post*, the same general pattern again repeats. And it was not until 1962 that *TV Guide* ran a story having to do with civil rights. Thus, press coverage provides no evidence that the Court's decision gave civil rights salience for most Americans.⁵

It is possible, of course, that the political agenda is formed more by elites than by ordinary citizens. Thus, it may be that the magazines most likely read by elites would provide increased coverage of civil rights in the wake of the Court's decision. But this is not the case. The magazines most likely to be read by political elites, the *New York Times Magazine*, *Newsweek*, *Time*, and the *New Republic*, show the same pattern. While most of these magazines did contain more civil rights articles in 1956 and 1957 than in the years prior to *Brown*, this is most plausibly due to the factors identified above. In fact, for each of these magazines there was as much, if not more, coverage of civil rights in several of the years of the 1940s as in 1958 or 1959. The same

⁴ This conclusion is based on examining the titles to civil rights entries in the *Reader's Guide To Periodical Literature* and *The New York Times Index*, as well as spot-checking articles in several periodicals.

⁵ The reader should note, too, that *Universal Newsreels* never mentioned *Brown* (Branch 1988, 113).

Table 4.1 Magazine And Press Coverage Of Civil Rights, 1940-1965

Year	<i>Reader's Guide</i>		<i>NYT Mag.^a</i>	<i>New Rep.</i>	<i>Newsweek</i>	<i>Time</i>	<i>Reader's Digest</i>	<i>Ladies H.J.</i>	<i>Life</i>	<i>Sat. Eve. Post</i>	<i>TV Guide</i>	<i>NYT Index^b</i>
	Entries	# of Journals										
1940	64	127	0	5	1	1	1	—	1	2	—	.5
1941	80	118	0	4	2	3	0	1	1	2	—	.4
1942	102	—	0	5	2	6	2	1	1	2	—	.4
1943	108	115	2	14	0	3	2	0	1	2	—	.4
1944	99	—	1	8	2	6	3	0	4	0	—	.6
1945	91	127	0	12	1	1	4	0	2	1	—	.5
1946	114	—	1	7	9	2	2	0	0	2	—	.6
1947	115	133	3	11	5	6	2	1	4	1	—	.8
1948	110	—	4	7	10	10	4	1	2	5	—	.4
1949	88	122	1	3	4	6	2	0	9	2	—	.6
1950	94	—	1	16	4	5	1	2	4	2	—	.5
1951	102	119	2	12	6	7	2	1	0	1	—	.4
1952	127	—	1	19	9	10	3	1	1	6	—	.3
1953	107 ^c	122	1	6	6	12	0	0	2	1	0	.5
1954	154	—	6	6	6	14	3	0	4	4	0	.3
1955	136	114	1	3	8	13	3	0	1	3	0	.4
1956	402	—	6	41	15	28	5	0	35	2	0	1.0
1957	235	111	6	11	12	14	2	0	9	2	0	1.0
1958	108	—	0	3	3	7	0	0	2	1	0	.4
1959	95	110	2	9	1	5	1	0	1	2	0	.6
1960	222	—	5	19	13	20	3	1	7	1	0	1.1
1961	214 ^d	134	11	16	19	13	1	0	4	2	0	1.3
1962	249	—	6	12	24	12	2	2	3	0	3	1.0
1963	489	129	12	27	49	26	3	1	14	4	1	2.8
1964	365	—	18	17	17	21	2	1	7	6	2	3.1
1965	322	126	9	14	21	11	4	1	5	3	0 ^e	3.0

SOURCE: See Appendix 5.

NOTES:

^aRepetitions excluded.

^bProportion of pages in *New York Times Index* devoted to coverage of civil rights (in percent).

^cNegro History Bulletin first indexed April 1953-February 1955.

^dEbony first indexed March 1961-February 1963.

^eFor *TV Guide* there was an average of 6.8 stories per year in the years 1966-79.

general pattern holds for civil rights coverage in the *New York Times* (column 12) as measured by the proportion of pages in the *Times Index* devoted to discrimination. In 1952, there was actually more coverage than in 1954 or 1955. Further, coverage in the years 1954, 1955, 1958, and 1959 was barely equal to or actually less than the coverage allotted to civil rights in four of the years of the 1940s! Here again, there is no evidence that the Court's action indirectly affected elites by putting civil rights on the political agenda through the press.

Textbooks

Another way that *Brown* could have influenced perceptions and beliefs is through changing textbook coverage of civil rights. Proponents of the Dynamic Court view claim that Court decisions generally influence the way Americans think about issues. Tracing the path of ideas is difficult, but if in the wake of *Brown* schools presented a different and more positive version of the contributions of black Americans and the need to end all race-based discrimination, this would provide good evidence for the claim. In this way, the Court could help mold the political agenda by influencing beliefs in a direction more supportive of civil rights. Textbook coverage of civil rights, then, might be one way of tracking *Brown*'s subtle but powerful influence on ideas.

Examining textbook coverage of blacks and civil rights in the years prior to *Brown*, several studies have documented how blacks were portrayed as simple, lazy, and content, making few if any contributions to white America (American Council 1949; Carpenter 1941). A major 1949 study of 315 elementary, secondary, and college texts, for example, found that a "very large proportion of the references" to blacks treat them as "slaves or as childlike freedmen." The "little data" that are presented in history and social science textbooks about post Civil War conditions perpetuate the "plantation mammy and Uncle Remus stereotypes" (American Council 1949, 32). The claim is that this changed after *Brown*.

While it is the case that the textbooks of the 1980s correct the racism of earlier presentations, the change was so long in coming that it is difficult to make a case that *Brown* played much of a role. For example, a 1961 study of the 48 "most widely used" secondary-school textbooks found that the "main criticisms" of the 1949 report were still "equally valid." In reaching this conclusion, the study randomly selected one-half of the 48 books. Using the 1949 report as a baseline, the study found that "textbooks continue to present a picture of this group primarily as slaves and as inexperienced, exploited, ignorant freedmen" so that the "impression left with the reader is that Negroes in America have always been, and thus presumably are now, a simple, backward people." Astonishingly, although all the books were published after *Brown*, and almost half (23 of 48) were published in 1960 or 1961, only 12 (of 24) made any reference to *Brown* at all! Of those 12, only 4 made more

than incidental mention of it, 2 seeming to blame the Court for stirring up trouble! (Marcus 1961, 7, 38–40, 43). This lack of change was limited to blacks, for the study found positive change since 1949 in the textbook treatment of Jews and other minorities. It is hard to imagine a study less supportive of the Dynamic Court view.

The thrust of these findings was corroborated by a 1970 study of seven texts (six state-approved) being used in elementary and junior high schools in the South. The study found that the "Negro is never portrayed as an actor" and that "there is a deliberate attempt to perpetuate the image of the Negro as an emotional, trusting, lazy child" (McLaurin 1970, 8). If *Brown* supported civil rights by bringing new ideas to public consciousness, there is no evidence that it did so through influencing the textbooks American children read in school.

In sum, neither press coverage of civil rights nor textbook treatment of blacks provides evidence for the Dynamic Court view's extra-judicial-effects claim. This finding is striking since *Brown* is virtually universally credited with having brought civil rights to national attention.

Elites

The extra-judicial-effects argument claims that the actions of the Supreme Court influenced members of Congress, the president, and the executive branch. The argument might be that because of the "deference paid by the other branches of government and by the American public" (Neier 1982, 9) to the Supreme Court, its decisions prodded the other branches of the federal government into action. Further, the argument might run that the Court's actions sensitized elites to the legitimate claims of blacks. As Wilkinson puts it, "*Brown* was the catalyst that shook up Congress" (Wilkinson 1979, 49). Using the approach outlined above, I examine likely places for these effects to be found.

Legislation

A sensible place to look for evidence of indirect effects is in the legislative history and debates over the 1957, 1960, and 1964 civil rights acts, the 1965 Voting Rights Act, and in presidential pronouncements on civil rights legislation. If Court action was crucial to congressional and presidential action, one might reasonably expect to find members of Congress and the president mentioning it as a reason for introducing and supporting civil rights legislation. While it is true that lack of attribution may only mean that the Court's influence was subtle, it would cast doubt on the force, if not the existence, of this extra-judicial effect.

At the outset, the case for influence is supported by the fact that civil rights bills were introduced and, for the first time since 1875, enacted in the

years following *Brown*. While this makes it seem likely that *Brown* played an important role, closer examination of the impetus behind the civil rights acts of 1957, 1960, and 1964, and the Voting Rights Act of 1965, does not support this seemingly reasonable inference. While an alternative explanation is suggested below, the discussion is aimed at testing the case for Court influence. A fuller treatment of possible alternative explanations is developed in chapter 5.

Starting with the 1957 bill, the first bill and temporally the closest to *Brown*, students credit it to Attorney General Brownell's pro-civil rights sympathies and to electoral pressures.⁶ Conspicuously absent is more than passing mention of *Brown*. As Burk put it, it was the "Montgomery boycott, violent incidents in Mississippi, and the hope of political gain among Northern black voters" that "sparked", "scattered voices within the administration" to press "the case for a stronger official identification with the integration cause" (Burk 1984, 155). Chief among these voices were those of Northern Republican representatives who hoped to appeal to their increasing number of black constituents, and Republican party leaders who saw an opportunity to make inroads on the Democrats post-New Deal strength among black voters. Brownell aside, "Republicans interested in civil rights as a matter of principle," Anderson concluded, were "in the minority" (Anderson 1964, 3).

Eisenhower's position on the bill, and civil rights in general, favors this analysis. His support for the bill was "at best tepid" (Anderson 1964, 45), and the bill was not introduced until April 1956, quite late in a congressional session that faced nominating conventions coming up in the summer and a presidential election looming in the fall. Eisenhower did not speak in support of the bill and "it was only in the heat of the final weeks of the [1956] election campaign, at a moment when the Republican leadership considered the outcome to be hanging in the balance, that the President finally endorsed the Justice Department's program" (Anderson 1964, 45, 135).

The press and political opponents understood the bill as a response to electoral pressures, not to constitutional mandates. Senator Humphrey (D., Minn.) called it "lip service by leap-year liberals" (quoted in Anderson 1964, 39), and a *New York Times* editorial found "the most interesting thing about this series of proposals is that the Administration did not see fit to embody them in legislative form sooner than the spring of this Presidential election year, when they would be calculated to cause maximum embarrassment to the Democratic Party" ("Civil Rights Report" 1956, 30).⁷ Indeed, Anderson

⁶ See Anderson (1964, 3, 47, 133–35); Burk (1984, 6, 145, 165, 218); Kluger (1976, 754); Lawson (1976, chap. 6); Wilkins (1984, 234).

⁷ An earlier editorial made the same point, concluding that "the sudden flurry of interest in civil rights legislation so late in the Congressional session is enough to make one wonder" ("Civil Rights at First Base" 1956, 26).

reports that the "civil rights bill was considered by the entire press to be significant only as a gesture and an element in the jockeying between the two parties for advantage in the urban constituencies" (Anderson 1964, 96–97). And, as chapter 2 showed, substantively it accomplished little.

This analysis is strengthened by Eisenhower's extreme reticence to act on civil rights in the years following *Brown*. In a press conference of July 17, 1957, just a few months before Little Rock, Eisenhower stated: "I can't imagine any set of circumstances that would ever induce me to send Federal troops . . . into any area to enforce the order of a federal court" (quoted in Burk 1984, 173). While Eisenhower did send troops to Little Rock, he did so only as a last resort, to prevent violence. Indeed, at Mansfield, Texas, a year earlier, he had done nothing while the governor successfully used the Texas Rangers to remove black students from Mansfield High School and Texarkana Junior College. As Burk points out, 1956 was an election year, Texas was seen as a crucial state, and Eisenhower was on friendly terms with Governor Shivers. These factors were missing at Little Rock (Burk 1984, 167, 185–86). In addition, the administration did not apply the *Brown* decision to funding decisions for segregated Southern institutions. For example, the Library Services Act of 1956 sent \$7.5 million to segregated Southern libraries, and Alabama, Georgia, Mississippi, and South Carolina received \$5.3 million in National Defense Education Act funds in 1959 despite their lack of compliance with *Brown*. As late as 1960, the Southern states received over \$1 billion through the grants-in-aid program to state and local governments (Aptekar 1964, 88). Thus, *Brown* does not appear to have had a positive impact on the Eisenhower administration's activities.

The same general argument can be made for the 1960 Civil Rights Act. Again, electoral pressure was the crucial motivating factor. From the Republican point of view, the apparently successful strategy of courting Northern urban black voters and, at the same time, embarrassing the Democrats, was used again (Berman 1962, 115). On the Democratic side, Senate majority leader Lyndon Johnson (D., Texas) "knew that his party's chances in 1960 might be seriously hurt if the Eighty-Sixth Congress, which the Democrats controlled, failed to pass civil rights legislation." Also, Johnson had his own presidential ambitions and was fearful of being branded a Southern extremist (Berman 1962, 5). Not surprisingly, then, the final product had little substantive content, allowing politicians to play it both ways, taking credit for acting with the black electorate while telling concerned whites that little had changed. Its enactment was of "scant news value" and the bill-signing did not even make the front page of the *New York Times* (Berman 1962, 1). As Thurgood Marshall put it, the bill "isn't worth the paper it's written on" (quoted in Berman 1962, 117). The National Association for the Advancement of Colored People (NAACP) called the bill "a fraud" and Marshall

complained to the *New York Times* that "it would take two or three years for a good lawyer to get someone registered under this bill." He emphasized the word "good",⁸ (Lewis 1960a, 14). Thus, the 1960 Civil Rights Act does not provide evidence for the influence of *Brown*.

The story of the 1964 act is similar in that there is no evidence of Court influence and a great deal of evidence for other factors, in this case the activities of the civil rights movement. The Kennedy administration offered no civil rights bill until February 1963 and the bill it offered then was "a collection of minor changes far more modest than the 1956 Eisenhower program" (Orfield 1969, 24).⁹ When a House subcommittee modified and strengthened the bill, Attorney General Robert Kennedy met with the members of the full Judiciary Committee in executive session and "criticized the subcommittee draft in almost every detail" (Berman 1966, 21–22; Whalen 1985, 44–45). The president specifically objected to the prohibition of job discrimination that became Title VII, the provision making the Civil Rights Commission a permanent agency, the provision empowering the attorney general to sue on behalf of individuals alleging racial discrimination, and the provisions mandating no discrimination in federally funded programs and allowing fund cut-offs (Berman 1966, 22; Greenberg 1973, ix). It wasn't until the events of the spring of 1963 that the administration changed its thinking.

In Congress, there is little evidence that *Brown* played any appreciable role. The seemingly endless congressional debates, with some four million words uttered in the Senate alone (Whalen 1985, 193), hardly touched on the case. References to *Brown* can be found on only a few dozen out of many thousands of pages of Senate debate.¹⁰ While much of the focus of the debate was on the constitutionality of the proposed legislation, and on the Fourteenth Amendment, the concern was not with how *Brown* mandated legislative action, or even how *Brown* made such a bill possible. Even in the debates over the fund cut-off provisions, *Brown* was seldom mentioned (Berman 1966; Orfield 1969, 33–45; Whalen 1985; Graham 1990, 82–83). This is particularly surprising since, as Condition IV suggests, it would have been very easy for pressured and uncertain members of Congress to shield their actions behind the constitutional mandate announced by the Court. That they did not credit the Court with affecting their decisions prevents the debates from

8. During the 1960 campaign Kennedy said that he had asked Senator Joseph Clark and Representative Emanuel Celler to prepare civil rights bills. When they introduced these bills in 1961, the administration denied sponsorship and Pierre Salinger, Kennedy's press secretary, stated that the administration did not consider new civil rights legislation "necessary at this time" (quoted in Sarrett 1966, 73).

9. References can be found in the following parts and on the following pages of volume 110 of the *Congressional Record*, 88th Congress, 2nd sess., 1964: Part 4: 4496, 5017, 5087, 5247, 5267, 5342; Part 5: 5695, 5703, 5705, 5935, 6540, 6813, 6814, 6821, 6837, 6838; Part 6: 8052, 8054; Part 7: 8620, 8621; Part 8: 10919, 10921, 10925, 10926, 11194, 11195, 11198; Part 9: 11357, 11875, 12339, 12579, 12580; Part 10: 12683, 13922; Part 11: 14294, 14296, 14447, 14457. Over 40 percent of these references are by Senators opposing the bill.

providing evidence for the indirect-effects thesis. Thus, there does not appear to be evidence for the influence of *Brown* on legislative action.

Finally, there is the question of the 1965 Voting Rights Act. It would make little sense to find major Court influence here, eleven years after *Brown*, not having found evidence for it in the earlier bills. And this is the case, for the impetus and explanation for the enactment of the 1965 Voting Rights Act were the activities in Selma, not Court decisions (Garrow 1978).

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

Finally, one can look to the political parties themselves to see if *Brown* induced them to reach out and include more blacks in their organizations. Looking at the number of black convention delegates, as late as 1964 there were only sixty-five black delegates (2.8 percent of the total number) at the Democratic National Convention, the number of black delegates the Republicans achieved in 1912! From 1952 to 1956 the number of black delegates to the Democratic National Convention dropped by nearly one-third. It wasn't until the 1972 Democratic convention that black delegates comprised over 10 percent of the total. On the Republican side, there were actually fewer black delegates in the years 1956–68 than there were in 1952 (Jaynes and Williams 1989, 217). These findings provide no support for *Brown*'s positive influence on political elites.

In sum, I have not found the evidence necessary to make a case of clear attribution for the Court's effects on Congress, the president, or the major political parties. Students of the Civil Rights Acts of 1957, 1960, and 1964, and the 1965 Voting Rights Act, credit their introduction and passage to electoral concerns, or impending violence, not Court decisions. The extra-judicial-effects claim is not supported with Congress or the president.

Title VI

When the 1964 Civil Rights Act became law, it contained a title (Title VI) prohibiting the use of federal funds in programs that discriminated on the

basis of race. One claim that is often made is that Title VI stemmed from *Brown*. Without *Brown*, the argument goes, there would not have been the impetus for introducing such legislation. If this is the case, then *Brown* had an important indirect effect.

At first blush it appears that such a case can be made. Starting in 1955, the year after *Brown*, and continuing fairly regularly in the following years, Representative Adam Clayton Powell, Jr., of Harlem, with the support of the NAACP, introduced amendments to federal school-aid bills prohibiting any federal aid to states that maintained segregated schools by law in defiance of *Brown* (Sundquist 1968). If 1955 marked the first appearance of this type of legislative proposal, and if it was inspired by *Brown*, then a case can be made for *Brown's* influence. However, 1955 was not the first time such amendments had been offered, supported, or taken seriously enough to kill bills. In 1943, for example, Senator Langer of North Dakota had introduced an amendment to the Educational Finance Act of 1943 which read: "there shall be no discrimination in the administration of the benefits and appropriations made under the respective provisions of this act, or in the state funds supplemented thereby on account of race, creed, or color" (quoted in Munger and Fenno 1962, 67–68). While requiring equalization of funding rather than prohibiting it where segregation ruled, the aim was to insure that if federal money was spent, black children would receive their proportionate share.¹⁰

The equalization strategy changed in 1946 when newly elected Representative Powell himself proposed an amendment to a bill providing for a school-lunch program. The amendment denied lunch program funds "to any state or school if . . . it makes any discrimination because of race, creed, color, or national origin of children" (*Cong. Rec.* 20 February 1946, 1495). While Powell maintained on the House floor that his amendment only required equalization, he describes it in his autobiography as the "first test" of what was later to be called the Powell Amendment (Powell 1971, 81). Other members, particularly Southerners, argued that it prohibited aid to states maintaining segregated schools by law. Making the point clear, Representative Bender of Ohio offered an amendment denying funds to "any State wherein there is maintained under the laws of such State separate schools for the education of children of different color" (*Cong. Rec.* 20 February 1946, 1495). In 1949, Senator Lodge of Massachusetts offered an amendment to a federal education bill prohibiting segregation in districts where federal aid was received. The amendment was supported by the NAACP (Munger and Fenno 1962, 69).¹¹

10. The NAACP did not support the Langer Amendment on the ground that it would kill the bill and that federal money, even if unfairly distributed, was better than no money at all (Bendiner 1964, 45).

11. At both its 1950 and 1951 conventions, the NAACP went on record in support of federal aid to education "provided no such federal aid is given to states where racially segregated education is practiced" (quoted in Munger and Fenno 1962, 69).

Also in May of 1949, the NAACP voted to "withhold active support" from federal legislation in "housing, health or education which does not expressly forbid segregation" (quoted in Bernstein 1972, 293).

On the executive level, in 1947 President Truman's Committee on Civil Rights (PCCR) recommended the "conditioning by Congress of all federal grants-in-aid and other forms of federal assistance to public or private agencies for any purpose on the absence of discrimination and segregation based on race, color, creed, or national origin" (PCCR 1947, 166). President Truman, in 1951, without the aid of *Brown*, vetoed a bill containing a provision requiring schools on federal property to conform to local law (Berman 1970, 191). And, as late as April 1963, President Kennedy, when asked at a news conference if he supported such executive branch authority, replied in the negative, finding it "unwise to give the President of the United States that kind of power" (quoted in 110 *Cong. Rec.* 24 March 1964, 6046).

What this brief history demonstrates is that the idea of conditioning federal aid on non-discrimination or non-segregation predated *Brown* in both the legislative and executive branches. Most poignantly, Representative Powell wrote that the inspiration for his amendment came to him in a January 1945 speech in Charlotte, North Carolina. "It was then," he wrote, "that I decided to create the Powell Amendment, forbidding Federal funds to those who sought to preserve segregation, and wherever I thought there was an opportunity that it could be passed . . . there I would introduce it." Nine years before *Brown*, as Powell "thought and prayed, the words came: 'No funds under this Act shall be made available to or paid to any State or school'" (Powell 1971, 81). Thus, it is hard to make a case that *Brown* provided the impetus for Title VI.

It is worth pausing here for a moment to ask what, if not Court action, played a major role in producing congressional and presidential support for civil rights? While chapter 5 is entirely devoted to this question, one key point merits presentation here. The point is that civil rights action, especially in the 1960s, was based in large part on the elite belief that, unless there was federal action on civil rights, mass bloodshed would occur. The avoidance of violence was the linchpin of the Kennedy administration's civil rights program (Navasky 1977). In terms of the 1965 Voting Rights Act, the violence at Selma was crucial in insuring quick passage of a strong bill (Garrow 1978). And in terms of the 1964 Civil Rights Act, Berman, concluding his study of the bill's passage, writes: "First President Kennedy and then President Johnson, as well as the bipartisan leadership in Congress, came to the conclusion that only a strong civil rights bill could possibly prevent widespread bloodshed and utter catastrophe for the nation" (Berman 1966, 139; Graham 1990, 142). The fear of violence, not the inspiration of Court action, was most clearly a major impetus for federal action.

Sponsorship of Civil Rights Legislation

Another potential indicator of Court influence over Congress and the president is sponsorship of civil rights legislation. If *Brown* influenced the other branches, one might reasonably expect to see an increase over time in the number of civil rights bills introduced and in the number of sponsors of civil rights bills. On the surface, the enactment of civil rights bills in 1957, 1960, and 1964 provides evidence for such influence. However, as I suggested above, the introduction and enactment of these bills was based on factors other than Court decisions. Further, there was no increase in the sponsorship of substantive, enforceable equal-opportunity bills. Burstein and MacLeod have identified all such bills introduced, starting in 1941, and counted the number of sponsors. The number grows through the 1940s, reaching thirty-four in the years 1951–52. However, the number of sponsors then drops throughout the 1950s, falling to twenty in 1959–60, before rising to a peak in 1963–64 (Burstein and MacLeod 1979, 27). This pattern, with the number of sponsors actually dropping in the years immediately following *Brown*, does not show evidence of the Court's extra-judicial effects. Rather, it suggests a lessening concern with civil rights.¹²

Time

A final area worth exploring is the passage of time. If Congress and the president had acted immediately after the Court acted, it would seem reasonable to credit the Court with influence. On the other hand, the longer the time period between the two acts, the more tenuous the link. Clearly there is a continuum, with a finding of influence more reasonable when the subsequent action is close in time, less reasonable when many years have passed, and somewhat fuzzy in between. But characterizing the passage of time, of course, depends on the circumstances. Turning to the evidence, congressional and executive action was long in coming after Court decisions. In the field of elementary and secondary education, it was a full decade after *Brown* before Congress and the executive branch acted in a forceful manner. With higher education, it was at least a decade and a half from the graduate and professional school cases of the late 1940s until action was taken. In voting, there was more than a decade between the last Texas Primary Case and the 1965 Voting Rights Act. And in housing, *Shelley v. Kraemer* preceded the 1968 Fair Housing Act by twenty years. These large time-gaps left opportunities for intervening groups, institutions, and events to exercise influence. While I will have more to say about these intervening factors shortly, they did not gain much publicity until the 1960s, six full years after *Brown*.

One must be cautious in interpreting this data. Taken on their own, the

12. The reader should note, too, that between 1937 and the introduction of the 1957 act, the House had passed civil rights bills eight times (Anderson 1964, 47).

time intervals are hard to characterize. Do they represent too long a period to credit the Court with influence or, given the nation's normally glacial response to change, do they illustrate great alacrity? While the characterization is perhaps impossible to make in the abstract, the time intervals can be characterized in the context of the other possible indicators of indirect effects. Given the lack of clear attribution, the lack of changes in legislative initiative, the special role of violence, and the other non-Court related factors, the evidence suggests that the time intervals can be fairly characterized as too long to give the Court much credit. The time concern does not appear to provide strong evidence for the indirect-effects thesis.

In sum, in a number of appropriate places where the Supreme Court would be expected to affect elites, evidence of the effect does not exist. In the areas of clear attribution, legislative action, and time, evidence of the effect on elites is not apparent. I turn now to examine the evidence for the indirect effect on white Americans in general, keeping in mind the possibility that the Court might work its effects on elites through the larger population.

Whites

The extra-judicial-effects thesis reaches white Americans as well as elites. The Dynamic Court view here is that the Supreme Court "pricked the conscience" (Miller 1970, 281) of white America by pointing out both its constitutional duty and its shortcomings. "Except for *Brown*," Aryeh Neier contends, white Americans "would not have known about the plight of blacks under segregation" (Neier 1982, 239). The Supreme Court's contribution to civil rights should be seen as a two-step process: the successful prodding of Americans to change their racial attitudes, resulting in mounting pressures on elites to act.¹³ There are a number of places where evidence of this claim should be found.

Public Opinion—General

The extra-judicial-effects thesis of the Dynamic Court claim views courts as playing an important role in alerting Americans to social and political grievances. According to one defender of the claim, "without the dramatic intervention of so dignified an institution as a court, which puts its own prestige and authority on the line, most middle-class Americans would not be informed about such grievances" (Neier 1982, 239). For this claim to hold, in order for courts to affect behavior, directly or indirectly, people must be aware of what the courts do. While this does not seem an onerous responsibility, the Constrained Court view claims that most Americans have little knowledge about U.S. courts and pay little attention to them. This holds true

13. Kingdon argues that "swings in national mood" are an important indicator to elites to give attention to previously low priority items (Kingdon 1984, 207, 153).

even for the Supreme Court, the most visible and important federal court. There is both general and specific evidence to support this claim.

In general, surveys have shown that only about 40 percent of the American public, at best, follows Supreme Court actions, as measured by survey respondents having either read or heard something about the Court (Goldman and Jahnige 1976, 145; Daniels 1973; Kessel 1966). In 1966, for example, nearly 40 percent of the American public could not identify Earl Warren, despite a decade of Court activism in which the Chief Justice was both loudly praised and vilified (Adamany 1973, 808).¹⁴ Also in 1966, despite important Supreme Court decisions on race, religion, criminal justice, and voting rights, 46 percent of a nationwide sample could not recall *anything at all* that the Court had recently done (Murphy et al. 1973, 53). And when prompted with a list of eight "decisions," four of which the Court had recently made and four of which it had never made, and asked to identify which, if any, the Court had made, only 15 percent of a 1966 sample made four or more correct choices (survey cited in Dolbeare 1967, 199–201).

Among Americans who have some awareness of what the Court does,

there is little evidence that Court decisions legitimate action. That is, people aware of what the Court does may disagree with it. In fact, the more knowledgeable a person is about the Supreme Court, the more likely he or she is to disagree with it. In reviewing the literature, Adamany writes of the "Court's incapacity to legitimize governmental action" (Adamany 1973, 807). Evidence for this conclusion comes from the work of Murphy and Tanenhaus, who found that only 13 percent of the American public has the knowledge and beliefs about the Court necessary for it to legitimate action (Murphy and Tanenhaus 1968a). This includes the belief that the Court is a proper, impartial, and competent interpreter of the Constitution. This means that the potential pool of people who could be spurred into supportive action by a Supreme Court decision is small. The point is that although law may be a powerful legitimating force in American society, courts are weak legitimizers. Generally, then, the social science literature suggests that it would be most unlikely that the courts lit the fire under the civil rights movement.

A possible way in which this general lack of knowledge and barrier to Court effectiveness could be overcome is through heightened press coverage. Winter found that during the years 1948–76 the public's concern over civil rights was more strongly correlated with the amount of press coverage given to the issue than with any other issue he studied, including foreign affairs, the economy, social control, and concerns with the efficiency and integrity of government (Winter 1981, 9). Similarly, Winter and Eyal, focusing on the 1954–76 period, found "evidence of a strong agenda-setting effect" for the media with civil rights (Winter and Eyal 1981, 381). Thus, despite the general

¹⁴ Eight percent more Americans correctly identified Charles de Gaulle than the Chief Justice.

findings of the literature, the Supreme Court could have influenced white Americans through the press. Evidence here is important for the thesis, since, as Neier claims, "white Americans discovered black Americans through *Brown*" (Neier 1982, 12). The trouble with this line of reasoning, of course, is that there is no evidence that Supreme Court decisions increased press coverage of civil rights. The point has already been made (see table 4.1 and figure 4.1).

Public Opinion—Brown and Civil Rights

Another place to look for evidence is responses to survey questions about civil rights in general and support for *Brown* in particular. Surprisingly, and unfortunately, there appear to be no polls addressing knowledge of *Brown*. Two reasons probably explain this. First, until recent decades there was a "tendency" by pollsters to overlook the "race problem" when civil rights issues have been "out of the public eye." Thus, coverage was spotty. Second, it probably never occurred to pollsters, all of whom had presumably heard of *Brown*, to ask how many Americans had too. They probably assumed that all had! (Erskine 1962, 137).

There are, however, polls charting the reaction to *Brown* by Southerners over time (Gallup 1972). In July 1954, just a few months after the decision, 24 percent of all Southerners approved of the decision and of integrated schools while 71 percent disapproved. Nearly seven years later, in June 1961, the numbers were virtually identical, with 24 percent approving and 69 percent disapproving. Among white Southerners, in February 1956, only 16 percent approved. When white Southerners were asked in July 1954 whether they would object to sending their children to integrated schools, only 15 percent responded that they would not object. By 1959, support for desegregation actually dropped, with only 8 percent of white Southerners responding that they would not object (AIPO poll in Erskine 1962, 140, 141). Given the lack of positive change over time, it is entirely possible that supportive respondents were supportive before the Court acted. If not, then at most the Court influenced about one-quarter of all Southerners, and about one-sixth of white Southerners. But since there was at least some support for desegregated schools in the South before the Court acted, it seems fair to assume that the actual influence was less.

If there is little evidence that *Brown* changed opinions about school desegregation in the South, perhaps it helped change white opinions more generally. Indeed, a main argument for the indirect-effects thesis is that Court action pricked the conscience of white America and changed racial attitudes, paving the way for the 1964 Civil Rights Act (Wiebe 1979, 153). This is a plausible argument for two reasons. First, Page and Shapiro (1982, 1983) found "considerable congruence between changes in preferences and in policies" (Page and Shapiro 1983, 175). Looking at 357 instances of significant

change in the policy preferences of Americans from 1935 to 1979, they found that "when there is an opinion change of 20 percentage points or more, policy change is congruent an overwhelming 90 percent of the time" (Page and Shapiro 1983, 180). Second, it is clear that white Americans underwent a major change of attitude between the early years of the Second World War and the passage of the 1964 act. For example, in 1942 the National Opinion Research Center (NORC) found that a majority of Americans favored segregated transportation (51 percent), restaurants (69 percent), and neighborhoods (84 percent). By 1964, however, two nationwide Gallup polls found that six out of every ten Americans approved of the 1964 Civil Rights Act (Free and Cantril 1967, 121, 122). Is there evidence that this change was the effect of Court action?

Ideally, to answer this question, one would look to time-series data on white opinions about civil rights. Support for the Court's influence would be found if there was a sharp increase in supportive attitudes after *Brown* or if the rate of change of supportive attitudes increased. Unfortunately, the data are not ideal. Questions were not asked regularly and the pre-1954 data are sketchy. That being said, throughout the period from the beginning of the Second World War to the passage of the 1964 act, whites became increasingly supportive of civil rights. Writing in 1956, Hyman and Sheatsley found that the changes in attitude were "solidly based" and "not easily accelerated nor easily reversed" (Hyman and Sheatsley 1956, 39). Reviewing the available data in 1964, they noted the "unbroken trend of the past twenty years" (Hyman and Sheatsley 1964, 23). Further, they found that the changes were not due to any specific event, such as Kennedy's assassination, or a Supreme Court decision. They found that changes in national opinion "represent long-term trends that are not easily modified by specific—even by highly dramatic—events" (Hyman and Sheatsley 1964, 17).

These findings are also supported by various bits of public opinion data. One involves the views whites have of the intelligence of blacks. Here, the belief that blacks are as intelligent and educable as whites has been steadily increasing with no appreciable jump following *Brown* (Erskine 1962, 138; Hyman and Sheatsley 1956, 35; 1964, 20). In the field of job discrimination, by 1947 over 50 percent of Americans felt that Negroes should have an "equal chance" with whites in employment (NORC poll in Strunk 1947, 657). In 1950, 48 percent of Americans thought the federal government should go "all the way" or "part" of the way in requiring employers to hire non-discriminately as opposed to 41 percent who thought no action should be taken (AIPO poll in Strunk 1950, 175). These findings suggest that there was a steady trend in changing white opinion. They provide no evidence for the claim that the Court pricked the conscience of white Americans or in some way influenced their views.

Another way of examining the indirect-effects claim on white Americans

is to look at how the sensitivity of Americans to civil rights changed generally. According to one proponent of the claim, the "*Brown* decision was central to eliciting the moral outrage that both blacks and whites were to feel and express about segregation" (Levin 1979, 110). If the Court served this role, it would necessarily have increased awareness of the plight of blacks. The evidence, however, shows no sign of such an increase. Survey questions as to whether most blacks were being treated fairly resulted in affirmative responses of 66 percent in 1944, 66 percent in 1946, and 69 percent in 1956 (Hyman and Sheatsley 1956, 39). The variation of 3 percent is virtually meaningless. By 1963, when Gallup asked if any group in America was being treated unfairly, 80 percent said no. Only 5 percent of the sample named "the Negroes", as being unfairly treated while 4 percent named "the whites" (Gallup 1972, 3: 1825). This result, and the change over time, hardly shows an America whose conscience is aroused.

This lack of sensitivity to the plight of blacks can also be seen in views about attempts by blacks to exercise their rights as American citizens. In May 1961, of those respondents (63 percent) who had read or heard something about the freedom rides, nearly two-thirds (64 percent) disapproved while only 24 percent approved. When asked if civil rights demonstrations such as "sit-ins" or "freedom buses" would "hurt or help" the civil rights movement, over half the respondents opined that they would hurt (70 percent of Southerners) (Gallup 1972, 3: 1723, 1724). Former President Harry Truman, who desegregated the army, addressed an NAACP rally, issued a far-reaching civil rights report, and generally did more than any preceding president for civil rights, expressed this lack of sensitivity: "Northerners who go South as Freedom Riders are meddlesome intruders [who] should stay at home and attend to their own business" (quoted in Barnes 1983, 168). Most poignantly, in December 1958, when Gallup asked its usual question about the most admired men in the world, Governor Orval Faubus of Arkansas, who had repeatedly defied court orders a year earlier to prevent the desegregation of Central High School in Little Rock, was among the ten most frequently mentioned (Gallup 1972, 2: 1548). If the Court pricked the conscience of white Americans, the sensitivity disappeared quickly.

Similarly, for years Gallup has been asking its survey respondents their opinion of "the most important problem facing this country today." Figure 4.2 presents results from many of these questions from August 1947 to December 1965. Any response touching on an area of civil rights was counted. There was no change after *Brown*. A jump is recorded in September of 1956. No Court action was going on at the time but the Montgomery bus boycott was in full swing and 600 National Guardsmen patrolled the streets of Clinton, Tennessee, to quell violence over school desegregation. September 1957 shows 10 percent listing civil rights as the most important problem, in response, no doubt, to the crisis at Little Rock. But then the percentage drops,

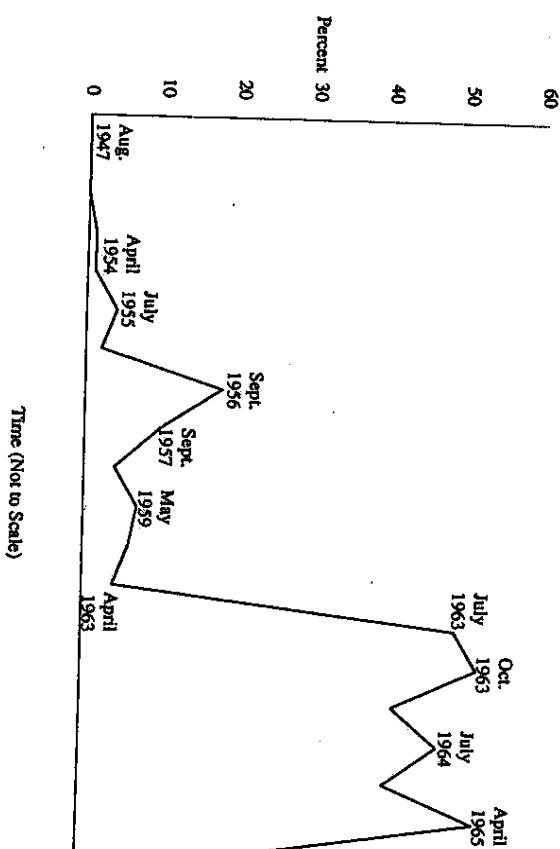


Figure 4.2. The Most Important Problem Facing This Country Today: Civil Rights Responses

and remains low, until the explosion in the summer of 1963. Needless to say, the spring and summer of 1963 saw the bloody civil rights protest marches in Birmingham, Alabama, the march on Washington, and the introduction of what became the 1964 Civil Rights Act. And civil rights remained on people's minds through the next two years as Americans marched and died throughout the country. Again, the evidence does not support the claim of the indirect-effects thesis that Court action stirred the conscience of white America.

The jump in the percentage of Americans naming civil rights as the most important problem facing America is startling. While the percentage had stayed at 10 percent or below from 1947 until 1963 (1956 excepted), it remained above 30 percent through the spring of 1965. It is most unlikely that this dramatic change was a result of Court action nearly a decade earlier. More likely, it resulted from the mass media's portrayal of the violence unleashed against peaceful protesters. For example, Garrow (1978) has chronicled the massive and supportive white response to the events in Selma that insured the quick passage of a strong voting-rights bill. One hundred and twenty-two members of Congress gave 199 speeches supportive of the bill. Sympathy marches were held in Boston, Chicago, Detroit (where Governor Romney and Mayor Cavanaugh led a march of 10,000), and Los Angeles, among other cities. President Johnson, speaking to Congress and an estimated 70 million viewers on all three television networks, gave the first personally delivered special presidential message on domestic legislation in nineteen years. Speaking of the black protester, the President said: "His actions and protests, his

courage to risk safety and even to risk his life, have awakened the conscience of this nation" (quoted in Garrow 1978, 107). As will be discussed shortly, there was a virtual explosion of protest activity in the early 1960s, particularly in 1963. Thus, there does not appear to be evidence supporting the claim that the massive change in the opinions of white Americans about civil rights was an effect of Court action. As Burke Marshall, head of the Justice Department's Civil Rights Division put it, "the Negro and his problems were still pretty much invisible to the country . . . until mass demonstrations of the Birmingham type" (quoted in Fairclough 1987, 135).

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

Blacks

The Dynamic Court view's indirect-effects thesis makes claims about the effect of the Supreme Court on black Americans. Here, a plausible claim is that *Brown* was the spark that ignited the black revolution. By recognizing and legitimizing black grievances, the public pronouncement by the Court provided blacks with a new image and encouraged them to act.¹⁵ *Brown* "began," one legal scholar tells us, "a union of the mightiest and lowliest in America, a mystical, passionate union bound by the pained depths of the black man's cry for justice and the moral authority, unique to the Court, to see that justice realized" (Wilkinson 1979, 5). Thus, *Brown* may have fundamentally re-oriented the views of black Americans by providing hope that the federal government, if made aware of their plight, would help. Black action, in turn, could have changed white opinions and led to elite action and civil rights. If this is the case, then there are a number of places where evidence should be found.

For *Brown* to have played this role, blacks must have known about the decision and approved both of its holdings and of the Court's constitutional role. As discussed earlier, there is little evidence that Americans, black or white, credit the Court with a legitimizing role. Further, it is not entirely clear that knowledge of *Brown* was widespread. For example, during the school desegregation crisis in Clinton, Tennessee, in the fall of 1956, a team of social scientists interviewing people found that "a number" had "never heard of the U.S. Supreme Court decision against segregation" (Robinson 1957, 183).

15. This assumption is virtually universal among lawyers and legal scholars, and representative quotations can be found throughout this and earlier chapters. In addition, see Choper (1980, 92-93); Zanden (1963, 545).

Eldridge Cleaver entered prison one month after the decision without "even the vaguest idea" that *Brown* was anything out of the ordinary (Cleaver 1968, 3). A decade after *Brown*, a volunteer teaching in a Mississippi Freedom School during the summer of 1964 wrote in a letter: "Only students are from 13 to 17 years old, and not one of them had heard about the Supreme Court decision of 1954 . . . they are surprised to hear that the law is on their side" (quoted in Sutherland 1965, 93).

Part of the reason for this lack of knowledge is clearly Americans' general ignorance of Supreme Court decisions. Part also is due to poor newspaper coverage, as has been shown. Further, a 1961 survey of Southern blacks found that nearly one-third did not read newspapers or watch TV regularly, over half did not read any magazines regularly, and over 20 percent did not even listen to the radio regularly (Matthews and Prothro 1966, 249). But another possibility is that many blacks did not approve of the decision. In November 1955, a special Gallup poll found that barely half of Southern blacks (53 percent) approved of *Brown* (Gallup 1972, 2: 1402). Although such poll data should be approached cautiously,¹⁶ a poll taken just a few weeks later found that 82 percent of Southern blacks approved of an Interstate Commerce Commission ruling prohibiting segregation in transportation (Gallup 1972, 2: 1402). The large difference between the two approval percentages is striking. Knowledge of, and support for, *Brown* do not appear to have been high.

Brown was not greeted with an outpouring of public support by blacks. Overall, the reaction within the black community to *Brown* was "muted" (Kluger 1976, 710). After *Brown*, "there were no street celebrations in Negro communities" (Branch 1988, 112), and no "grand celebrations" (Williams 1988, 351). Ralph Abernathy understood the lack of public response this way: "most blacks in the Deep South states looked with curiosity at what was going on in the high courts, shrugged their shoulders, and went back to their day-to-day lives. . . . After all, they had waited a lifetime and seen no change at all" (Abernathy 1989, 114). The fact that it was the Supreme Court that had declared an end to segregation made little difference for, as Lawson puts it, blacks were "long accustomed to having favorable court rulings circumvented" (Lawson 1976, 49). Indeed, it was Charles Houston, one of the grand architects of the NAACP's successful litigation strategy, who had remarked years before that "nobody needs to explain to a Negro the difference between the law in books and the law in action" (quoted in Williams 1988, 35). And many Southern blacks had their minds on other matters such as the murder of Emmett Till in 1955 which "shook the foundations of Mississippi" (Myrlie Evers in Hampton and Fayer 1990, 6) and which "without question . . . moved black America in a way the Supreme Court ruling on school desegregation could not match" (Williams 1988, 44). This is not an auspicious beginning for a Court-inspired revolution.

Another possible explanation for the generally moderate response may lie with the black press. Its coverage of the cases preceding *Brown* showed "understandable caution" and was sometimes "optimistic, though not ecstatic" (Weaver and Page 1982, 15, 21, 27). After *Brown*, responses varied. In some states, like Texas, the decision was strongly supported (Smallwood 1983). In others, however, the story was different. By 1954, Mississippi had only five black papers, four of which were quite conservative. The *Jackson Advocate*, for example, did not support the efforts of any civil rights organization, including the NAACP. In 1957, it attacked the reform movement in education since *Brown*, and the efforts of the NAACP, as "the greatest mistake in the entire history of the struggles of the American Negro." In 1959 the paper attacked the Montgomery bus boycott for "making matters worse for the masses of Montgomery Negroes" (Thompson 1983, 190, 190–91). While Mississippi is undoubtedly an extreme case, a book-length compilation of studies of the black press in the eleven Southern states and Missouri had only six references to *Brown* (Suggs 1983). Thus, it is possible that the black press did not fill in where the white press failed.

The evidence plainly indicates that civil rights marches and demonstrations affected both white Americans and elites and provided a major impetus for civil rights legislation. A nationwide Harris survey of black Americans revealed their belief that it was the sit-ins, pickets, and marches, not Court action, that "awakened white America" and served as the "torch that set the smoldering civil-rights battle ablaze" (Brink and Harris 1963, 66).¹⁷ Surely, the Dynamic Court view posits that the "historic" action of the Court encouraged and spurred blacks to act. As Wilkinson puts it, "the Court sired the movement, succeeded it through the early years, [and] encouraged its first taking wing" (Wilkinson 1979, 3). If this were the case, if, in the words of civil rights litigator Jack Greenberg, the direct-action campaign would not have developed "without the legal victories that we'd won earlier" ("Some-one" 1975, 11), then there are a number of places where evidence of this effect should be seen.

One such place is the demonstrations. That is, if *Brown* sparked the movement, one would expect to see an increase in the number of demonstrations shortly after the decision. Table 4.2 and figure 4.3 present the data. It can be seen that there is almost no difference in the number of civil rights demonstrations in the years 1953, 1954, and 1955. There was a large jump in 1956, due to Montgomery. But then the numbers drop. For example, 1959 saw fewer civil rights demonstrations than in four of the years of the 1940s! And the number of demonstrations skyrocketed in the 1960s, six or more

16. Given the political, social, and economic oppression under which Southern blacks lived, poll results may not reflect honest opinions.

17. But it should also be noted that a full year after the sit-ins started, nearly one of every six Southern blacks had never heard of them (Matthews and Prothro 1966, 438).

Table 4.2 Civil Rights Demonstrations, 1940–1965

Year	No. of Demonstrations	Year	No. of Demonstrations
1940	5	1953	6
1941	2	1954	10
1942	6	1955	15
1943	15	1956	173
1944	9	1957	13
1945	5	1958	35
1946	19	1959	10
1947	23	1960	414
1948	27	1961	282
1949	7	1962	153
1950	3	1963	685
1951	6	1964	335
1952	1	1965	443

Source: *New York Times* as compiled by Bustein (1979).

Note: Demonstration is defined as a "public, manifestly political action by at least five people on behalf of the rights of racial minorities" (Bustein 1979, 168).

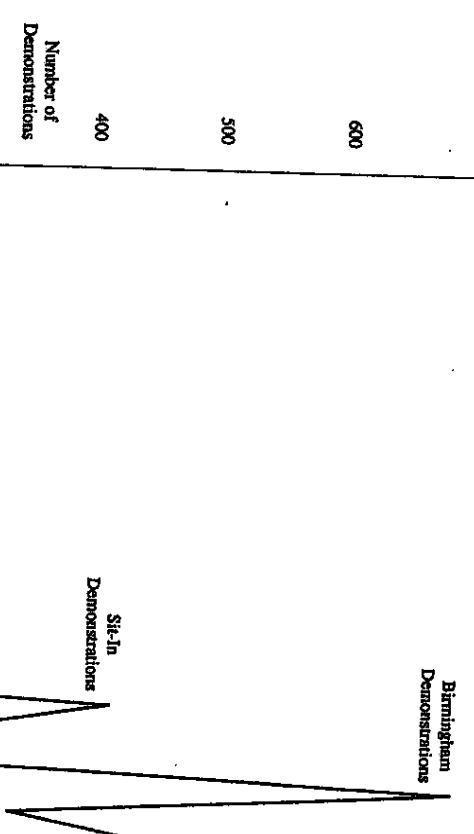


Figure 4.3. Civil Rights Demonstrations, 1940–1965

this particular incident sparked the boycott, although Parks was fairly well-

known and commanded respect in the black community. Because the Montgomery bus boycott is mentioned by so many civil rights activists, and because it launched both Dr. King's and Reverend Abernathy's civil rights careers, it is worth examining in greater detail.

In the 1940s and early 1950s there were a number of black civil rights organizations in Montgomery. One of them, the Women's Political Council (WPC), became the "most militant and uncompromising organ of the black

years after *Brown*. This pattern does not suggest that the Court played a major role. The time period is too long and the 1960s increases too startling to credit the Court with a meaningful effect.

The Montgomery Bus Boycott

The 1956 Montgomery bus boycott created worldwide attention. Coming just a few years after *Brown*, it is quite plausible that it was sparked by the Court. If this were the case, one might trace the indirect effect of *Brown* to Montgomery to the demonstrations of the 1960s to white opinion to elite evidence even for this tortuous causal chain. The immediate crisis in Montgomery was brought about by the arrest, in December 1955, of Mrs. Rosa Parks, a black woman, for refusing to give up her seat to a white person and move to the back of a segregated city bus.¹⁸ Parks was the fourth black woman to be arrested in 1955 for such a refusal (Lewis 1970, 48).¹⁹ It is unclear why

18. Mrs. Parks, who was not feeling well that day, had not planned to be arrested. However, she had been involved in civil rights activities as an active member of the local NAACP since 1943 and as an occasional officer of the organization. Perhaps more important, in July 1955, she spent two weeks at an interracial conference at the Highlander Folk School in Tennessee (Garrow 1986, 11–13).

19. A March 1955 episode involved a fifteen-year-old high school student. However, no protest was organized because of the circumstances: the young woman was charged with resisting arrest and was unmarried and pregnant (Garrow 1986, 15).

community" (Thornton 1980, 173–74).²⁰ Its president, Jo Ann Robinson, held particularly strong feelings about bus segregation, having suffered a humiliating experience around Christmas, 1949, on her way to the Montgomery airport to fly North for the holiday (Robinson 1987, 15–16). The WPC soon began to focus on bus segregation and, in 1953, received thirty complaints about it (Robinson 1987, 30). Thus, since the early 1950s the WPC had targeted bus segregation. And, as Robinson writes, the "ideal [of a bus boycott] itself had been entertained for years" (Robinson 1987, 20; Garrow 1986, 14–16).

In 1953, at the same time as the WPC was preparing to launch a bus boycott, Montgomery elected a racial moderate, Dave Birmingham, to the three-member City Commission. Birmingham's election encouraged black groups to approach the city with their grievances, and Robinson led a WPC delegation to lodge complaints with the city at the end of 1953 and again in the spring of 1954. At the latter meeting, the WPC was joined by a number of other black groups, including "a large group representing black trade union locals." The meeting was evidently quite stormy, for Mayor Gayle subsequently testified that several days later an angry Mrs. Robinson called him and said "they would just show me, they were going in the front door and sitting wherever they pleased" (Thornton 1980, 174, 176–78).

One of the ways in which the WPC had prepared for a boycott was through the preparation of a notice calling on the black community to act and the planning of distribution routes. "On paper, the WPC had already planned for fifty thousand notices calling people to boycott the buses; only the specifics of time and place had to be added" (Robinson 1987, 39). The March 1955 arrest of a student for violating the bus segregation law was at first seen as providing an opportunity to act, but her personal circumstances mitigated against action. Her conviction, however, was "a bombshell" and following it, "other complaints poured in" to the WPC (Robinson 1987, 42, 43). The arrest of Rosa Parks provided the opportunity the WPC was waiting for, and Robinson and the WPC decided to stage a boycott the day of the Parks trial. Relying on their preparations, and acting on their own, they mimeographed notices announcing a one-day boycott and blanketed black Montgomery with them. By the time of the December 2 meeting of Montgomery's black leadership called by E. D. Nixon to discuss what to do, the forty or so assembled leaders "found themselves faced with a *fait accompli*" (Thornton 1980, 197). Thus, the background of the bus boycott points to many factors, but not to *Brown*.²¹

20. Thornton's article, based in part on extensive interviewing, is by far the most detailed and comprehensive examination of the factors leading to the boycott. See also Garrow (1985), particularly his long note on further reading at 26–27.

21. It is the case that Robinson (1987, viii) wrote a letter to Mayor Gayle four days after the *Brown* decision threatening a boycott, and that King mentioned *Brown* in his December 5

There is another piece of evidence, as well, that suggests that *Brown* was not influential: the nature of the boycotters' initial demands. Despite the efforts of the WPC, and the evident anger of the black community, initially the boycotters did not demand an end to bus segregation (Abernathy 1989, 154). Rather, the principal demand called for modified seating by race, with blacks starting at the back and whites at the front. As late as April 1956 King was still willing to settle on these terms (Fairclough 1987, 20).²² As Thornton describes it, the boycotters were not trying to overturn the segregation law, as *Brown* might have inspired them to do. Instead, they "initially conceived their movement not so much as a direct action against bus segregation itself as rather a search for a means to manipulate the political process" (Thornton 1980, 231). This led the NAACP to withhold support on the grounds that the demands were too "mild" (Wilkins 1984, 228). As Abernathy puts it, "at first we regarded the Montgomery bus boycott as an interruption of our plans rather than as the beginning of their fulfillment" (Abernathy 1989, 169). Again, this suggests that a host of local factors provided the inspiration for the boycott.

Finally, four additional parts of the historical context suggest that *Brown* had little influence. First, the idea of a bus boycott was not new, having been used successfully by blacks in Baton Rouge, Louisiana, during the summer of 1953. Dr. Martin Luther King, Jr., the leader of the Montgomery bus boycott, knew the leader of that boycott, T. J. Jemison, from college days, and spoke with him early in the boycott (Branch 1988, 145). From the Baton Rouge boycott, Abernathy notes, Montgomery's blacks took "considerable inspiration" (Abernathy 1989, 178; Garrow 1986, 26–27). Second, Montgomery's blacks "did know that other cities in the Deep South, notably Mobile and Atlanta, had already conceded the 'first come, first served' principle" (Fairclough 1987, 12). Third, in November 1955, Representative Adam Clayton Powell visited Montgomery and suggested that blacks use their economic power to force change. Characteristically, the flamboyant Powell took credit for instigating the bus boycott (Thornton 1980, 194).²³ Finally, King specifically addressed the influence of *Brown* on the boycott. It was clear, he said, that *Brown* "cannot explain why it happened in Montgomery" and that the

speech at the first mass meeting of the boycotters (Garrow 1986, 15) and occasionally in his writing on Montgomery (King 1958, 64, 191). However, when placed in context, these actions provide evidence, at best, of only a small additive influence for *Brown*.

22. Fairclough also points to a similar initial reticence to demand an end to segregation in the Tallahassee, Florida, bus boycott of 1956 (Fairclough 1987, 20).

23. Morris (1984, x) argues that the Montgomery bus boycott was "partly inspired by the Baton Rouge effort and to some extent modeled after it." For the story of the Baton Rouge

boycott, see Morris (1984, chap. 2).

24. Powell (1971, 124–25) suggests that it was this speech and a meeting with a group of local black leaders including Nixon, King, and Parks that was decisive. In his visit, just three weeks before Parks acted, he outlined various direct-action nonviolent protests that he had led in New York.

"crisis was not produced by . . . even the Supreme Court" (King 1958, 64, 191–92).²⁵ Although Montgomery may have inspired blacks, there does not appear to be much evidence that the Court inspired Montgomery.²⁶

Little Rock and Frustration

After Montgomery, and the 1956 presidential election, the next major civil rights event to make the news was the Little Rock crisis of September 1957. United States Army troops were sent to Little Rock to control violence and allow nine black children to attend the previously segregated Little Rock Central High School pursuant to a court order. Could it be that the Little Rock crisis and the reaction of the federal government made a difference? That is, perhaps Little Rock suggested to blacks that the federal government would act to help. While this is plausible, equally plausible is the notion that Little Rock suggested how hard it would be to achieve desegregation. It took the U.S. Army's continuing presence to ensure the safety of nine children. And, as the discussion below suggests, Little Rock is not mentioned as a source of inspiration by activists and students of the movement.

A related possibility is that the failure of *Brown* to produce change created a high level of frustration that led to black activism. Stuart Scheingold suggests that "it was not the decisions themselves but the political mobilization spawned by resistance to the decisions that brought positive results" (Scheingold 1989, 80). Almost invariably throughout the South, wherever desegregation was tried, it was met with white resistance. Perhaps blacks grew increasingly frustrated by the lack of change and were thus spurred to action. While this again is plausible, it is unlikely to have played more than a minor role, for three reasons. First, frustration was not something new to the black community. The wrongs of segregation had been apparent for a long time. What was new was that blacks were acting to end it. Boycotts in Baton Rouge and Montgomery, demonstrated that blacks, acting on their own, could improve their lives. It did not take *Brown* for blacks to understand that separate but equal was inherently unequal. Second, *Brown* had little meaning for the students who made up the movement. "To these young people," Howard

25. At a news conference in January 1956, King explained the boycott as "part of a worldwide movement. Look at just about any place in the world and the exploited people are rising against their exploiters. This seems to be the outstanding characteristic of our generation" (quoted in Garrow 1986, 54).

26. Morris (1984, 25) credits the Baton Rouge boycott with more importance than the Court. However, the Supreme Court may have played a vital role in the final victory by allowing the city a way out of a boycott that was costly and damaging. In *Gaylor v. Browder* (1956), the Supreme Court upheld a lower-court decision prohibiting enforcement of Montgomery's bus segregation law. As Constitution IV suggests, the Court's decision may have allowed the city to end segregation without "giving in" to the boycotters' demands. On the other hand, without the strength of the boycott, there would have been little pressure on Montgomery to comply. Indeed, as the discussion in chapter 2 showed, court decisions alone were ineffective in ending segregation in transportation.

Zinn wrote in his 1964 study of the Student Non-Violent Coordinating Committee (SNCC), "the Supreme Court decision of 1954 was a childhood memory" only "dimly remembered" (Zinn 1964, 18). This point is elaborated further below. Third, it is not often the case that violence and resistance spur people to action. Rather, it tends to deter them. It seems more plausible to suggest that it was the positive actions of black demonstrators that provided the inspiration. This point will be strengthened in the discussion of the motivations of the activists. Thus, while black Americans were certainly frustrated by the lack of equality, it does not seem likely that the Court added very much to the level of frustration.

Sit-Ins and Demonstrations

Another possible way in which *Brown* may have sparked change is through providing the inspiration for the sit-in movement and the demonstrations of the 1960s. The decision might have given blacks new hope that the federal government would work to end discrimination. It might have confirmed their own belief in the unfairness of segregation. Or it might have suggested that white America was changing. In addition, it could have served as a resource or tool for activists, legitimating their own beliefs in the evils of segregation and justifying, in a constitutional manner, their demands for justice. If this were the case, one might plausibly expect to find participants in, and students of the demonstrations talking and writing about the Court's decision as one reason for their actions. A review of biographies, autobiographies, and scholarly studies of the civil rights movement provides the evidence for assessing the claim.

Dr. Martin Luther King, Jr.

One possible way in which *Brown* might have ignited the civil rights movement is by inspiring Dr. King. His ringing denunciations of segregation, his towering oratory, and his ability to inspire and move both blacks and whites appear to have played an indispensable role in creating pressure for government action (Garrow 1986). Was King motivated to act by the Court? From an examination of King's thinking, the answer appears to be no. King rooted his beliefs in Christian theology and Gandhian non-violence, not constitutional doctrine. His attitude to the Court, far from a source of inspiration, was one of strategic disfavor. "Whenever it is possible," he told reporters in early 1957, "we want to avoid court cases in this integration struggle" (quoted in Garrow 1986, 87). He rejected litigation as a major tool of struggle for a number of reasons. He wrote of blacks' lack of faith in it, of its "unsuitability" to the civil rights struggle, and of its "hampering progress to this day" (King 1963, 23, 157). Further, he complained that to "accumulate resources for legal actions imposes intolerable hardships on the already overburdened" (King 1963, 157). In addition to its expense, King saw the legal

process as slow. Blacks, he warned, "must not get involved in legalism [and] needless fights in lower courts" because that is "exactly what the white man wants the Negro to do. Then he can draw out the fight" (quoted in Garrow 1986, 91). Perhaps most important, King believed that litigation was an elite strategy for change that did not involve ordinary people. He believed that when the NAACP was the principal civil rights organization, and court cases were relied on, "the ordinary Negro was involved [only] as a passive spectator" and "his energies were unemployed" (quoted in Morris 1984, 123).

Montgomery was particularly poignant, he told the 1957 NAACP annual convention, because, in Garrow's paraphrase, it demonstrated that "rank-and-file blacks themselves could act to advance the race's goals, rather than relying exclusively on lawyers and litigation to win incremental legal gains" (Garrov 1986, 78). And, as he told the NAACP Convention on July 5, 1962, "only when the people themselves begin to act are rights on paper given life blood" (quoted in Branch 1988, 598). King's writings and actions do not provide evidence for the Dynamic Court view that he was inspired by the Court.

The Sit-Ins

The sit-in in Greensboro, North Carolina, in February 1960 started the sit-in movement of the 1960s. Organized by four black college students, it does not appear to have been Court-inspired. The four students, before the sit-in, used to meet for bull sessions where they read and discussed the works of Ralph Bunche, Frederick Douglass, W. E. B. Du Bois, Gandhi, Langston Hughes, and Toussaint L'Outverture, among others. No mention of the Court or *Brown* is recorded (Chafe 1980, 113; Oppenheimer 1963, 57; Raines 1983, 79).²⁷ Recorded are repeated references to King and the Montgomery bus boycott (Chafe 1980, 113; Wolff 1970, 155). "Montgomery was like a catalyst," one of the four said, that "started a whole lot of things rolling" (quoted in Chafe 1980, 113). Other non-Court factors have often been cited by both the four participants and those trying to explain why the sit-ins occurred. Joseph McNeil, for example, was particularly angered by a December 1959 episode when he returned to Greensboro from New York and was refused food service at the Greensboro Trailways Bus Terminal (Chafe 1980, 114). In a 1973 interview for a TV special on the "Greensboro Four," McNeil recounted that incident, stating that "the impetus for action came from the 'outrage' he felt when he returned home from a trip North and had to re confront separate facilities" (Ethridge 1973, 4). McNeil also worked in the college library with Eula Hudgens, who had participated in the 1947 Journey of Reconciliation, the Congress of Racial Equality's (CORE) first freedom ride. Hudgens "spoke frequently" with McNeil about her experience and was "not surprised when the young men acted" (Chafe 1980, 113–14). In addition, an eccentric white

businessman, Ralph Johns, had been encouraging black students since at least 1949 to test segregation at Woolworth's. One of those he encouraged was McNeil, and Johns helped the four plan their action.²⁸

After Greensboro, the sit-ins spread quickly throughout the South. Within sixty days of Greensboro, sit-ins had spread to at least sixty-five Southern cities (SRC 1960b, 1).²⁹ For black students throughout the South, the inspiration was the action of other students, as well as Montgomery and King. Instead of looking to courts for inspiration and support, the demonstrators "appealed to a higher law" because they "weren't sure about the legality" of their actions.³⁰ When black students from Atlanta joined the sit-ins, they took out a full-page advertisement in Atlanta's newspapers listing their demands and defending their actions. Entitled "An Appeal For Human Rights," the detailed and lengthy list of grievances was supported by six separate justifications of the sit-ins. No mention of the Court, the Constitution, or *Brown* is found anywhere in the text ("An Appeal" 1960, 13). The six-year time interval between *Brown* and the sit-ins, the lack of attribution to the Court, the crediting of several non-Court factors, and the rapidity with which the movement spread, all suggest it was unlikely that *Brown* played much of a role.

The year 1960 was not the first time sit-ins had occurred for civil rights.

As early as 1942 James Farmer had organized a CORE sit-in at the Jack Spratt coffee-house in Chicago (Farmer 1985, 106–8), and Howard University students sat-in at segregated Washington, D.C., restaurants in 1943 (Barnes 1983, 58). In the late 1950s, sit-ins had occurred in Wichita, Kansas (1958), Kansas City, Missouri (1958, 1959), Oklahoma City³¹ and a few other Oklahoma cities (1958, 1959), and Miami, Florida (1959), with varying levels of success.³² But the fact that the movement caught on only in 1960, six full years after *Brown*, does not offer much evidence for the indirect-effects thesis. Why did the sit-ins work? Was it because white business owners, in the wake of *Brown*, saw the constitutional legitimacy of the protesters' claims? The evidence does not support this conclusion. In most places businesses rejected the demands and refused to alter their practices. Constitutional principles did not appear to motivate them. Rather, they tried to outlast the demonstrators. However, as the discussion in chapter 3 indicated, economics played a big role. Sit-ins and ensuing black boycotts took their toll. In Greensboro, for example, Wolff writes of the "tremendous economic pressure put

28. On the role of Ralph Johns, see Chafe (1980, 113); Meier and Rudwick (1973, 102); Wolff (1970, 17–29).

29. For other accounts of the early sit-ins, see Pollitt (1960); SRC (1960a).
30. Remarks of Julian Bond, University of Chicago, 10 January 1990. In 1960 Bond was a student leader of the Atlanta sit-ins.

31. For a short statement by an Oklahoma City sit-in demonstrator, see Posey (1961). Posey, who was "so impressed with Mr. King" (Posey 1961, 9), also mentions Montgomery and Gandhi, but not the Court or *Brown*.

32. For a description of these events, see SRC (1960b, 1–xxv).

on the stores by the Negroes' boycott, along with the reticence of whites to trade there because of fear of trouble." The Woolworth's store where the sit-ins started registered a \$200,000 drop in sales in 1960 (Wolff 1970, 173, 174). Economic pressure, not constitutional mandate, appears the best explanation for the success of the sit-ins.

The Freedom Ride

The evidence points to the same conclusion with the Freedom Ride, the courageous and electrifying 1961 bus journey organized by CORE through the Deep South. The Freedom Ride, patterned on CORE's 1947 Journey of Reconciliation, was designed to test desegregation in interstate transportation and facilities.³³ Thirteen "Freedom Riders" left Washington, D.C., on May 4, 1961, aboard Greyhound and Trailways buses with a public itinerary taking them through Virginia, North Carolina, South Carolina, Georgia, Alabama, Mississippi, and Louisiana. The well-known story includes severe beatings and the fire-bombing of a Greyhound bus outside of Anniston, Alabama (Farmer 1985, chaps. 17 and 18; Raines 1983, chap. 3; SRC 1961). Yet in the writings by participants and others about the ride there is virtually no mention of *Brown* or of the Court positively inspiring CORE's action. While the ride was in part organized as a reaction to the *Boycott* decision, CORE, as will be developed below, was committed to non-violent direct action and opposed to a legal strategy for change. The riders knew that Court decisions would have little effect. The purpose of the ride was to publicize the denial of rights, to galvanize blacks into action (the riders held rallies every evening), and to garner publicity. The black riders, with the exception of CORE national director James Farmer, were all under thirty and most were veterans of the sit-in movement, while the whites had peace/socialist backgrounds (Meier and Rudwick 1973, 136, 137). And when the original CORE riders were too badly beaten to go on, the ride was continued by students from SNCC. Indeed, the SRC understood the ride as "an extension of the sit-ins . . . sustained by the same enthusiasm and many of the same persons" (SRC 1961, 4). There is no evidence that civil rights litigation inspired this act of bravery.

Black Groups

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

³³ In *Morgan v. Virginia* (1946), the Supreme Court invalidated as to interstate passengers a Virginia law requiring segregated seating. In *Boyd v. Virginia* (1960), the Court also invalidated segregated facilities in interstate transportation.

The SCLC was founded in the winter of 1957. The moving force behind it was not the inspiration of *Brown* but an attempt to capitalize on the success of the Montgomery bus boycott. Four important actors in SCLC's founding made this clear. For Bayard Rustin, who drafted the working papers for the first meeting, the idea was to create "a sustaining mechanism that could translate what we had learned during the bus boycott into a broad strategy of protest in the South" (quoted in Garrow 1986, 85). Stanley Levison, a confidant of King's who collaborated with Rustin, wanted to create an organization "to reproduce that [the Montgomery] pattern of mass action, underscore mass, in other cities and communities" (quoted in Fairclough 1987, 31). And Ella Baker, whose role in creating SNCC is noted below, was in continual dialogue with Rustin and Levison "about the need for developing in the South a mass force that would . . . become a counterbalance, let's call it, to the NAACP" (quoted in Fairclough 1987, 30). The fourth person, of course, is King, around whom most of the discussions revolved. Elected SCLC president, King's view of the courts has already been established. Given this background, and the fact that the SCLC became synonymous with King, its founding does not lend support to the indirect-effects thesis.

The founding of SNCC in 1960 is similar. SNCC was formed, to a large extent, by the efforts of Ella Baker of the SCLC who organized a conference of student sit-in activists at Shaw University in Raleigh, North Carolina, in April of 1960. Baker's aim was to help students engaged in sit-ins create at least some communication and organization network, albeit of their own choosing. Her inspiration, evidently, far from being the Supreme Court, was the actions of the students themselves, for she was becoming "restive under the cautious leadership of King" (Carson 1981, 20).³⁴ An important conference contributor, the Reverend James Lawson, urged the students to avoid courts and continue direct action: "The legal question is not central" he reportedly told the conference. "Unless we are prepared to create the climate, the law can never bring victory" (quoted in Williams 1988, 137). The organization that emerged and its leaders did not credit *Brown* with inspiring them. John Lewis, long-time Chairman of SNCC, was "inspired by radio reports of the Montgomery bus boycott and its leader King" (Carson 1981, 21), and by a belief in Christian non-violence (Good 1967, 44). Cleveland Sellers, a respected SNCC activist and later leader also pointed to Montgomery (Sellers 1973, 16). The point is that *Brown* is simply not mentioned as a source of inspiration.

The founding and revitalization of CORE provides little evidence for the Dynamic Court view claim. CORE's founding predates *Brown* by a dozen years. Its April 1942 founders, including James Farmer, were "products of the Christian student movement of the 1930s" (Meier and Rudwick 1973, 4),

³⁴ On the role of Ella Baker, see also Garrow (1986, 131ff.), King (1987, 42–46).

principally the Fellowship of Reconciliation (FOR). In a February 19, 1942, memo to A. J. Muste of FOR, Farmer laid out plans for the building of a Gandhian-type movement of mass non-violent direct action (Farmer 1985, Appendix A). While it was not until the 1960s that CORE was able to act, its thinking was always based on such a model. Indeed, in 1947, it launched the first freedom ride, the Journey of Reconciliation, a bus trip through the upper South to demonstrate the "inherent limitations of legalism" (Meier and Rudwick 1973, 34). As Farmer told Roy Wilkins of the NAACP in response to Wilkins's opposition to the Freedom Ride, and preference for litigation, "we've had test cases and we've won them all and the status quo" scarcely mention of *Brown*, and no index entry.³⁵ The Dynamic Court view finds little supportive evidence with CORE.

This is also the case with the mostly white students who came to Mississippi in the summer of 1964. McAdam reviewed their applications, which contained statements of why they wanted to participate in "Freedom Summer." Well-educated, mostly white, and from wealthy families, these applicants are as likely a group as could be found (lawyers aside) to credit *Brown* with inspiring them to act. While McAdam did find some mention of *Brown*, other factors were mentioned to a much greater extent.³⁶ These included notions of a new generation, religion, idealism, and a general political commitment (McAdam 1988, 48). "The vast majority of applicants," McAdam found, "credit their parents with being the models for their actions" (McAdam 1988, 49). And a collection of hundreds of letters written from Mississippi by those who went contains only a few references to *Brown* (Sutherland 1965). It does not seem likely that these kinds of people needed a Court decision to inspire them to act.

If *Brown* played a role in inspiring people to act, one might expect it to have found its way into the music that was an important part of the civil rights movement. However, although references to local and national politicians and law enforcement officials were put to music, *Brown* and the courts were seldom, if ever, included. In Seeger and Reiser's (1989) compilation of over three dozen songs from the movement, there is only one mention of the Court, in a song sung by the freedom riders. And, as has been noted, the freedom riders put little faith in courts. The music of the civil rights movement was inspirational, but *Brown* and the courts were not part of it.

If *Brown* is not mentioned by those who sat in, demonstrated, and marched, was anything? The answer is a clear yes. The participants pointed to a number of sources of inspiration for their actions. For some, the emer-

gence of black African nations and the movements that accompanied their liberation had a "profound effect" (Carson 1981, 16; Williams 1965, 11; Zanden 1963, 545; Zinn 1962, 3). Over the twelve months from June 1960 to June 1961, eleven African countries gained independence. "We identified with the blacks in Africa," John Lewis of SNCC said, "and we were thrilled by what was going on" (quoted in Williams 1988, 139). Third-world liberation movements were also prominently mentioned by King in his classic *Letter From Birmingham Jail* ([1963] 1968, 5, 11). For others, the Montgomery bus boycott was an "inspiration" (Zinn 1964, 18). James Forman, a powerful force in SNCC, credits the bus boycott with having a "very significant effect on the consciousness of black people" and a "particularly important effect on young blacks." Montgomery, Forman believed, "helped to generate the student movement of 1960" (Forman 1972, 84, 85).³⁷ Participants in sit-ins also pointed to other sit-ins as inspiration (Gaither 1960), and to Dr. King, either by his actions or his writings (Gaither 1960; Finch 1981, 205; Oppenheimer 1963, 103; Woodward 1974, 197). *Brown* and the Supreme Court may have played a role in inspiring the activists of the early 1960s but they did not merit it in describing their inspiration for acting.³⁸ And given the fact that they did point to other factors as inspiring them, the lack of attribution of *Brown* is all the more telling.³⁹

Another possibility for the indirect-effects thesis is that the Court influenced traditional black leaders who in turn called blacks to act. At the-outset, this claim appears quite plausible. Members of the NAACP reacted with elation to *Brown*. To Roy Wilkins, NAACP executive secretary, "May 17, 1954 [the date of the *Brown* decision] was one of life's sweetest days. We had won a second Emancipation Proclamation" (Wilkins 1984, 214). So inspiring was the victory, that rather than pull out the usual celebratory bottle of Scotch upon hearing the news, the NAACP staff in New York "just sat there looking at one another. The only emotion we felt at that moment was awe—everyone of us felt it" (Wilkins 1984, 214). Among other leaders of the NAACP, similar reactions were recorded. Dr. Benjamin Mays, president of Morehouse College, and a member of the national board of the NAACP, remembers that

³⁵ John Lewis agrees, writing that the Montgomery bus boycott "had the greatest impact on me, more than anything else" (Lewis in Raines 1983, 73).

³⁶ In questionnaires received from 827 students at three black colleges in Greensboro and Raleigh in May 1960, over one-half ranked "resentment against everyday injustices" as the main source of motivation for the sit-ins. "Democratic ideals," a possible stand-in for the courts, was ranked first by only one in five (Searles and Williams 1962, 218).

³⁷ For confirmation of this analysis, see, for example, the following works by participants: Abernathy (1989); Farmer (1985); Forman (1972); King (1958, 1963, 1968); King (1987); various participants in Peck (1960); various participants in Raines (1983); Sellers (1973); Sutherland (1965); Studies of the movement that confirm this analysis include Branch (1988); Carson (1981); Chafe (1980); Fairclough (1987); Garrow (1978, 1986); Hampton and Fayer (1990); McAdam (1988); Meier and Rudwick (1973); Oppenheimer (1963); Southern Regional Council (1960a, 1960b, 1961); Seeger and Reiser (1989); Weiss (1989); Williams (1965); Williams (1988); Wolff (1970); Zanden (1963); Zinn (1964).

"people literally got out and danced in the streets . . . the Negro was jubilant" (quoted in Morris 1984, 81). And Thurgood Marshall publicly expressed his pleasure with the decision (see chapter 2). It seems likely, too, that NAACP chapter leaders throughout the South were emboldened by the decision and redoubled their efforts.

While many NAACP officers were obviously excited and invigorated, the earlier parts of this chapter have shown that there is no substantial evidence that this affected the movement as a whole. One reason is that the ferocious reaction of the Southern states to the NAACP hampered its operations in the South. Many Southern states attempted to legislate or adjudicate the NAACP out of existence. For example, Ruby Hurley, who in the early 1950s, opened the first permanent NAACP office in the South in Birmingham, was forced to leave in 1956 (Raines 1983, 131, 135). But more important, the NAACP and its leaders were committed to a legal strategy, not one of demonstrations, marches, and civil disobedience. For the NAACP, in the words of long-time Executive Secretary Roy Wilkins, *Brown* was a "fitting reward" for its "faith in the basic institutions of the country and for its patient strategy of correcting injustices by taking them to the courts" (Wilkins 1984, 214). When the movement took to the streets, the NAACP was replaced by other, more aggressive groups and individuals who took the lead in the civil rights movement of the 1960s. The sit-ins, for example, which started the demonstration phase of the civil rights movement, were "entirely student-inspired and directed" (Pollitt 1960, 318).⁴⁰ All across the South it was black teenagers who were the first to join the movement when a civil rights organizer came to town (Watters 1965, 119). Traditional black leaders and organizations counseled against direct action. Cleveland Sellers remembers being told by the local NAACP in South Carolina that the question of segregation "should be settled in the courts and not in the streets" (Sellers 1973, 26). Thurgood Marshall counseled against non-violent direct action by "well-meaning radical groups" (quoted in Meier and Rudwick 1973, 35).⁴¹ More important, CORE's 1954 plan for a Ride for Freedom fell through because the NAACP refused support (Meier and Rudwick 1973, 72). As the respected Southern author Harry Gold put it in 1960: "If the NAACP and every other do-good organization disappeared from the face of the earth tonight, the movement would not skip a beat" (quoted in Pollitt 1960, 318).

Traditional black leaders and organizations were taken totally by "surprise" by the sit-in movement (Zinn 1964, 29). Roy Wilkins saw the sit-ins as "spontaneous" (Wilkins 1984, 267), and the NAACP's public relations director, Henry Moon, admitted that "the demonstrations are not something

we planned" (quoted in Lomax 1960, 42). The NAACP Legal Defense and Educational Fund (Inc. Fund), was totally unprepared for the sit-ins and, while it did defend the demonstrators when asked, it never developed a long-term strategy for the situation. One result was the creation of new leadership and organizations which took the lead in promoting direct action (Killian and Smith 1960; Williams 1965, 19). The late 1950s and early 1960s saw the emergence of Dr. King and the SCLC, SNCC and its leaders, and the reinvigoration of the older direct-action group CORE. Older groups were forced to change their strategy, too. As Sarrett tactfully puts it, "events caused the NAACP to shift its emphasis toward direct action in order to maintain its position of leadership in the Negro protest movement" (Sarrett 1966, 323). The point is that, rather than leading the movement, the established black leadership found itself following it, trying to catch up with its troops (Pinard et al. 1969).

This last point requires elaboration. For most of this century, the NAACP had been the major black civil rights voice. During the post-*Brown* years it provided key legal support for arrested demonstrators and lobbied the federal government in support of civil rights. Yet it remained deeply ambivalent, if not hostile, to the direct-action movement. To the extent, then, that the NAACP was inspired by *Brown*, such inspiration had little effect on the movement as a whole.

Part of the NAACP's hostility to direct action came from the kind of people who joined and led it. The NAACP's leadership was "drawn almost exclusively from the ranks of black professionals and businessmen" (Wynn 1974, 42). In many parts of the country it was an "organization for social prestige," to which the "better people belonged" (Wynn 1955, 43). Its demands, in keeping with its membership, were "directed toward the Negro status" (Wynn 1955, 40; Lomax 1960, 47). As one commentator put it, "there were good reasons why just plain [black] folks called it the 'National Association for the Advancement of Certain People'" (Lewis 1986, 11). Thus, it is quite accurate to characterize it as a "moderate, elitist organization" (Murphy 1959b, 389; Lomax 1963, 116). In the late 1950s and early 1960s, these were not the kinds of people ready and willing to take to the streets.

Another reason for the hostility stems from organizational needs. The NAACP was fearful that new civil rights organizations would diminish its membership, income, and most important, its influence. Throughout its history, the NAACP has been fearful of competition, viewing, in the 1940s and 1950s for example, both the Communists and the Urban League as threats (Wilkins 1984, 185, 190). By the 1960s, the NAACP saw itself in "full-fledged competition" with "S.C.L.C., C.O.R.E., and S.N.C.C." (Wilkins 1984, 285). It was "troubled," Garrow reports, by what King and the SCLC "might mean for the NAACP's own branches in the South" (Garrow 1986,

⁴⁰ The NAACP did not support the Greensboro sit-in and NAACP lawyers did not defend the demonstrators (Morris 1984, 193).

⁴¹ The statement, made in November 1946, was in response to plans for CORE's Journey of Reconciliation.

91).⁴² Indeed, CORE's James Farmer believed that "King's mass meetings in churches across the South were draining away dollars that otherwise would have come to the association" (Farmer 1985, 189). Long accustomed to being the authoritative civil rights voice, the NAACP felt threatened.

Most important, the NAACP was committed to working through the courts, believing that civil rights could best be realized through observance of the law (Wynn 1955, 87).⁴³ For Roy Wilkins, "our faith in law" meant that the "meat and potatoes [of the civil rights struggle] had to be citizenship protected by law" (Wilkins 1984, 269, 270). Throughout the movement, then, the NAACP was opposed to civil disobedience, to demonstrations that violated the law. In the Jim Crow South, however, almost any civil rights demonstration did just that. Thus, as the movement grew and centered on direct action, the NAACP's influence waned.

A few examples will serve to bring home the seriousness of the conflict between the groups. After the founding of SCLC, Wilkins ordered Medgar Evers, the NAACP's Mississippi representative, to keep his distance, because the "NAACP does not wish to cooperate with the ministers [sic] group" (quoted in Garrow 1986, 91). When, in 1957, King proposed a large-scale voter registration drive, the "Crusade for Citizenship," a "furious" Wilkins sent a memo out to all NAACP staffers requiring them to check with national headquarters before participating in any civil rights conferences. The memo stated, in part, "we need only one national organization to speak for Negroes and all other organizations and leadership should rally around the NAACP" (quoted in Garrow 1986, 97, 98).⁴⁴ The same testy relations existed with the activists of CORE and SNCC. For example, Wilkins tried to talk CORE out of staging the Freedom Ride, telling Farmer that, in Farmer's words, "all we really need is one good test case so we can fight it out in the courts and put an end to segregated travel in this country" (Farmer 1986, 13). And when the freedom riders asked the Jackson, Mississippi, NAACP branch for help they were turned down on the ground that the branch "would be having its annual Freedom Fund drive at the time and could not afford to divide its energies" (Lomax 1963, 146). With SNCC and student activists, the NAACP often found itself in competition. In Albany, Georgia, for example, the NAACP refused to join with the other groups, believing that the NAACP Youth Council was the "only organizational vehicle needed for student activism" (Garrow 1986, 175, 176-79). Indeed, SCLC's Abernathy writes of NAACP "informers" who kept Albany Police Chief Laurie Pritchett apprised of demands "a threat to . . . local leadership, its financial base, and its patiently cultivated strategy of working within the law" (Morris 1984, 122, 115, 121).

⁴² Morris repeatedly stresses this tension, writing that in the SCLC the NAACP perceived "a threat to . . . local leadership, its financial base, and its patiently cultivated strategy of working within the law" (Morris 1984, 122, 115, 121).

⁴³ See, generally, any study of the NAACP, including Finch (1981), Hughes (1962), Wilkins (1984).

⁴⁴ Garrow (1986, 103) reports further that in "some" cities "local NAACP representatives were attempting to sandbag SCLC's efforts."

onstration plans in Albany, a civil rights campaign that was widely perceived as a major defeat for the SCLC and King (Abernathy 1989, 227, 228). A final, telling example is that Wilkins initially opposed the 1963 March on Washington in favor of the "quiet, patient lobbying tactics that worked best on Congress" (Wilkins 1984, 291).

There was also a good deal of personal animosity between the NAACP leaders and other civil rights leaders. Attorney General Robert F. Kennedy, for example, told the president that "Roy Wilkins hates Martin Luther King" (Garrow 1986, 674 n.43), and there is evidence that the NAACP tried to diminish King's influence and remove him from his leadership position (Garrow 1986, 687-88 n.6).⁴⁵ A few years earlier, Thurgood Marshall reportedly told the Eisenhower administration that King was an "opportunist" and a "first-rate rabble-rouser" (Branch 1988, 217).⁴⁶ At times the NAACP rebuked SNCC over such issues as its willingness to work with the National Lawyers Guild (Forman 1972, 220, 380).⁴⁷ And in later years Dr. King was attacked by the established groups for publicly opposing the war in Vietnam.

This conflict, of course, ran both ways. To the activists, the NAACP and the other established groups, with their legal strategy, were a source not of inspiration but of irritation. CORE had always been opposed to the NAACP's legal strategy. James Farmer viewed the NAACP as a lifeless organization whose branches "were all too often mere collection agencies" (Farmer 1985, 191). To the Reverend James Lawson, speaking at the Raleigh Conference in 1960 that formed SNCC, the NAACP was a "black bourgeois club" (quoted in Oppenheimer 1963, 70), emphasizing "fund-raising and court action" (quoted in Carson 1981, 23), not change. Cleveland Sellers found its approach "too slow, too courteous, too differential and too ineffectual" (Sellers 1973, 19). Eldridge Cleaver wrote of its "Uncle Tom's hat-in-hand approach" (Cleaver 1968, 67). Overall, many young blacks who led and peopled the civil rights demonstrations viewed the NAACP as "a legalistic organization dominated by a timid black bourgeoisie" (Meier and Rudwick 1973, 105). Indeed, some students of the civil rights movement have argued that part of the movement was a generational "revolt against the established Negro leadership" (Lomax 1963, xiii). In sum, I can find no evidence for the claim, and a great deal to the contrary, that it was the traditional black leaders, inspired

⁴⁵ However, Garrow (1986, 362) also reports that Wilkins met privately with high-ranking FBI officials to demand that tanks about King be stopped.

⁴⁶ The comments were reportedly made in response to King's plan to lead a Prayer Pilgrimage to Washington, D.C., on the third anniversary of *Brown*. Branch's source is an FBI memo of May 9, 1957 (Branch 1988, 945). The pilgrimage was disappointing to its organizers, drawing "only limited attention" from the press and attracting "far fewer than the fifty thousand participants first predicted by the organizers" (Burk 1984, 220).

⁴⁷ McAdam (1988, 146, 147) reports that at the "height of planning" for the Mississippi Freedom Summer (1964), Jack Greenberg of the Inc. Fund threatened to withdraw support if the National Lawyers Guild was allowed to participate. SNCC stuck to its principles of refusing ideological tests.

Table 4.3 Income For Civil Rights Organizations, 1940-1965
(In Thousands of Dollars)

Year	NAACP	LDEF	NUL	SCLC ^a	CORE ^a	SNCC ^a	Total	% ^b
1940	64	—	—	—	—	—	64	18.8
1941	76	—	—	—	—	—	76	50.0
1942	114	—	—	—	—	—	114	59.7
1943	182	—	—	—	—	—	182	87.9
1944	342	—	—	—	—	—	402	17.5
1945	402	—	—	—	—	—	357	-11.2
1946	357	—	—	—	—	—	319	-10.6
1947	319	—	—	—	—	—	305	-4
1948	300	—	—	—	—	—	—	—
1949	—	—	—	—	—	—	—	—
1950	—	—	—	—	—	—	—	—
1951	—	—	—	—	—	—	—	—
1952	—	—	—	—	—	—	—	—
1953	391	224	—	—	—	—	620	—
1954	466	200	—	—	—	—	674	8.7
1955	672	—	—	—	—	—	—	—
1956	—	347	265	—	14	—	1,343	—
1957	727	320	265	10	21	—	1,459	8.6
1958	822	315	265	10	47	—	1,608	10.2
1959	890	358	265	25	70	—	2,103	30.8
1960	1,041	490	265	60	242	5	2,615	24.4
1961	1,051	561	340	193	456	14	3,295	26.0
1962	1,082 ^c	669	670	198	556	120	3,673	67.3
1963	1,114 ^c	1,197	1,410	750	733	309	5,513	15.0
1964	1,147	1,425	1,651	626	838	650	6,337	—
1965	1,865	1,662	1,930	1,500	625	638	8,220	29.7

Sources: For the NAACP: National Association for the Advancement of Colored People (1939-41, 1947-61, 1964-66); McAdam (1982, 253); For CORE: Meier and Rudwick (1973, 78, 82, 126, 148, 149); McAdam (1982, 253); For SCLC: Fairclough (1987, 47, 70, 142, 206, 255); Haines (1988, 84, 193); McAdam (1982, 253); For SNCC: Haines (1988, 84, 195); Roberts (1966, 148); McAdam (1982, 253).
LDEF: Haines (1988, 84, 190); For NUL: Haines (1988, 84); Weiss (1989, 92-93).

Notes: Income reports from various sources differ. Different reporting and accounting procedures, and varying estimates make it impossible to achieve exactitude across organizations. The data presented here are estimates from the sources listed above. They should be seen as indicative of the trend, not as precise indicators of actual income.

^aSCLC was founded in 1957; Core in 1962; and SNCC in 1960.

^bMy estimate.

ter Brown. At first glance, it seems obvious that the increase is a result of Brown. However, examining where the money came from clouds the picture somewhat. At its June 1953 Annual Conference, the NAACP launched the Fight For Freedom (FFF) campaign, designed to raise \$1 million annually.

Branches set up special committees to coordinate the fund-raising. Also, a "greater emphasis" was placed upon the life-membership campaign (NAACP

by the Court, who led the civil rights demonstrations of the 1960s. When the older groups did act, they did so to preserve their leadership roles and stand up with their young people. As one adult active in the Albany Movement put it, "the kids were going to do it anyway . . . we didn't want them to have to do it alone" (quoted in Zinn 1962, 4).

In exploring the case for the extra-judicial-effects claims of the Dynamic Court view with blacks, I looked for evidence in a variety of places, ranging from the Court's effects on black public opinion, to its ability to inspire black activists, black protest activity, and black leaders. In none of these places was evidence found for the claim and in a number of places the evidence seems to contradict it. Again, the extra-judicial-effects thesis lacks support.

Money and Membership

A last possible measure of extra-judicial influence that I will examine is changes in contributions to and memberships in civil rights groups. Here, the argument might be that Supreme Court action, particularly *Brown*, led to major increases in both categories and laid the foundations that made the marches and demonstrations of the 1960s possible. It seems plausible to expect an increase in contributions from individuals, labor unions, and foundations as well as surges in membership due to the symbolic and legitimating effect of Supreme Court action. By making civil rights groups financially and numerically stronger, then, the Supreme Court could have contributed to the civil rights movement.

There are a number of difficulties with this argument and in making the examination it requires. First, of the major, active civil rights groups, only the NAACP and CORE existed prior to *Brown*, and CORE was generally inactive until 1960. The only group whose income can be fairly examined over a long time-span is the NAACP. Further, as has been suggested earlier, the NAACP was never enthusiastic about the direct-action activities of the 1960s. They were originated and led by SNCC, SCLC, and CORE, often with only the grudging acceptance of the NAACP. To the extent that the demonstrations and marches were crucial to changes in civil rights, increased contributions to the NAACP may not have had a major influence on those changes. Finally, accurate income data are hard to obtain. Figures differ and it is often unclear exactly what is included in different estimates. However, since I am interested in general-trend data, rather than specific numbers, and since the available sources agree on the trend, inexact and differing figures should not be a serious problem.

Table 4.3 presents income data for the NAACP, the Inc. Fund (IDEF), the National Urban League (NUL), SCLC, CORE, and SNCC. As can be seen in column 2 (labeled NAACP), there was a large increase in income available to the NAACP between 1953 and 1954 (19.2 percent), and between 1954 and 1955 (44.2 percent) (percentages not shown in table), the year af-

1955, 76). In 1954, perhaps because of a late start, only \$66,124 was raised by the FFF campaign. In 1955, however, that amount increased to \$150,845. Funds from membership increased by about \$70,000. The increase in other contributions was small, only about \$15,000. The question this leaves is how important the increased fund-raising activity was in comparison to the *Brown* decision as an impetus for increasing contributions. While it is impossible to know, the fact that both were occurring makes it unlikely that the increases were solely due to one. Further, those who have examined the question have not pointed to the Court. Williams, for example, credits the increase to the murder of Emmett Till in Mississippi in the summer of 1955 (Williams 1988, 44). And the NAACP, in its annual report for 1954, did mention the increased fund-raising activities as the reason for its growing income. No mention is made of *Brown* (NAACP 1955, 3, 76).

Another way of examining the increase is to view it in the context of changes in income available to the NAACP over the long term. The 1953–54 and the 1954–55 percentage increases are less than those of 1941–42, 1942–43, and 1943–44. And they are dwarfed by the 1964–65 increase. This suggests that the increases in 1954 and 1955, if indeed "caused" solely or even primarily by the Court, were not without precedent.

The data collected in the table permit analysis of other civil rights groups. Since the Inc. Fund (LDEF) was the litigation arm of the NAACP, one might expect its income to have increased dramatically in 1954. Unfortunately, the data (column 3) are incomplete, but they suggest approximately a 10 percent decline in income from 1953 to 1954 with a resumption of growth after that. Its biggest increases came between 1962 and 1963, when income grew a whopping 78.9 percent. Similarly, the SCLC (column 5) did very poorly in the 1950s, as did the NUL (column 4) where Theodore W. Kheel, president during the late 1950s, remembers "payroll-less days and weeks" (Weiss 1980, 90). The income of both groups skyrocketed in the 1960s, with the NUL taking in over \$14.5 million by 1970 (Haines 1988, 84, 188). And while CORE (column 6) did increase its income throughout the 1950s, income growth exploded in the 1960s, with 1965 income nearly nine times as high as 1959 income. Overall, total income data for the leading civil rights groups (columns 8 and 9), give little evidence of the Court's effect. Income growth did rise dramatically, but this happened in the 1960s, in the wake of the activist phase of the civil rights movement. Summarizing his detailed examination of the finances of the civil rights movement in the 1950s and 1960s, Haines concluded: "Through the 1950s the trend line for total income remained rather flat. During the early 1960s, however, and especially in 1963, it began to grow rather rapidly" (Haines 1988, 82). The pattern in the overall increase in income to civil rights groups does not support the indirect-effects thesis. The extra-judicial-effects thesis also suggests that the increase in income would, in part, result from growing contributions from foundations, labor

unions, and other predominantly white organizations. The available data, though sketchy, do not support the claim. Foundation grants were not forthcoming to any large extent until the 1960s. For example, the "funds that Rustin and Levison anticipated from foundations and trade unions" when they helped found the SCLC in 1957 "failed to materialize" (Fairclough 1987, 47). The NAACP, too, seemed to obtain most of its funds from its members, reporting for the year 1959 that, "as always, the bulk of the income was raised by the branches from \$2, \$5 and \$10 annual memberships and from special Freedom Fund projects" (NAACP 1960, 13). In addition, the *Foundation News* "reported no grants to the NAACP, CORE, or their respective tax-exempt funds until 1966" (Haines 1988, 115–16). Thus, in the years before the civil rights movement massively took to the streets, foundations and labor unions did not offer support.

This changed in the 1960s. For example, the United Negro College Fund reportedly went from no foundation grants in 1960 to eight grants totalling nearly \$5.25 million in 1964 (Haines 1988, 118–19). The Taconic and Field Foundations and the Stern Family Fund contributed \$783,000 to the Voter Education Project in the spring of 1962 (Watters and Cleghorn 1967, 49). Also in 1962, the Phelps Stokes Fund gave money for a meeting of civil rights organizations (Forman 1972, 363). Labor unions contributed some funds after 1960 as well. The AFL-CIO put up the money for the October 1960 conference that formalized SNCC (Forman 1972, 219). And union contributions to CORE, amounting to only \$695 in 1958 and \$1,347 in 1959, averaged about \$40,000 each year in the years 1962–64, before dropping in 1965 (Meier and Rudwick 1973, 82, 126, 149, 336).⁴⁸ On the macro level, "larger foundation contributions to 'interracial relations' jumped from \$2.3 million to \$26.7 million during 1964–65," an increase of over eleven-fold (Henry 1979, 179). And the Ford Foundation, a major supporter of civil rights activity, did not commit itself to support the movement until 1967 (McKay 1977).⁴⁹

Large corporations followed the same pattern. A 1970 study of 247 "major urban-based companies," all on "Fortune's list of the largest U.S. financial and industrial corporations," found that 201 had some sort of civil rights program, including donations to civil rights groups, and hiring and training programs. However, of these 201 programs, only 4 were started before 1965 (Cohn 1970, 69). When executives were asked why they initiated programs, the "principal motive" was "enlightened self-interest," with four-fifths mentioning "appearance" and only two-fifths mentioning "compliance" with the

⁴⁸ Unions were not always helpful. Forman (1972, 323) reports that in the summer of 1963 the UAW refused to contribute to SNCC.

⁴⁹ See also Ford Foundation (1974); Ford Foundation and American Bar Association (1976). A cynic might note that it was only after riots broke out in America's cities that major foundations became interested in funding civil rights organizations. On the threat of violence as the most important factor in increasing income for mainstream and conservative civil rights groups, see Haines (1988).

Table 4.4 NAACP And CORE Membership, 1944-1965

Year	NAACP Membership	Crisis Circulation	CORE Associate Membership	CORE Contributors
1944	429,000	12,000 ^a	—	—
1945	405,000	45,000 ^a	—	—
1946	420,000	49,000 ^a	—	—
1947	"leveled off"	45,000	—	—
1948	383,000	41,000	—	—
1949	248,076	34,388	—	—
1950	193,000	22,000	—	—
1951	210,000	24,000	—	—
1952	215,000	28,000	—	—
1953	240,000	30,000	—	—
1954	240,000	28,000 ^a	—	—
1955	309,000	35,700	—	—
1956	350,424	45,000	—	—
1957	312,277	64,350	—	—
1958	334,543	61,645	—	—
1959	341,935	65,500	—	4,500
1960	388,347	77,480	20,000 (Dec.)	—
1961	380,134	88,850	26,000 (May)	—
1962	—	70,000 ^a	52,000 (Dec.)	—
1963	—	90,000 ^a	70,000 (Sept.)	—
1964	455,839	114,748	—	—
1965	440,538	111,700	—	—

SOURCES: NAACP: National Association for the Advancement of Colored People (Various years); CORE: Meier and Rudwick (1973, 97, 127, 149).

NOTE:

^aN. W. Ayer & Sons.

law (Cohn 1970, 70). The point is that contributions to civil rights activity on the part of white organizations do not appear to have increased in the wake of *Brown*. Contributions did not amount to much until after the outbreak of the marches and demonstrations.

A final bit of evidence available to assess the extra-judicial effects of *Brown* on civil rights organizations is changes in membership. Table 4.4 presents data for the NAACP membership from 1944 through 1965. While there was a modest increase from 1954 to 1955, membership had been building for a number of years from a low point in 1950. It wasn't until the 1960s that the membership level recorded in 1944 was again reached. Subscriptions to *The Crisis*, the magazine of the NAACP, also presented in table 4.4, follow roughly the same pattern. For CORE, the only other organization for which I have obtained data, the number of associate members soared in the 1960s. Membership nearly doubled in 1960, doubled in 1962, and increased by nearly 50 percent in 1963 over the previous year's total. The number of con-

tributors almost tripled from 1958 to 1960. Again, the point here is that the changes in membership do not show evidence of increase in reaction to the *Brown*. Rather, the major changes appeared to have come in reaction to the direct-action phase of the civil rights movement.

In sum, evidence in support of the claim that the actions of the Supreme Court increased contributions to, and membership in, civil rights organizations is mixed. At best, some of the impetus for the increase in income available to the NAACP can be credited to the Court. But some can be credited to the fund-raising activities of the organizations themselves, the position the NAACP took. Also, larger increases occurred both in years before and in years after *Brown*, particularly in the 1960s. In terms of growing membership, the modest increase immediately after *Brown* is most accurately seen in the context of NAACP membership activity and the long-term trend. Further, major increases occurred in the 1960s. Finally, it appears that contributions from wealthy white organizations and foundations did not increase in the wake of *Brown*. Rather, it was the activism of the 1960s that appears to be the motivating factor. It was these activities, not Court action, that led to major "growth in numbers and financial resources of all civil rights organizations . . . and the renewed interest in civil rights by white liberal organizations of all types" (Oppenheimer 1963, 274). Evidence in support of extra-judicial effects is weak.

Conclusion

Before I sum up the findings of this chapter, I think it is important to note that while there is little evidence that *Brown* helped produce positive change, there is some evidence that it hardened resistance to civil rights among both elites and the white public. I have documented how, throughout the South, white groups intent on using coercion and violence to prevent change grew. Resistance to change increased in all areas, not merely in education but also in voting, transportation, public places, and so on. *Brown* "unleashed a wave of racism that reached hysterical proportions" (Fairclough 1987, 21). On the elite level, *Brown* was used as a club by Southerners to fight any civil rights legislation as a ploy to force school desegregation on the South. Just a few days before *Brown* was decided, for example, a U.S. House committee opened hearings on a bill introduced by Massachusetts Republican John W. Heselton to ban segregation in interstate travel. The bill died and *Brown*, Barnes concludes, "probably contributed to the demise" (Barnes 1983, 94). In hearings and floor debates on the 1957 Civil Rights Act, Southerners repeatedly charged that the bill, aimed at voting rights, was a subterfuge to force school desegregation on the South (U.S. Cong., House 1957, 806, 1187; Cong. Rec. 1957, 9627, 10771). When Attorney General Brownell testified before a Senate committee on the 1957 bill, he was queried repeat-

edly and to his astonishment on whether the bill gave the president the power to use the armed forces to enforce desegregation (U.S. Cong., Senate, Hearings 1957, 214-16). By stiffening resistance and raising fears before the activist phase of the civil rights movement was in place, *Brown* may actually have delayed the achievement of civil rights. Relying on the Dynamic Court view of change, and litigating to produce significant social reform, may have surprising and unfortunate costs.

In the preceding pages I have examined a number of places which reasonably could be expected to yield evidence of extra-judicial effects. Could it be, however, that the method predetermined the result? That is, wouldn't the result have been the same if, instead of tracing the effect of *Brown*, I had tried to trace the effect of, say, presidential action such as the desegregation of the armed forces? And if so, doesn't that mean that the method is faulty? Although it is theoretically possible that the method determined the result, happily this is not the case. This can be stated with confidence because I can point to activities for which the method would find many effects. For example, if I examined the evidence for the effects on civil rights of the events in Birmingham in the spring of 1963, I would find much. The evidence would range from clear attribution and action by elites to heightened press coverage to rapid changes in white opinion to an increase in the number of civil rights demonstrations. A similar argument can be made for the events in Selma in 1965. If the method can find no more evidence of the extra-judicial effect of Court action than of the effect of any number of other decisions and actions of the federal government, it may well be because the Court's actions were as important, but no more so, than those other activities. It may be the result, more than the method, that is troubling.

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

edly and to his astonishment on whether the bill gave the president the power to use the armed forces to enforce desegregation (U.S. Cong., Senate, Hearings 1957, 214–16). By stiffening resistance and raising fears before the activist phase of the civil rights movement was in place, *Brown* may actually have delayed the achievement of civil rights. Relying on the Dynamic Court view of change, and litigating to produce significant social reform, may have surprising and unfortunate costs.

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The Current of History

I have found little evidence that the judicial system, from the Supreme Court down, produced much of the massive change in civil rights that swept the United States in the 1960s. This runs so counter to the accepted wisdom that one might be tempted to sympathize with a skeptical reader who might say: "But the Court did act, and change did occur—what else could have accounted for it?" In this chapter, I will marshall evidence suggesting that pro-civil-rights forces existed independent of the Supreme Court and could plausibly have accounted for eventual congressional and executive branch action as well as for Court action. While we can never know what would have happened if the Court had not acted as it did (if *Brown* had never been decided or had come out the other way), the existence and strength of pro-civil-rights forces at least suggest that change would have occurred, albeit at a pace unknown.¹ Such change would have included economic change, black migration and the concentration of black voters in key electoral states, international awareness, and, in general, a changing society. The point of this analysis is to suggest what has been implicit throughout: that the courts were of limited relevance to the actual progress of civil rights in America.

Economic Changes and Effects

When the Second World War ended, the U.S. had set itself on a course for change. The military demands and labor shortages created by the war had opened new opportunities for blacks (Blaustein and Zangrando 1968, 355). The heightened demand for labor had prompted wartime concessions, and many formerly segregated workplaces had desegregated under the pressure to perform (Willhelm 1981, 850). This continued into the 1950s and 1960s as rapid economic growth made it in the self-interest of many whites not to

¹ 1. For a further treatment of the argument suggested here, see McAdam (1982).

discriminate, at least in some parts of their economic lives (Burkey 1971, 75). For example, Ray Marshall found that tight labor markets and the movement of whites to better-paying jobs provided textile employers a powerful motive to hire blacks (Marshall 1975, 29). Economic growth pressured segregation.

One result of this pressure was to markedly improve the financial condition of blacks. While in 1939 the median wage and salary income of non-white primary families and individuals was 37 percent of what their white counterparts earned, by 1952 that ratio had increased to 57 percent. In subsequent years, the ratio fluctuated between 51 percent and 56 percent (Burgess 1969, 269). This change can also be seen in the growth of the non-white work force employed in white-collar jobs. In 1940 only 10 percent of the non-white work force was employed in professional, managerial, clerical, sales, or craft professions. By 1960, however, the proportion more than doubled, reaching 22.2 percent (Burgess 1969, 266–67). Between 1950 and 1958 the percentage of non-white workers in skilled and white-collar jobs increased as follows: craftsmen, 20 percent; sales workers, 24 percent; clerical and kindred workers, 69 percent; professional and technical workers, 49 percent (Searles and Williams 1962, 216; Burgess 1969, 265–67). While blacks still lagged far behind whites in economic well-being, their situation was improving.

As black employment improved, economists, business owners, and politicians became increasingly aware of the existence of black purchasing power and the loss of income that segregation inflicted. While precise figures are hard to come by, as early as 1953 the secretary of the Department of Health, Education, and Welfare (HEW) stated that “racial bias was costing the United States between 15 and 30 billion dollars annually” (quoted in Hazel 1957, 234).² By 1964, the figure appeared to have been about 30 billion dollars annually, equal to Canada’s entire consumer market (Burgess 1969, 270). In 1962, the President’s Council of Economic Advisers predicted a gain of 2.5 percent in GNP if racial discrimination was ended and an even larger increase if educational achievement was equalized (cited in Southern Regional Council 1962, 3, 4). The federal government was well aware of the real costs of segregation.

Local business and political leaders also became aware of the economic costs of segregation. Continued segregation and the possibility of violence gave communities a bad reputation and made it unlikely that new businesses would move in. Little Rock, for example, averaged five new industrial sites per year during the period from 1950 to 1957. However, between the fall of 1957 and February 1961, not one new industry came in. This led a group of prominent business leaders to organize against the efforts of Governor Faubus to preserve segregation. In New Orleans, business leaders organized against pro-segregation demonstrations on the ground that they were hurting busi-

2. Elmo Roper believed that the figure was closer to \$30 billion (Hazel 1957, 60).

for analysis

ness. And in Virginia, while 1951–53 had seen an average increase of 31,400 new industrial jobs per year, the number dwindled to 5,100 per year in the period from 1957 to 1959, at the height of massive resistance. Here, too, business leaders organized to press political leaders to end segregation (Sarratt 1966, 289–95).

Segregation, then, prevented white business owners from collecting black dollars. It hampered black travel and was an inefficient use of labor.³ Indeed, as early as 1947, President Truman’s Committee on Civil Rights stressed the economic cost of segregation, devoting twice as much text to its “economic reason” to act on civil rights as to its “moral reason.” Thus, the needs of an expanding economy and the realization that blacks had money to spend, pressured segregation attitudes.

A distinct effect of economic changes was population shift. Blacks moved from the rural South to the cities of the South and the North in record numbers to take advantage of jobs. In the period from 1940 to 1960, for example, the number of black farm operators decreased from approximately 675,000 to 267,000, and over 3 million blacks left the South. Out-migration of blacks from the South increased dramatically in the 1940s and 1950s, running at nearly four times, and three and a half times respectively, the 1930s rate (McAdam 1982, 95, 78). Numerically, this meant that between 1940 and 1950 the black urban population grew by 3.2 million and that by 1950 nearly 4 million more blacks lived in urban areas than in rural areas. Between 1950 and 1960 the urban population grew again, this time by 4.4 million. By 1960 it was close to three times the black rural population (Brink and Harris 1963, 39). A population that was both rural and Southern had become urban and, to a large extent, Northern.

Improvement in the economic position of blacks and migration from the rural South to urban areas increased the pressure for civil rights in a number of ways. One way was to allow for the strengthening of black organizations. Rural Southern blacks, eking out a meager existence, lacked the time, money, education, and communication networks to organize for civil rights. They also feared for their lives. Migration and improved economic conditions changed that. Southern black churches, later to become a crucial institution in the civil rights movement, expanded enormously (McAdam 1982, 99–100).⁴ Black colleges came into their own and their enrollments soared. From 1941 to 1961, enrollments doubled, increasing from 37,203 to 84,770. By 1964, their enrollment was 105,495 (McAdam 1982, 101).⁵ Black civil rights organizations, particularly the National Association for the Advance-

3. Segregation was also inefficient in small ways. For example, Pollitt points out that if the demands of productivity don’t allow workers to go home for lunch, then lack of facilities where blacks can eat will be a pressure point (Pollitt 1960, 364).

4. On the crucial role of black churches in the desegregation struggle, see Morris (1984).

5. Professor McAdam kindly provided me with these figures.

ment of Colored People (NAACP), also grew. Whereas NAACP membership in the mid-1930s had been under 100,000, by 1946 dues-paying members totalled 420,000.⁶ Improved economic conditions and migration produced black organizations insulated from white economic pressures and able to fight for civil rights.

Electoral Changes

The social processes identified here "served to undermine the politico-economic conditions on which the racial status quo had been based" (McAdam 1982, 73). Yet they did so quietly, without public announcements or a great deal of white scrutiny. The same cannot be said, however, for the potential effect on *elections* that these processes contained. By the mid-1950s, if not earlier, the new strategic electoral position of blacks reached the front pages of America's leading newspapers and the back rooms of presidential and congressional campaign organizations.

The dynamic behind this growing white awareness of black electoral power was migration. Approximately 87 percent of all blacks who left the South between 1910 and 1960 settled in the seven key electoral states of California, Illinois, Michigan, New Jersey, New York, Ohio, and Pennsylvania (McAdam 1982, 79–80). These seven states alone accounted for over 70 percent of the electoral votes needed to elect a president. By 1964, one-third of all blacks lived in those seven states (Brink and Harris 1963, 80). While there was some awareness of this potential vote in the 1930s,⁷ and further recognition in the late 1940s, full recognition came in the 1950s.

The need for black votes was a prime motivator of President Truman's civil rights activities: "Following the defeat of the Democratic party in the 1946 election, Truman soon realized that in order to win the 1948 presidential election he would need the votes of the many Negroes who lived in the key industrial states of the North and West" (Berman 1970, 77). He acted accordingly. Soon after the 1946 election, Truman established by executive order a civil rights committee and, in June 1947, he condemned discrimination in a speech to a rally of the NAACP in front of the Lincoln Memorial (Berman 1970, 55, 61). Truman also authorized the government to file a brief before the Supreme Court in the *Shelley* case, arguing for the unenforceability of restrictive covenants (Elman 1987, 818; Berman 1970, 74). In February 1948, he sent a civil rights message to Congress, requesting legislation on ten fronts, including the establishment of a permanent commission on civil rights, the provision of federal protection against lynching, the establishment of a Fair Employment Practices Commission, and the prohibition of discrimination in interstate transportation facilities (Berman 1970, 84). After the nomi-

6. See table 4.4. That figure was not reached again until the mid-1960s.

7. "Let Jesus lead you, and Roosevelt feed you" was an FDR slogan from the 1936 presidential campaign (Lewis 1986, 4).

nating conventions in the summer of 1948, Truman issued several executive orders setting up civil rights review boards in each federal agency, and declaring that it was the policy of the president to desegregate the military (Berman 1970, 116). And, it was black votes in California, Illinois, and Ohio that provided Truman's margin of victory (Berman 1970, 129–30).

The 1956 presidential campaign brought the issue into the open. Writing on the front page of the *Wall Street Journal* in the spring of 1956, Alan Otten declared that "many Negro voters are bolting the Democratic camp in favor of the Republicans" and that Democratic officials, in private, admitted "great concern." "The impact on this year's Presidential and Congressional elections," Otten wrote, "could be decisive" (Otten 1956, 1, 4). *Congressional Quarterly (CQ)* followed soon after by pointing out that the Republicans only needed to gain two Senate seats and fifteen House seats to control both houses. This was particularly important, *CQ* noted, since blacks held the balance of power in sixty-one districts outside of the South and since it "appears certain that in 1956 Democrats will lose and Republicans will gain Negro votes" ("Where Does Negro Voter Strength Lie?" 1956, 496). This article was brought to the administration's attention by its congressional liaison, Bryce Harlow, in early May 1956 (Burk 1984, 165). Robert Bendiner, writing in the *Reporter*, found it "safe to say" that the 1956 election "would show a very marked swing away from the Democratic party" by black voters (Bendiner 1956, 9; Rowan 1956, 37–39). He also pointed out that Truman's election in 1948 depended on black voters and "less than a fifteen per cent switch in the Negro vote" would have delivered the election to Dewey (Bendiner 1956, 8).⁸ Black leaders added to the chorus. NAACP leaders Wilkins and Mitchell publicly suggested that blacks might do better, in Wilkins's words, by "swapping the known devil for the suspected witch" (quoted in Ware 1962, 56). And a "good part of the Negro press" followed suit by "moving away from the Democratic camp" (Bendiner 1956, 10).

The Republicans attempted to capitalize on this apparent shift by courting black votes. Nearly 100,000 copies of a pamphlet entitled "Abe & Ike—In Deed Alike" were distributed, identifying Republicans as the party of civil rights. The Eisenhower administration sent a four-point civil rights program to the Congress designed to "woo colored voters" (Otten 1956, 1). The impetus behind the program was, in large part, electoral. As Garrow points out, "a group of urban Republicans, looking ahead to the 1956 elections and the growing number of votes being cast by Northern blacks, urged Attorney General Herbert Brownell to consider the introduction of some civil rights legislation" (Garrow 1978, 12).

The results of the 1956 election did show a shift in black votes. *CQ* found that in thirty-five non-Southern districts where blacks were more than 10 per-

8. See also "It's 4 Million Negro Votes that the Fight's All About" (1957, 41).

cent of the population, Eisenhower increased his share of the vote over his 1952 total by 5 percent, more than double his increase nationwide. In Harlem, where Representative Adam Clayton Powell campaigned for Eisenhower, his increase was 16.6 percent ("For Whom Did Negroes Vote in 1956?" 1957, 704). In the largest black district in the country, in Illinois, Eisenhower picked up an additional 10.9 percent (Ware 1962, 59). Overall, *U.S. News & World Report* commented that the "Democratic share of the Negro vote slipped from 79 per cent in the presidential election of 1952, to 61 per cent in that of 1956" ✓ ("It's 4 Million Negro Votes That The Fight's About" 1957, 41).⁹

The electoral position of blacks, and the 1956 demonstration that their vote could change, provided pressure for civil rights action. The Eisenhower administration attempted to capitalize on the situation by introducing civil rights legislation. The congressional debate over what became the 1957 Civil Rights Act was greatly influenced by the upcoming 1958 congressional elections. As *U.S. News & World Report* commented, the real debate was "for the vote of 4 million Negro voters who hold a balance of political power in 14 Northern and Border States" containing 107 House seats ("It's 4 Million Negro Votes That The Fight's About" 1957, 41). Similarly, the presidential election of 1960 has been seen as essential to the passage of the 1960 Civil Rights Act (Blaustein and Zangrando 1968, 477). And it must be remembered that in the states of Texas, South Carolina, North Carolina, Illinois, New Jersey, Michigan, Missouri, and Pennsylvania, John Kennedy would have lost without the black vote (Lewis 1960b).¹⁰ Thus, by the 1950s the electoral position of blacks brought increasing pressure for civil rights.

In sum, the Second World War and the changes brought about by economic growth and industrialization weakened segregation. The influx of blacks to the urban centers of America, particularly the North, made segregation and its effects harder to ignore, both visually and politically.

International Demands

The Second World War propelled the U.S. into the international arena. Its new role, leader of the "free world," put its own practices in the spotlight. In the Cold War, in the fight for the hearts and minds of people throughout the world, segregation made the American model unappealing. As the Cold War continued, "racial discrimination in the U.S. received increasing attention from other countries" (Dudziak 1988, 62). Time and time again the U.S. government, political leaders, and commentators argued that segregation hampered foreign relations and provided ammunition for Communist propaganda. Blacks clearly benefited from the rhetoric of the Cold War. In the next

9. For a survey of the party distribution of the black votes in sixty-three cities in 1956, see Glantz (1970); Moon (1956; 1957a; 1957b).

10. Presidents Truman, Kennedy, and Carter all failed to carry the white vote.

few pages I give the reader a brief look at the prevalence of the Cold War argument against segregation.

Even before the Cold War, the rhetoric of World War II itself spurred civil rights. C. Vann Woodward notes that an association between Nazism and "white supremacy was inevitably made in the American mind" (Woodward 1974, 130–31). Similarly, the "democratic ideology and rhetoric with which the war was fought" brought American race relations into question (Dalfiume 1970, 247). The onset of the Cold War insured that the questioning would continue.

The location of the nation's capital south of the Mason-Dixon line ensured segregation a prominent place in international discourse. As Dudziak points out, any claim that segregation was a small, regional problem that was nearly eradicated seemed false when foreign diplomats and dignitaries suffered from it daily (Dudziak 1988, 109). And this was recognized; as the United States argued in its *Brown* brief, Washington, D.C., was "the window through which the world looks into our house," and "the treatment of colored persons here is taken as the measure of our attitude toward minorities generally" (Brief for the United States, *Brown* 1954, 4).

Segregation could also embarrass the U.S. in international affairs through the United Nations. With the UN in New York, a forum was available to highlight segregation. In June 1946, for example, the National Negro Congress filed a petition in the UN seeking "relief from oppression" (Streator 1946). Nearly a year and a half later, the NAACP did likewise, with a document entitled "A Statement on the Denial of Human Rights to Minorities in the Case of Citizens of Negro Descent in the United States of America and an Appeal to the United Nations for Redress" (Streator 1947). Denouncing U.S. racial discrimination as "not only indefensible but barbaric," the 155-page document claimed that racism threatened the U.S. more than Communism did: "It is not Russia that threatens the United States so much as Mississippi; not Stalin and Molotov but [Senator] Bilbo and [Representative] Rankin."¹¹ The statement received "extensive coverage" in both the national and foreign media (Dudziak 1988, 95), and the Soviets proposed that the UN investigate the charges (Berman 1970, 66). A final example came at the height of the UN debate over the Bay of Pigs invasion when Robert Williams, a black leader in North Carolina, sent the following message to the Cuban ambassador, which he read aloud:

Please convey to [U.S. ambassador to the UN] Mr. Adlai E. Stevenson: Now that the United States has proclaimed military support for the people willing to rebel against oppression, oppressed Negroes in South urgently request tanks, artillery, bombs, money, and the use of American airfields and white mercenaries

11. A condensed version of the introduction to the statement and an abstract of its chapters can be found in Du Bois (1947).

to crush the racist tyrants who have betrayed the American revolution and Civil War. We also request prayers for this noble undertaking. (quoted in Forman 1972, 177–78)

As Eric Goldman put it, writing in the *New York Times Magazine*, in 1961, the “existence of segregation in the United States is a tremendous liability to all Americans in the East-West struggle” (Goldman 1961, 12).

The response of some in the federal government was to argue that segregation must be abolished as an aid in the fight against Communism. In 1947, President Truman’s Committee On Civil Rights (PCCR) pointed to the “international reason” as one of three reasons to act on civil rights:

The United States is not so strong, the final triumph of the democratic ideal is not so inevitable that we can ignore what the world thinks of us or our record.
(PCCR 1947, 148)

The committee also quoted from a May 1946 letter from Dean Acheson, acting secretary of state, presenting the State Department’s position that “the existence of discrimination against minority groups in this country has an adverse effect upon our relations with other countries” (PCCR 1947, 146). President Truman made many references to the Cold War imperative to end segregation, as in his 1947 speech to an NAACP rally, his 1948 message to Congress accompanying the administration’s civil rights proposals, a campaign speech in Harlem in October 1948, and his last State of the Union Address in January 1952 (Berman 1970, 63, 85, 137, 194–95). In addition, the State Department continually argued that segregation interfered with U.S. foreign policy. In June of 1961, Secretary of State Dean Rusk formally put the State Department on record in support of the Justice Department’s proposals that the Interstate Commerce Commission toughen its anti-discrimination rules (Lewis 1961, 21). In September of that year, the State Department took the unusual step of publicly urging the Maryland legislature to pass an anti-discrimination bill pending before it (Garrison 1961). International opinion in the context of the Cold War was an important concern for government officials in assessing civil rights.

Cold War rhetoric was also a concern for the U.S. Commission on Civil Rights (USCCR) and for elected officials. In its 1959 report, the commission argued that voting discrimination “undermines the moral suasion of our national stand in international affairs” (USCCR 1959, 134). It argued against housing discrimination, in part because “not the least effect of the inequalities in housing is the doubt it casts throughout the world on our moral capacity for the leadership expected of us” (USCCR 1959, 393). These arguments were echoed by political leaders. When Tennessee Governor Frank Clement ordered state troopers to quell desegregation violence in Clinton, Tennessee, in the fall of 1956, he commented: “How can we be trusted with the peace of the world if we cannot keep peace among ourselves?” (quoted in Collier

1957, 128). In hearings before the U.S. Commission On Civil Rights in 1959, Senator Javits of New York spoke of the need to end discrimination for international reasons (USCCR 1959, 393). The Eisenhower administration acted out of a similar concern. A few days after the *Brown* decision, the Republican National Committee issued a press release stating that the decision was “appropriately within the Eisenhower Administration’s many-frontal attack on global Communism” (quoted in Dudziak 1988, 115). And after Eisenhower sent troops to Little Rock, his speech explaining the decision was translated into forty-three languages and the Voice of America broadcast details of the intervention (Burk 1984, 186).

In the Kennedy administration, the theme continued. Attorney General Robert Kennedy urged the freedom riders to halt their journey to allow the president to hold forthcoming talks with European and Communist heads of state without the vivid reminder of segregation (Lomax 1964, 23; Branch 1988, 472–73; Goldman 1961, 5), and he called their decision to stay in jail “good propaganda for America’s enemies” (quoted in Branch 1988, 476). In a speech at the University of Georgia in 1961, he criticized incidents like Little Rock because they “hurt our country in the eyes of the world.” Graduation of black students from the University of Georgia, Kennedy said, “will without question aid and assist the fight against Communist political infiltration and guerilla warfare” (quoted in Branch 1988, 414). And lack of progress, the Kennedy administration feared, would have the opposite effect. Intelligence reports to the administration noted that the Soviet Union broadcast 1,420 anti-U.S. commentaries about racism and repression in Birmingham in just the two weeks following the settlement between civil rights demonstrators and city authorities (Branch 1988, 807).¹²

The concern that segregation hurt the U.S. internationally also found its way into U.S. government briefs in civil rights cases (Dudziak 1988, 103–13). In *Shelley v. Kraemer* (1948), the restrictive covenant case, the government’s *amicus* brief contained the State Department’s position that “the U.S. has been embarrassed in the conduct of foreign relations by acts of discrimination taking place in this country” (Brief for the United States, *Shelley* 1948, 19). To bolster this position, the brief quoted extensively from Secretary of State Acheson’s 1946 letter discussed above (PCCR 1947, 19–20). In *Henderson v. U.S.* (1950), the U.S. devoted four pages of its brief to documenting the ways in which discrimination embarrassed the government in the conduct of foreign policy (Neier 1982, 51). In *Sweatt* (1950) and *McLaurin* (1950), the U.S. urged the Court to view segregation through a Cold War lens: “It is in the context of a world in which freedom and equality must become living realities, if the democratic way of life is to survive, that

12. Branch also notes intelligence reports that this was a seven-fold increase in hostile broadcasts over the height of the Meredith crisis at the University of Mississippi, and a nine-fold increase over the criticism of the freedom rides.

the issues in these cases should be viewed" (quoted in Dudziak 1988, 109). And finally, in the U.S. brief in *Brown* in 1952, the attorney general wrote: "It is in the context of the present world struggle between freedom and tyranny that the problem of racial discrimination must be viewed. . . . Racial discrimination furnishes grist for the Communist propaganda mills" (Brief for the United States, *Brown* 1954, 6).

So natural was the Cold War rhetoric that even civil rights groups used it. The NAACP used it, both in its briefs defending the rights of blacks (Bell 1980, 96), and in praising the *Brown* decision, the day it was issued, for "being very effective in combatting propaganda of Communists" ("N.A.A.C.P. Sets Advanced Goals" 1954, 16). In the final report of an NAACP conference in Atlanta following *Brown*, the decision was celebrated, in part, as "vindication of America's leadership of the free world" (quoted in Wilkins 1984, 216). Similarly, speaking in the early 1950s, Whitney M. Young, Jr., then working for the Omaha National Urban League, and later to become the league's national leader, relied on Cold War arguments to support civil rights (Weiss 1989, 52). Surprisingly, the more activist wing of the civil rights movement used Cold War rhetoric as well. In 1960, the student sit-in movement in Atlanta included international concerns among its six reasons for acting ("An Appeal" 1960, 13). And Dr. King, in his speech at St. John's Church in Birmingham announcing and celebrating the settlement of that campaign, stated:

The United States is concerned about its image. When things started happening down here, Mr. Kennedy got disturbed. For Mr. Kennedy . . . is battling for the minds and the hearts of men in Asia and Africa—some one billion men in the neutralist sector of the world—and they aren't gonna respect the United States of America if she deprives men and women of the basic rights of life because of the color of their skin. Mr. Kennedy knows that. (quoted in Branch 1988, 791)

Judges, too, were not immune from this argument. At a testimonial dinner in his honor in 1962, J. Skelly Wright reminded his audience:

In the present great struggle between the East and the West for the minds of men, 90 per cent of the people of the world are colored. . . . If we're going to make any progress with that 90 per cent we had better practice what we preach. (quoted in Sarratt 1966, 203)

Finally, the press used the Cold War to support civil rights. The *St. Louis Post-Dispatch* wrote of the *Brown* decision: "Had the decision gone the other way, the loss to the free world in its struggle against Communist encroachment would have been incalculable. Nine men in Washington have given us a victory that no number of divisions, arms, and bombs could ever have won" (quoted in USCCR 1959, 164). The *New York Times* editorialized: "When some hostile propagandist rises in Moscow or Peiping to accuse us of being a class society, we can . . . recite the courageous words of yesterday's opin-

ion" ("All God's Chillun" 1954, 28). And, despite the fact that Universal Newsreels never mentioned *Brown*, the Voice of America immediately translated the opinion into thirty-four languages and broadcast it around the world (Branch 1988, 113).

The Cold War, and the not-hard-to-come-by perception that segregation was a blemish on American democracy, provided an argument for civil rights. As I have shown, it was an argument that was made much of. And like the effect of industrialization and economic growth cited earlier, it was independent of the courts.¹³

A Changing Society

Throughout the post-war years, America was changing rapidly. The demands and opportunities created by the economy, and the rhetoric of the Cold War, gave civil rights a tremendous boost. But the pressure for civil rights had been building for a long time.¹⁴ Starting with the Unemployment Relief Act of 1933, nondiscrimination provisions were enacted in many employment and training programs of the thirties and early forties. Regulations of many federal agencies also prohibited employment discrimination in various federally assisted programs such as the public works program of the 1933 National Industrial Recovery Act. The Ramspeck Act of 1940 barred racial discrimination in the federal civil service and the armed forces. Although these provisions has little practical effect, they did demonstrate a growing awareness of the need to fight discrimination.

This change can also be seen in a number of other ways. In January 1947, an attempt was made to bar a segregationist Senator, Bilbo of Mississippi, from taking his seat in Congress. Bilbo stepped aside voluntarily for an operation, and died before the matter could be resolved (Lawson 1976, 113). Change can also be seen in the number of civil rights bills introduced and sponsors recorded in successive sessions of Congress. As early as 1940 the House passed an anti-lynching bill. It passed anti-poll-tax bills in 1943, 1945, and 1947. In 1944 and 1945, 134 and 179 signatures, respectively, were gained on discharge petitions for civil rights bills in the House (Hazel 1957, 130, 261, 133, 137). Overall, while only ten pro-civil-rights bills were introduced in the Seventy-fifth Congress (1937–38), the number increased steadily, reaching seventy-two in the 1949–50 period (Eighty-first Congress) (Woodward 1974, 127).¹⁵ In the case of equal opportunity legislation, the number of sponsors in both houses of Congress increased gradually over time,

13. These factors were often combined: "Negroes are gradually accumulating economic strength, and a democracy competing in a cold war with Moscow must enfranchise them" (T.R.B. 1957, 2).

14. For a brief history of government action, see USCCR (1977c, 65–69).

15. McAdam gives a figure of thirteen bills introduced in the 1937–38 session but agrees with the latter number and the trend (McAdam 1982, 6).

commencing at one in 1941–42 and reaching thirty-four by 1951–52. Interestingly, the latter number was not reached again for a decade, until 1961–62 (Burstein and MacLeod 1979, 27). The growing increase in civil rights activity in Congress suggests a changing society.

Black leaders made good use of this growing awareness. As already mentioned, as far back as 1946 CORE staged a freedom ride. The Journey of Reconciliation, as it was called, took CORE members through Virginia, North Carolina, and Kentucky and demonstrated the extent of segregation that existed. Earlier, under the leadership of A. Philip Randolph, president of the Brotherhood of Sleeping Car Porters, black leaders threatened a massive march on Washington, D.C., for jobs (Randolph 1964). In response to this threat, President Roosevelt, by executive order (8802), established a Fair Employment Practices Committee to guard against discrimination in federal employment and vocational training programs. The Committee lacked enforcement powers and died in 1946, but it did demonstrate that blacks had the power to exert pressure on the government.

President Truman also responded to civil rights through executive orders. In December 1946, he established a Committee On Civil Rights whose report I have cited repeatedly. In many senses the report served as a “blueprint” for civil rights, “urging much of the significant action to be taken against racial discrimination in the next two decades” (Greenberg 1977, 588).¹⁶ Executive Orders 9980 and 9981, issued in July 1948, established a Fair Employment Board within the Civil Service Commission and a presidential commission on segregation in the armed forces. The point of this brief history is to demonstrate that the civil rights movement that burst forth in the 1960s had been growing for three decades. While the pot did not boil over until the 1960s, it had been simmering for a long time.

Another indication of the growing civil rights movement is the number of reported civil rights demonstrations. Thanks to the work of Paul Burstein the growth in civil rights demonstrations has been traced (see table 4.2). In the 1940s, there was a growing number of such demonstrations, rising from two in 1941 to twenty-seven in 1948. In fact, there were more civil rights demonstrations in the years 1943, 1946, 1947, and 1948 than in any year following until 1960 (1956 and 1958 excepted!).

Other signs of change include the steady growth of black literacy rates through the 1940s and 1950s, reaching 82 percent in 1960 (USCCR 1961b, 1: 42). Also, the social and economic variables that combined with political factors to keep blacks unregistered and politically inactive were “declining rapidly” while “every one of the variables positively associated” with the attainment of civil rights was “on the increase” (Matthews and Prothro

16. In 1948 the report was read virtually verbatim to the American public in four radio broadcasts, accompanied by music, over the Mutual Broadcasting System (Siepmann and Reisberg 1949).

1963a, 44). Blacks themselves were increasingly optimistic about the future. In a 1942 Roper survey fully 50 percent of blacks thought their sons would have more opportunity to get ahead than they had, compared to 46 percent of whites. By 1947, however, the black figure jumped to 75 percent while the white figure reached only 62.1 percent (McAdam 1982, 109).¹⁷ The spread of mass communication was having an impact as television and radio brought the talents of black entertainers or sports heroes like Jackie Robinson to all (Kluger 1976, 749). By the 1960s the media coverage of the brutality of segregation had a receptive audience.

The combination of all these factors—growing civil rights pressure from the 1930s, economic changes, the Cold War, population shifts, electoral concerns, the increase in mass communication—created the pressure that led to civil rights. The Court reflected that pressure; it did not create it. Even Jack Greenberg, head of the NAACP Inc. Fund, admits that by the time of *Brown* there “was a current of history and the Court became part of it” (Greenberg 1977, 589). That current was growing in force and, as my analysis has shown, the Court contributed little to it. So strong was the pressure for change, argues Peltason, that “even if the Supreme Court had sustained segregation, such a decision could not have long endured” (Peltason 1971, 249). Reflecting on the growing social, political, and economic forces of the time, the government’s civil rights litigator Elman put it this way: “In *Brown* nothing that the lawyers said made a difference. Thurgood Marshall could have stood up there and recited ‘Mary had a little lamb,’ and the result would have been exactly the same” (Elman 1987, 852). But I need not engage in historical speculation. All I need to show is that there is evidence that the changes in civil rights could plausibly have happened without Supreme Court action. For if they could have, then my finding that the courts contributed little to civil rights does not violate the skeptic’s concern for causation. And while there is no way to be certain, the lack of evidence for the contribution of the courts, and the evidence of the strength of social, economic, and political change, go a long way toward establishing causal connections.

17. The two questions differed in wording.

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