Explaining Massive Resistance:
The Debate over the Capacity of the Law to Promote Racial Equality, 1954-1964

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ABSTRACT

In this article, I examine how those who supported the Supreme Court’s ruling in Brown v. Board of Education (1954) understood and explained the subsequent rise of massive resistance to school desegregation and the conspicuous failures of the Court’s mandate throughout the South. My analysis draws on several interrelated historical claims. First, that Brown was initially greeted with a striking degree of optimism toward the prospects for successful implementation. This optimism was, in large part, the product of arguments activists and scholars had been making in the years preceding Brown about the capacity of legal reform to promote the cause of racial equality. Racial liberals argued that white supremacist attitudes were not as entrenched as was commonly assumed, and that the law could play a powerful pedagogical role as a definer of moral value. But by 1956, as the white South mobilized in defiance of the Court’s desegregation mandate, these legalist assumptions about the reformist potential of the rule of law and the nature of southern race relations came under assault. Massive resistance, unexpected in its strength, scope, and the bluntness of its refutation of federal authority, forced those who had previously touted law’s capacity to reconsider their positions. Some sought to downplay the extent of Brown’s failures, or to explain resistance as the product of ineffective, tentative application of the law, rather than any flaw in the assumption that laws could uproot entrenched customs. Yet other liberal advocates of school desegregation moved toward a reconsideration of the power of law to promote social reform. This reconsideration inspired a new generation of scholarship in law, history, and the social sciences, unified by a more chastened vision of law’s ability to remedy the most contentious divisions in American society. More consequentially, the disillusioning experience with massive resistance contributed to the rise of the direct-action phase of the civil rights movement, led by civil rights activists who were more skeptical toward legal reform than the racial liberals who pressed for Brown.

The effort by racial liberals to make sense of massive resistance in the decade following Brown established narratives for evaluating the capacity of the law to effect social change that persist to this day. Whether framed in terms of the advisability of litigation as a reform tactic or the role of the Supreme Court in promoting social change, Brown still stands at the center of debates over law’s capacity, claimed by both legalists and their critics.
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When the Court handed down its decision, not even the most optimistic among us felt that integration was at hand or just around the corner, but even the most pessimistic little dreamed that it was so far off. And now, with the infallibility of hindsight, we can see what we could not have possibly anticipated four years ago. For who had the prophetic vision to foresee the emergence of the South’s frighteningly successful massive resistance movement against the prompt implementation of the law of the land?

— William H. Robinson (1959)¹

INTRODUCTION

Although the Supreme Court’s 1954 school desegregation decision in Brown v. Board of Education has often been portrayed as a dramatic shock to a nation long accustomed to its Jim Crow customs and prejudices, in fact the ruling hardly came as a surprise to anyone who was paying attention to national trends. The media, politicians, academics, activists, (with obvious exceptions in the white South) widely praised the Court for addressing an issue that had emerged in the postwar period as a major national and international dilemma. At the time of the decision, even those who were less than enthusiastic about desegregation generally attributed a sense of inevitability to the ruling. The Court’s intervention reflected the general assumption, recognized

by all but the most willfully blinded of segregationists, that the days of Jim Crow were numbered. One of the most remarkable (and often overlooked) aspects of the history of *Brown* was the widespread optimism toward the prospects for desegregation that accompanied the decision.

In contrast, few were prepared for what followed *Brown*: the development of an organized, expanding resistance movement, led by the major political figures of the South, and dedicated not only to opposing school desegregation but to directly challenging the authority of the Supreme Court. To be sure, at the time of *Brown* there were those who predicted that integration might spark violent confrontations, and no one had high hopes for near-term compliance in certain areas in the Deep South. But these skeptical predictions were generally subsumed in the pervasive optimism that accompanied the decisions, an optimism that many felt justified by the relative calm in the South in the first year and half after *Brown*. Even those who refused to accept these hopeful prognostications did not expect defiance in pockets of the Deep South to actually spread to the rest of the South, to establish a pattern of open defiance to federal authority that would energize and mobilize the region, that would divide the nation and resurrect the ghosts of the Civil War and Reconstruction. No one would have predicted that prospects for desegregation in the Deep South would be less promising five years after *Brown*. The strength and effectiveness of massive resistance in the face of a desegregation mandate from the Supreme Court, rather than the desegregation decision itself, was a shock to prevailing assumptions.

This article examines how supporters of school desegregation came to terms with these shattered expectations, how they made sense of the disillusioning reality of massive resistance. At the center of this article are the activists, lawyers, scholars, and liberal commentators who played a critical role in creating a persuasive case for civil rights reform in the years leading up to *Brown*. It was largely due to the work of these racial liberals that the Court’s desegregation decision could be recognized as a necessary, even inevitable step forward for the nation. It was largely due to their work that *Brown* was greeted with such optimistic predictions for its successful implementation. Racial liberals proved especially effective at promoting the argument that laws played a powerful educational role in society. Even without direct enforcement, they argued, the law could shape human behavior, which, in turn, could shape moral sensibility. Yet the aftermath of *Brown* failed to support the boldest of these legalist claims. The authoritative declaration of a new national legal desegregation norm in *Brown* did not set in motion a cascade of progressive changes: it did not unleash a latent commitment to human equality in the South; it did not embolden southern liberals to stand taller knowing the law of the land was behind them; and it did not push segregationist hard-liners to the margins of society. Rather, *Brown* sparked a newly energized resistance movement dedicated to refuting the Court’s opinion. Those who had called on the Court to act now had to explain why the Court was being openly refuted across the South, why so little actual desegregation was taking place. After having for years made the case for the capacity of the civil rights law to destroy Jim Crow, racial liberals now had to explain why the law was failing to do its job.

Among racial liberals, reactions to massive resistance tended in two different directions. One response was a refusal to accept the failures of *Brown*. There were powerful pressures to reject any characterization of *Brown* as a failed reform effort, particularly the fear of playing into the hands of segregationist defenders of Jim Crow who were doing their best to make the
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decision fail. Thus, proponents of desegregation commonly responded to massive resistance by trying to reassert control over the narrative of Brown, by emphasizing those places outside the Deep South where school desegregation was taking place, without violence or resistance. They also sought to explain massive resistance as the product of opportunistic maneuvering by a handful of demagogues, of breakdowns in the democratic system. And they attacked the gradualist approach, as encapsulated in the famous “all deliberate speed” requirement of the Supreme Court’s 1955 implementation decision (Brown II). By emphasizing these factors, many supporters of Brown concluded that massive resistance did not mark a failing of the rule of law. Rather, massive resistance was the product of a breakdown of the normal process by which new law is internalized in the social fabric, either by demagogic interference or insufficiently bold assertion of legal norms. The law of Brown, they argued, was never given a real opportunity to go into effect in the South. The flaw was not in the principle that law could lead society, but in the execution of this principle.

Yet other racial liberals questioned whether the principle itself might be flawed. This response accepted the limitations of Brown, and then used this fact as the basis for a reconsideration of the role of law in guiding fundamental social change. In the era of massive resistance, many civil rights advocates returned to approaches to social change they had temporarily put aside in their push for judicial leadership in civil rights: the need for educational efforts, for the slow process of negotiation, for organization and struggle and, if need be, for confrontation outside the formal legal process, to turn legal reform into social reality. In short, the effort to come to terms with massive resistance sparked a reconsideration of the role of the courts and the law in social reform movements.

Most consequentially, a recognition of the failures of Brown and the limits of the law provided a powerful platform for activist efforts that sought to promote reform by working outside formal legal institutions. Martin Luther King Jr. pressed his case for the necessity of direct action protest as a corrective to overly idealistic assumptions about the potential for litigation and lobbying. The students who initiated the lunch counter sit-in movement of 1960 were motivated as much by frustration with the implementation of Brown as by the new constitutional norm it established. They saw their protest as an alternative pathway to achieving social justice than the one pioneered by the NAACP lawyers. The students’ approach centered on private initiative, consciousness raising, and local-level negotiation rather than legal reform.

Massive resistance proved a transformative period in shaping modern attitudes toward the relationship between law and social reform. Racial liberal thought had not prepared its adherents for a resurgent, revitalized segregationist movement. Not since the failed experiment with Prohibition had the nation so directly confronted the limits of legal reform. Some took from this experience a renewed commitment to the rule of law. The proper response to massive resistance was more law—clearer, bolder legal standards, more litigation, better enforcement. Others saw the central lesson of massive resistance as pointing in the other direction. Law unaccompanied by changes in public attitudes—brought about by education, negotiation, social pressure, even civil disobedience—was destined to fail. Here was the great irony of Brown: the decision set in motion events that would challenge the confidence and optimism that made the decision possible in the first place. Yet this proved a moment of constructive disillusionment. The civil rights movement, at the height of its influence, would effectively combine a commitment to legal
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reform with a chastened, more realistic understanding of the capacity of the law to achieve racial justice.

The effort by racial liberals to make sense of massive resistance in the decade following Brown established narratives for discussing the capacity of the law to effect social change that persists to this day. Whether framed in terms of the advisability of litigation as a social reform tactic or the role of the Supreme Court in promoting social change, Brown still stands at the center of debates over law’s capacity, claimed by both legalists and skeptics in their debate over the relationship between law and social reform.

I. ROOTS OF OPTIMISM

Writing in the months following the first Brown decision, political scientist John Roche offered an assessment of the prospects for the desegregation decision that reflected the characteristic optimism of liberal supporters of the decision. His analysis relied on several basic assumptions, each of which with roots in the efforts of civil rights advocates in the decade or so leading up to Brown. He interpreted the relative calm in the South in the weeks following Brown as indicative of the relative weakness of racial extremists within the white South. “[T]he moderation displayed by many Southern politicians since May, 1954, indicates that strong forces of compromise and concession are checking the extremist battalions. . . . [T]he South is not united behind segregation” Roche also added that the growing black vote in the South, the product of earlier court rulings striking down the all-white primary system, would only encourage more support for desegregation.

The process of desegregation would be accelerated by a kind of self-perpetuating dynamic, premised on the assumption that increased interracial contact tended to break down the stereotypes on which racial prejudice was built. “[I]f the research of social psychologists is correct,” Roche wrote, “the number of people who reject segregation will increase as a direct coefficient of integration, i.e., the more people there are exposed to integrated situations, the more there will be who favor desegregation. Thus, in a sense, integration will tend to create its own public opinion, and at an increasingly rapid rate.”

Because of the latent willingness to accept the desegregationist trend within the South, Roche had nothing but praise for the Court’s conciliatory approach to school desegregation. It was “a stroke of political genius” for the Court to put off a ruling on implementation. By taking the extraordinary measure of detaching the constitutional right from the remedy, the Court would allow the South to internalize the new reality established by the Court, to recognize the

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3 Id. at 55.
5 Roche, supra note 2, at 56.
6 Id. at 51.
inevitability of change, and to prepare themselves. The delay created by delaying a ruling on the
details of implementing desegregation had, Roche approvingly noted, “muffled Southern
reaction to an extraordinary extent.”

Most significantly, Roche’s faith that desegregation would be accomplished primarily
through leadership rather than compulsion drew on his vision of the role of law as a powerful
educational force in society. In response to concerns about how the courts could possible
enforce such a decision in thousands of different segregated school districts, he explained: “The
best answer to the question appears to be that the Court will not enforce its decision; rather, it
will supply a catalyst to those forces in the South that will, in the long run, abolish segregation.”
Thus, his belief that the Court’s ruling would supply the necessary “catalyst” drew on a
combination of faith in the forces of moderation in the South and in the capacity of the law.
 “[T]he basic clue to success is the mobilization of the lawful majority, and here the Supreme
Court has supplied the standard around which they can rally. No longer in the exposed position
of being mere defenders of the Negro, the moderates are now the forces of law and order, the
guardians of the Constitution. . . . [T]he Supreme Court’s function is an educational one.

Events in the following year did nothing to disabuse Roche of this faith in the role of law
in the civil rights struggle. In the spring of 1955 he published, with Milton M. Gordon, a
sociologist, an article in the New York Times Magazine entitled “Can Morality be Legislated?”
The article drew on recent scholarly studies that explored “the relationship between law and
mores, between the decrees of courts and Legislatures and the vast body of community beliefs
which shape private action.” They concluded that law “does more than prohibit or compel
specific behavior. Indeed, in its operation, law actually provides the setting for types of social
relationships—relationships which may have a profound effect on the very attitudes which are
necessary to adequate enforcement of the statute in question.” Applied to the problem of
school segregation, the force of the Court’s decree would prove decisive in swaying moderate
opinion in the South (which, by their estimation, constituted the majority of the population)
“toward compliance.” “The symbols of state power are to the undedicated nonrevolutionary
mighty and awesome things, and he will thing long and hard before he commits himself to
subversive action. Consequently the law tends to become . . . a ‘self-fulfilling prophecy’; that is,
a statute tends to create a climate of opinion favorable to its own enforcement.”

Roche’s sanguine assessment of the prospects for Brown was characteristic among
supporters of the decision in the year and a half following the decision. The following two

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7 Id.
8 Id. at 54.
9 Id. at 56 (footnote omitted).
11 Id. at 47.
12 Id. at 44.
13 Id. at 44.
14 See infra Part I.C.
sections trace the roots of this optimism in the efforts of advocates and scholars in the 1940s and early 1950s to make the case for civil rights reform.

A. Civil Rights and the Debate over the Capacity of the Law\textsuperscript{15}

From the late nineteenth into the mid-twentieth century, civil rights reformers fought, with little success, against the argument that law was powerless to affect prejudicial attitudes and customs. Since the late nineteenth century, most Americans agreed that racial progress would be achieved by education rather than legislation. Improving race relations required attacking prejudicial attitudes rather than discriminatory actions—the logic being that the latter was only the product of the former. In the years leading up to Brown, the single most formidable argument against civil rights legislation and judicial rulings was that beliefs, not laws, dictated behavior. This was the assumption of the Plessy Court, that laws were “powerless to eradicate racial instincts” and “social prejudices.”\textsuperscript{16} This was the claim captured in the popular dictum put forth by Yale University sociologist William Graham Sumner, which encapsulated prevalent social Darwinist assumptions of Jim Crow era, that “stateways” were powerless to change “folkways.”\textsuperscript{17}

A skepticism that the guiding hand of the law could improve race relations pervaded American society by the early twentieth century. The idealistic post-Civil War moment in which the Thirteenth, Fourteenth, and Fifteenth Amendments were ratified had faded into the past. Congress’s last effort in the field of civil rights, the ambitious public accommodations legislation in the Civil Rights Act of 1875, had been struck down by the Supreme Court in 1883.\textsuperscript{18} After Reconstruction, northern attention turned from the South, and the federal government largely left the white South to itself as its leaders reconstituted their society around the principle of white supremacy. If there was any recognition of the irony that a central tool for building the Jim Crow South was, in fact, Jim Crow law, it was generally explained away by emphasizing that these laws were simply reflecting already existent social commitments. Laws were following customs. Laws were not telling the people (or at least whites) to do anything they were not already disposed to do anyway.

The anti-legalist sentiment toward race relations as expressed by the Plessy Court and by the social Darwinists remained powerful into the twentieth century. Skepticism toward the efficacy of civil rights reform was a central line of defense for defenders of Jim Crow through the civil rights movement. This same skepticism steered racial progressives in the 1920s and 1930s toward educationalist projects, rather than legal reform, and it remained a central tenet of southern liberalism into the 1960s. These assumptions would have to be overcome if the nation

\textsuperscript{15} For a more thorough examination of the history examined in the following two sections, see Christopher W. Schmidt, “Freedom Comes Only Through Law”: The Debate over Law’s Capacity and the Making of Brown v. Board of Education, UTAH L. REV. (forthcoming, December 2008).
\textsuperscript{16} 163 U.S. 537, 551-52 (1896).
\textsuperscript{17} WILLIAM GRAHAM SUMNER, FOLKWAYS: A STUDY OF THE SOCIOLOGICAL IMPORTANCE OF USAGES, MANNERS, CUSTOMS, MORES, AND MORALS (1906).
\textsuperscript{18} The Civil Rights Cases, 109 U.S. 3 (1883).
were to be steered on a new course of a national commitment to civil rights, even in the face of considerable resistance in the white South.

In the 1940s and 1950s these skeptical assumptions toward the reformist capacity of the law were undermined in the face of liberal scholars and activists who pressed the case that legal reform could effectively combat prejudice. Race relations, they argued, were more malleable than had been previously assumed and properly conceived laws could affect not only outward behavior, but personal attitudes. The triumph of the idea that legal reform could reshape race relations helped make possible the emergence of civil rights as a viable national issue in the early post-World War II period. The years leading up to Brown saw among supporters of civil rights an ever strengthening commitment to the idea that legal reform was the key to changing the increasingly embarrassing social practices of the Jim Crow South. By the time of Brown, the skepticism toward the idea of civil rights law that had dominated the late nineteenth and early twentieth centuries—encapsulated in social Darwinist mantra that “stateways” could not change “folkways”—was, while far from dead, pushed to the margins of mainstream reformist discourse. The efforts of a generation of scholars, activists, and lawyers had seriously discredited the claims of legal skeptics.

The creation of a compelling, persuasive ideology of civil rights reform had two elements, each aimed at assumptions of the folkways school of thought. First was to destabilize the belief that racial hierarchies were natural and inflexible and that racial prejudice was a natural component of the human condition. This was the key contribution made by Gunnar Myrdal in An American Dilemma (1944). Second was to press the argument that legal commands can be particularly effective in transforming social relations. In the early postwar period, these two projects were necessarily connected. The more malleable the attitudes and customs of Jim Crow, the more readily outside pressures, such as a federal law, could reform these attitudes and customs. And the more powerful the law, the deeper into Jim Crow race relations it could penetrate. Thus, the case for the capacity of the law made these two interlocking arguments: iniquitous racial customs and prejudices were not nearly as entrenched as was generally assumed (and certainly not the solid rock of Sumnerian folkways); and wide-scale legal reform was the most effective way to lead the nation away from its damaging tradition of racial inequality.

The rise of the legalist perspective came from a relatively straightforward insight: attitudes can follow actions. By this insight, postwar racial liberals sought to completely overturn the assumptions of folkways ideology. Social Darwinists argued that people have a relatively stable set of beliefs and customs from which their behavior derived; therefore, these folkways could not be (and should not be) reformed by legal command. By contrast, postwar social scientists, following Myrdal, saw much less stability in popular customs and beliefs; they were largely a product of habits and actions and behavior, all of which could be changed by changing legal requirements. Once people start acting differently—when they are required to follow employment antidiscrimination regulations, for instance—their attitudes toward racial minorities will change as well. Law itself was a major creator of attitudes; law had a crucial role in the education of society.
In new findings in psychology, advocates of legally enforced integration were able to locate a scientific basis for their position. Racial legalists added specificity to the idea that law affected personal beliefs, particularly in the realm of segregation, when they began drawing on the sociological concept of “contact theory.” This theory, premised on the idea that increased interaction among diverse groups would lead to improved relations between these groups, had largely displaced notions prominent earlier in the century that assumed unnecessary interactions between different groups risked destabilizing society. The basis of contact theory was that ignorance produced prejudice, and the best remedy for ignorance was exposure and education. As one scholar put it, “some kind of legal force is necessary to bring members of the two groups into a close enough relationship for the discriminators to learn from experience how inadequate their stereotypes have really been.” Social psychologists quickly built an entire scholarly literature around contact theory. Numerous experiments in interracial living came to the conclusion that, under the proper circumstances, living in close contact made different groups more tolerant and less prejudiced; military and workplace integration studies offered much the same conclusion.

19 Gene Weltfish, Some Problems on Which We Need More Facts—and Some Implications for Action, 1 J. SOC. ISSUES 52 (1945).
22 See, e.g., Ira N. Brophy, The Luxury of Anti-Negro Prejudice, 9 PUB. OP. Q. 456 (1945-46); Summary and Conclusions of the Fair Employment Practice Committee, June 28, 1946, reprinted in 11 DOCUMENTARY HISTORY OF THE TRUMAN PRESIDENCY 101-07 (Dennis Merrill, ed., 1996); To Secure These Rights, supra note ___, at 84-85; Segregation in Washington, supra note 20, at 68-74; Malcolm Ross, All Manner of Men (1948); Caroline K. Simon,
**B. The Making of Brown**

The NAACP’s victory in *Brown* was, to a significant extent, the product of the work of these liberal scholars and activists who, in the 1940s and 1950s, pressed the case that race relations were more malleable than had been previously assumed and that properly conceived laws could affect not only outward behavior, but personal attitudes. The triumph of the idea that legal reform could reshape race relations made possible the emergence of civil rights as a viable national issue in the early post-World War II period. And *Brown* was the great achievement of these efforts to demonstrate the efficacy of “stateways” in disrupting entrenched patterns of social inequality.

As the NAACP prepared their legal challenge to school segregations, they found plentiful support for their positions, particularly their optimistic assessments of the potential for federal civil rights reform, in recent legal and social scientific scholarship. In particular, the civil rights lawyers drew on studies that emphasized that a Supreme Court desegregation ruling would not be particularly explosive in the South. Because of social and cultural changes already under way (encouraged by previous civil rights reforms), combined with a belief that top-down legal commands could be effective in the area of race relations, racial legalists believed the Supreme Court could provide the intervention that would allow the nation to finally abandon Jim Crow policy, practices, and beliefs.

The claims of the racial legalists steadily seeped into mainstream liberal discourse. “Segregation has been legally disintegrating under one court decision after another,” observed a 1953 *New York Times* editorial.24 Impressive strides were being made within higher education, and “the legal issue has descended to the public schools by a logical sequence of events.” There

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24 *The Paradox of Segregation,* N.Y. TIMES, June 14, 1953.
were “risks” involved when a change in law is placed in opposition to “mores and social practices . . . [y]et change in race relations in the South . . . has been swift in recent years.” The editorial concluded: “The Supreme Court will render its decision on segregation in the public schools in a climate of growing tolerance that is one of the most heartening signs of our times. The climate suggests that, whatever the decision of the court may be, democracy has nothing to fear from more democracy.” Two leading civil rights advocates even predicted, “A Supreme Court decision reversing or undermining the Plessy doctrine would make all further legislative activity unnecessary.”

Support for these hopeful predictions could also be found in two influential books published early in 1954. Harry Ashmore, the liberal editor of the *Arkansas Gazette*, headed a research effort funded by the Ford Foundation, the results of which were published in a book titled *The Negro and the Schools*. Although he found many reasons for caution—Ashmore fully expected strong resistance in certain places in his native region—he also found grounds for optimism. A defining characteristic of integration efforts, Ashmore wrote, “is the frequency with which those who have had experience with integration—professional educators and laymen alike—have steeled themselves for a far more severe public reaction than they actually encountered.” About the same time as Ashmore’s study appeared, Gordon Allport, a Harvard psychology professor, published *The Nature of Prejudice*, a five-hundred-page exploration of the factors that contributed to bigotry and discrimination in American life. He, like Ashmore, also found much promise in previous reform efforts. “Over and over again it has been predicted that if discrimination is stopped dire consequences will follow—perhaps strikes or riots. Very seldom do they follow.”

The postwar campaign to promote the efficacy of civil rights reform helped to open opportunities in the cause of racial equality that would have been inconceivable to earlier generations. Without the deeply held optimism toward the capacity of law to release American society from the fetters of Jim Crow practices and racist beliefs, it is hard to imagine that the liberal establishment would have accepted civil rights reform, including legally mandated desegregation, as a necessary part of the public policy landscape of the day. And without this baseline of support, the Supreme Court would never have taken their monumental step in *Brown*.

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25 *Id.*
29 “More than an understanding of the psychic trauma produced by segregation was required . . . before the Supreme Court would outlaw it. The Court also had to be convinced that its decree would be effective in bringing about at least a gradual elimination of segregation practices. This conviction was based, one can speculate, on the successful experience in integrating Negro students in Southern colleges, on the success of the Truman-Eisenhower program to wipe out segregation in the armed forces, and on an acceptance of the new doctrine that law shapes
C. Optimism Affirmed, 1954-1955

The Brown decision was hardly a surprise to the nation. The Court had been signaling the direction of its leanings for several years by this point. As supporters of the decision recognized, the decision was very much in line with the prevailing trend of public policy and social development of recent decades.

The dominant prediction at the time of Brown was that the decision would work. The day after Brown, the New York Times reported that “leading American educators . . . did not believe there would be great difficulty in putting the ruling into effect. . . . No one expected any violence nor any real crisis to develop. A gradual changeover from the present system to a nonsegregated policy was predicted.” The paper also ran an article summarizing the work of psychologist Kenneth Clark, who found desegregation occurring peacefully, even in places with “deeply rooted prejudices.” Key to success, Clark noted, was the perception that the tide of opinion was shifting. “Even deeply prejudiced persons went along with desegregation when they saw it was accepted by others in the community.”

A Washington Post editorial explained, “The decision will prove, we are sure—whatever transient difficulties it may create and whatever irritations it may arouse—a profoundly healthy and healing one. It will serve—and speedily—to close an ancient wound too long allowed to fester.”


See, e.g., Editorial, PITTSBURGH POST-GAZETTE, reprinted in Editorial Excerpts from the Nation’s Press on Segregation Ruling, N.Y. TIMES, May 18, 1954 (“This ruling could hardly have come as a surprise to even the most determined advocate of segregation. The steadily changing social climate in this country since the ruling of 1896, and especially within the last few years, has made an end of segregation in the public schools inevitable.”); Thomas L. Stokes, Court Decision is Signal for Work, Atlanta Constitution, May 20, 1954 (“It is surmised that most Southerners expected the kind of decision that was rendered, which may help explain the restrained reaction. It is suggested that they foresaw it because, deep in their hearts, a great many must feel that it was the right decision. . . . Recognizing this, we come to see that the anti-segregation decision of the Supreme Court is, itself, just another step in a process that began some time ago.”); but see Chalmers M. Roberts, South’s Leaders Are Shocked at School Integration Ruling, N.Y. TIMES, May 18, 1954, at 2.


WASH. POST & TIMES HERALD (editorial), May 18, 1954, reprinted in Editorial Excerpts from the Nation’s Press on Segregation Ruling, N.Y. TIMES, May 18, 1954.
Initially at least, developments on the ground following the 1954 desegregation decision did little to disabuse the justices or the civil rights lawyers and their supporters of their optimistic assessment of the prospects for desegregation. Contrary to the predictions of many segregationists, Brown did not spark an immediate backlash. In fact, initial reactions to the ruling were generally promising. If there was one word used to describe the situation in the South following Brown it was “calm.” Jim Crow America received the decision “with general calm,” wrote the New York Times after a week,35 “most Southerners were calm,” reported Life36 and practically every other account in the days, weeks, and months following Brown.37 “The tone of the press was dignified. The voice of the fanatic and the agitator was not loud.” U.S. Senator Allen J. Ellender of Louisiana explained: “There is no doubt that this comes as a shock to the South. . . . But my hope is that the people of the South will make every effort to work out something without too much difficulty or violence.”38 In sum, it was a “placid reception,” which

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34 Arthur Krock, In The Nation, N.Y. TIMES, May 30, 1954; see also C. Vann Woodward, The Strange Career of Jim Crow 149 (1955) (“A unanimous decision, it has all the moral and legal authority of the Supreme Court behind it, and it is unthinkable that it can be indefinitely evaded.”); Henry Lee Moon, New Emancipation: The Atlanta Conference, NATION, June 5, 1954, at 484 (Channing H. Tobias, chairman of the NAACP board of directors, telling a meeting of black leaders soon after Brown that “the entire South will meet the test of the Supreme Court decision in the spirit of loyal, law-abiding citizens”); Court Said to End ‘A Sense of Guilt,’ N.Y. TIMES, May 18, 1954 (quoting Howard Odum: “The South is likely to surprise itself and the nation and do an excellent job of adjustment.”); Lillian Smith, letter to the editor, N.Y. TIMES, June 6, 1954; William T. Coleman to Felix Frankfurter, May 20, 1954, Frankfurter Papers, Harvard Law School, Part 3, Reel 3, Frame 939 (“Now that the Constitutional barrier has been removed, I am quite sure that the responsible people on both sides will be able to get together and work out a proper implementation of the decision.”).


37 See, e.g., Arthur E. Sutherland, Segregation by Race in Public Schools: Retrospect and Prospect,”20 LAW & CONTEMP. PROBS. 169, 178 (1955) (“The most notable feature of the commencement of desegregation was its generally calm reception.”).

38 Id. at 2; see also id. at 1 (U.S. Senator Harry F. Byrd of Virginia calling for “matured judgment after sober and exhaustive consideration”); The Decision, RICHMOND NEWS LEADER, May 18,
the *Times* largely attributed to the Court’s decision to delay its ruling on implementation—a strategic choice that was almost universally praised at the time.40

The ruling was an “inevitability,” wrote the editors of *Life*, as the Court “kept pace with educational and social progress.”41 “The Supreme Court’s rule is not itself a revolution,” explained the *Louisville Courier-Journal*. “It is rather acceptance of a process that has been going on for a long time and that is like an ocean’s steady pressures—not easy to see as they move in, but finally impossible to restrain by any man-made devices.”42 U.S. Senator Allen J. Ellender of Louisiana explained: “There is no doubt that this comes as a shock to the South. . . . But my hope is that the people of the South will make every effort to work out something without too much difficulty or violence.”43

Even the words of the most die-hard segregationist leaders demonstrated a striking lack of defiant passion in the immediate aftermath. South Carolina Governor James F. Byrnes described himself as “shocked” at the ruling, but he counseled that the South should “exercise restraint and preserve order.”44 There were prominent exceptions to these measured reactions, of course. Georgia Governor Herman Talmadge pronounced that “Georgians will fight for their right . . . to manage their own affairs.”45 And U.S. Senator James O. Eastland of Mississippi stated, “We will take whatever steps are necessary to retain segregation in education,” and he forecasted “great strife and turmoil.”46 But, among most commentators, even in the South, these

1954 (“This is no time for rebellion. This is no time for a weak surrender either. It is a time to sit tight, to think, to unite in a proposal that would win the Supreme Court’s approval.”).  
40 See, e.g., *All God’s Chillun*, N.Y. Times, May 18, 1954 (“These matters cannot be hurried.”); Benjamin Fine, *School Leaders Applaud Decision*, N.Y. Times, May 18, 1954 (Dr. Henry E. Hill, president of George Peabody College for Teachers in Nashville, Tennessee, stating: “The key is to give the South enough time to make normal adjustments.”).  
41 *A Historic Decision For Equality*, LIFE, May 31, 1954, at 11, 14; see also Edmond Cahn, *Jurisprudence*, 30 N.Y.U. L. Rev. 150, 157 (1955) (“For decades the public sense of injustice had denounced racial discrimination more and more resentfully. I suggest therefore that the Brown and Bolling decisions spared the nation a genuine constitutional crisis . . .”).  
42 Quoted in *A Historic Decision*, supra note ___, at 14.  
43 Robert C. Albright, *Southerners Assail High Court Ruling*, N.Y. Times, May 18, 1954, at 2; see also *id.* at 1 (U.S. Senator Harry F. Byrd of Virginia calling for “matured judgment after sober and exhaustive consideration”); *The Decision*, Richmond News Leader, May 18, 1954 (“This is no time for rebellion. This is no time for a weak surrender either. It is a time to sit tight, to think, to unite in a proposal that would win the Supreme Court’s approval.”).  
45 *id.*  
46 Robert C. Albright, *Southerners Assail High Court Ruling*, N.Y. Times, May 18, 1954, at 1, 2. See also, e.g., Editorial, New Orleans Times-Picayune, reprinted in *Editorial Excerpts from the Nation’s Press on Segregation Ruling*, N.Y. Times, May 18, 1954 (predicting “considerable turmoil for some time to come” and noting “[t]he disappointment and frustration of the majority of Southerners at the revolutionary overturn of practice and usage cannot immediately result in the improvement of race relations”).
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were generally explained predicable cries of a dying system. Writing in 1957, political commentator Samuel Lubell would reflect, “Right after the Court’s decision, my interviewing left me with the feeling that opposition to desegregation was mainly a rear-guard action. Most Southerners conceded that the Supreme Court decree would have to be complied with eventually. About all they hoped for from a show of resistance was to slow the implementation of the decision.” As liberals waited for the implementation decree, they typically saw little in the denunciatory pronouncements of the people like Talmadge and Eastland to disabuse them of their optimistic predictions.

In evaluating the post-Brown situation Walter White wrote, “Possibly the most significant reaction was the fact that so few bombastic threats such as those of Byrnes and Talmadge were made, and that so many of opposite tenor came forth.” Judge J. Waties Waring predicted, “There will be resistance in some benighted quarters of course, but the great body of right thinking people in the country will accept the decision with approval and breathe a sign of relief that America has found its soul. And this applies to the good people of the South who have not heretofore dared to come out in the open because of the segregation laws and the blatant demagogues.” Later in 1954, after a visit to Charleston, he predicted, “The walls of segregation are falling fast and the Negroes as well as the right thinking whites of the South know it. The law is now on our side and the segregationists are to be classed with the lawbreakers.”

Time magazine concluded its assessment of the ruling by noting, “The Supreme Court’s decision was another vital chapter in one of the greatest success stories the world has ever known: the American Negro’s 90-year rise from slavery. The Herman Talmadges are not going to write the last chapter of that story.”


50 Id. 229 (quoting Waring to Marion Wright, Nov. 12, 1954); see also THE REMINISCENCES OF J. WATIES WARING 204 (Columbia Oral History Project, 1972) (Nov. 8, 1956, interview) (“a law that is only unpopular in a particular community but that represents a national sentiment is not hard to enforce. . . . You’ll find that true of the racial progress in the schools”).

51 The Nation, TIME, May 24, 1954, at 22; see also Luther A. Huston, 1896 Ruling Upset, N.Y. TIMES, May 18, 1954, at 14 (Thurgood Marshall predicting that there would be no disorder as a result of the decision, and that the South would not “resist the Supreme Court”); Sutherland, supra note ___, at 179-80 (noting that even in the Deep South “there was little talk of forcible opposition. The legal maneuvering reflected the perennial and generally vain hope of those to whom some law is displeasing that by a change in verbal formulas they can escape the law’s substance.”).
In the immediate aftermath of the decision there were even signs of moderation emanating from the South. The governor of Virginia called for “cool heads, calm study, and sound judgment.” He initially seemed resigned to accepting desegregation and stated that he would call “representatives of both state and local governments to consider the matter and work toward a plan which will be acceptable to our citizens and in keeping with the edict of the court. Views of leaders of both races will be invited.” The Atlanta Constitution editorialized: “It is no time to indulge demagogues on either side or those who are always ready to incite violence and hatred. . . . It is time for Georgians to think clearly.”

“We accept the Supreme Court’s ruling,” wrote James Kilpatrick. “We do not accept it willingly, of cheerfully or philosophically. We accept it because we have to.”

The justices on the Supreme Court took note of these promising developments. Although he described himself as “shocked,” Governor Byrnes of South Carolina, who had earlier issued dire warnings of the probable results of a desegregation ruling, called on “all of our people, white and colored, to exercise restraint and preserve order.” Justice Felix Frankfurter took hope from Governor Byrnes’s calls “to exercise restraint and preserve order” (Byrnes had served with Frankfurter on the Supreme Court from 1941 to 1942) and wrote Chief Justice Warren that the governor had “shown more good sense after the event [i.e., Brown] than before it.”

“Particularly heartening,” Frankfurter confided to a friend, “is the predominantly moderate tone of the southern press and with a few conspicuous exceptions, even the southern public men are more sober than I should have expected them to be.”

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54 Quoted in Kluger, supra note ___, at 711.
56 John N. Popham, Reaction of the South, N.Y. Times, May 18, 1954; see also Senator Fears Trouble, N.Y. Times, May 23, 1954, at 81 (Louisiana Senator Allen J. Ellender expressing fears of unrest resulting from the decision, but counseling, in a radio broadcast, “we are law-abiding citizens and the Supreme Court’s opinion is the law of our land. . . . [A]s a nation and as individual states, we will be able to work out this new problem, which the court ruling raises, without haste, without rancor, without violence, and in a fair measure.”).

Just two months after the ruling, a University of Arkansas law professor noted, “Press reports to date . . . indicate that over one-third of the eighteen jurisdictions in which segregated schools have been mandatory will voluntarily commence widespread or piecemeal desegregation programs either before or shortly after the Court’s [implementation] decrees come down.” Wylie H. Davis, The School Segregation Decision: A Legal Analysis, 3 J. Pub. L. 83, 88 (1954).

Although he goes on to note that there would be significant attempts at evasion in the Deep South, Davis concluded: “Evasion or defiance of the law on a large scale would be a distressing blow to the education of whites and Negroes alike in the South, accompanied probably by a
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James M. Nabrit, Jr., a Howard University law professor who litigated Bolling v. Sharpe before the Supreme Court, told a group of black southern educators in late 1954 that school desegregation was just another step in a long line of advancements toward racial equality that included the integration of the military and of transportation and the opening of primaries. “All of these changes had been resisted in vain in the South, but, in time, as the resistance faded, each change improved the South and its race relations without being accompanied in any case by the drastic evil forecasts when it was inaugurated.”

In summarizing the developments over the retrogression in every other phase of race relations. The general calmness that has followed the school segregation cases, albeit with plenty of argumentative discussion among the rank and file and a little political football, is an encouraging sign.” Id. at 89.

Donald Jones, NAACP field secretary in Louisville, had a similar assessment. Although he predicted that five southern states—Louisiana, Alabama, Mississippi, South Carolina, and Georgia—would fight to hold onto their segregated schools, other southern states would either be integrated within a year of Brown I, or would be integrated once “given a push.” States Will Cling To Schools Fight, Chi. Def., Nov. 27, 1954, at 2.

See also Freedom Writer: Virginia Foster Durr, Letters from the Civil Rights Years 72 (Patricia Sullivan ed., 2003) (Virginia Durr to HLB, May 19, 1954: “Well the Great Decision came on yesterday and has caused far less excitement than anyone thought it would. A lot of Lucy’s friends were at the apartment when it came through and they took it calmly and said they did not see how the Court could have ruled any other way. A few vicious people could cause a lot of trouble, but if they can be kept under control I think it will work out without too much violence, at least in the cities, it is the country where there seems to be the most fear and resentment.”); Benjamin Muse, Ten Years of Prelude: The Story of Integration Since the Supreme Court’s 1954 Decision 17 (1964) (“Southern editors, few of whom were yet aroused to frank hostility, stressed the difficulty of complying with the Supreme Court ruling in the near future. . . . Many Southern editors at this stage urged a calm, constructive approach to the problem. Virtually all major newspapers in North Carolina and a number in Tennessee and Florida sounded this note.”).

59 Quoted in Mary McLeod Bethune, A Christmas Wish for Peace, Patience and Understanding, Chi. Def., Dec. 25, 1954, at 9; see also Educators Comment on School Decisions, Chi. Def., May 22, 1954, at 5 (quoting John H. Lewis, President of Morris Brown College in Atlanta, Georgia: “[P]rogressive integration will gradually take place on administrative, faculty and student levels, and will be accepted as a trend of the times. Where integration has already taken place in border states, whites and Negroes are working side by side in harmony.”); quoting Benjamin E. Mays, President of Morehouse College in Atlanta, Georgia: “The South will adjust to this case. There will be no violence and no revolution down South.”); School Bells and Liberty Bells, Chi. Def., Sept. 11, 1954, at 9 (“Already reports are coming in that the reality of racial integration is far less explosive than had been anticipated . . . We are confident that all honest efforts at integration . . . will succeed without difficulty.”).

But some observers were more hesitant. James P. Brawley, president of Clark College in Atlanta Georgia, warned following Brown that “[t]he battle . . . is not won. . . . [S]egregation is rooted in false ideologies of white supremacy and historic traditions and practices of racial superiority which will not be eradicated by court decisions. There will be subterfuges and devious efforts to circumvent the law. Given time, however, the whole South will adjust itself to
summer following Brown, the New York Times remained cautiously optimistic. “Across the fringes of the South—Delaware, Maryland, Missouri, and the District of Columbia—the color bars already are being dropped here and there in the public schools. Every major religious denomination in the region has taken a stand in support” of Brown.60 There were four states that the Times characterized as in “outright opposition” to school desegregation—South Carolina, Georgia, Mississippi, and Louisiana.61 ‘But the one fact that has thus far emerged is that where integration has been begun it has been carried out with hardly a ripple of protest and none of the ‘rivers of blood’ that Governor Herman Talmadge of Georgia predicted would flow.’62

In the period immediately following the ruling, the most promising signs of tangible change came from the border states, which appeared generally to accept the decision. Many border-state localities that still practiced segregation had been moving toward desegregation before Brown, and the ruling seemed only to accelerate this trend. Washington, D.C.; Baltimore; St. Louis, Kansas City and Columbia, Missouri; Wilmington, Delaware; and Louisville, Kentucky—all implemented school integration policies in the period between the Brown rulings.63 Arizona and New Mexico had systems in which segregation was permitted as a local option, but both states had begun to gradually desegregate schools in the early 1950s with relatively little publicized disruption or protest.64 In Texas the governor, while noting that the process would take time, said his state would comply with the decision. The governor of Kentucky assured that his state “will do whatever is necessary to comply with the law.”65 In three of the five localities that were involved in Brown and Bolling, desegregation had begun before the Court heard its third round of arguments. Topeka was moving in this direction before Brown, and by the spring of 1955 the city’s board of education had voted to complete the process

this new situation as an intelligent and law-abiding section of our great democratic America.”

Ibid. See also School Bells and Liberty Bells, CHI. DEF., Sept. 11, 1954, at 9 (“We do not doubt that there will be some difficulties as some communities change their school patterns …”).


62 Id.

63 See, e.g., Adopt D.C. School Plan for Ending Bias, CHI. DEF., June 5, 1954, at 3 (describing Washington, D.C. plan for ending its school segregation policy, which would begin in the fall of 1954 and be completed by fall of 1955); D.C. School Board Votes for Gradual De-Segregation Plan, CHI. DEF., June 12, 1954, at 4 (same); 12 States Defy School Order, CHI. DEF., Sept. 11, 1954, at 1 (“There is trouble expected in some Dixie states when Negroes attempt to enter white schools, but in other states, especially along the borderlines of the South, school boards have already bowed to the power of the Supreme Court.”); Mix Classes in 5 Dixie States As Schools Open, CHI. DEF., Sept. 18, 1954, at 3; Joan C. Baratz, Court Decisions and Educational Change: A Case History of the D.C. Public Schools, 1954-1974, 4 J. L. & EDUC. 63, 65-68 (1975).


of desegregation.\textsuperscript{66} Delaware had several cities implement desegregation plans before \textit{Brown II}. The nation’s capital, with President Eisenhower’s encouragement, also moved toward desegregation.\textsuperscript{67}

The year following the \textit{Brown} ruling proved to be a rather strange interlude. The Court had made the highly unconventional choice of separating its ruling on the merits of the case from its ruling on implementation. The parties to the case would return to the Supreme Court for yet another round of arguments, this time focusing specifically on how the desegregation ruling should be put into effect. They would be joined, once again, by the Justice Department, and by the attorneys general from states that would be affected by the desegregation order. The interlude between \textit{Brown} and the implementation ruling was made longer than expected when Justice Robert Jackson died in October 1954 and the appointment of his replacement, John Marshall Harlan, faced delays in the Senate. It was not until April 1955 that the lawyers presented their oral arguments on implementation. The Court then issued its implementation decree on May 31, 1955.

On the one-year anniversary of \textit{Brown}, Russell Baker of the \textit{New York Times} offered a cautiously optimistic appraisal of the situation. “In the year elapsed since the court spoke,” he wrote, “the South has witnessed considerable confusion, much indecision, more uneasiness and a few bold experiments.” By this point Georgia, Mississippi, and South Carolina had clearly lined up in opposition to the Court ruling. Yet Baker found notable successes not only in Washington, Baltimore, St. Louis, and various counties in West Virginia, but also in a few places within the Deep South.\textsuperscript{68} The NAACP issued a generally promising report on school desegregation progress in the spring of 1955. Following the ruling, the organization noted, 250,000 black and white children who had previously been in segregated schools were now attending classes together in some five hundred different schools. Despite the fact that this was a small fraction of the over thirteen million children still attending racially separate schools, the NAACP report found the development, accomplished in the absence of a formal Court decree beyond the statement of principle in \textit{Brown}, to be promising. The report criticized the press for failing to publicize these accomplishments, while focusing too much on the isolated examples of resistance to integration, such as the incidents of protest and threatened violence that led to the failure of school desegregation efforts in Milford, Delaware. “[F]or every Milford incident, there have


been scores of unheralded instances of Negro children being welcomed by their new white schoolmates and teachers. Indeed, this has been the rule; the hate demonstrations, the exception.” The report emphasized its hopes for desegregation beyond the border states; it found “plenty of evidence that the South—even the white South—does not present a solid phalanx against compliance.” From this, NAACP executive secretary Roy Wilkins concluded, “It becomes more clear each day that racial segregation in our country is on the way out.”

This optimism was a factor in encouraging the NAACP legal team to push an uncharacteristically aggressive line in its briefs and oral arguments on the implementation decree, arguing for “immediate” or “forthwith” desegregation. Throughout the school litigation campaign, the NAACP lawyers had proven themselves exceptionally adept at taking the temperature of public and judicial sentiment, steering their litigation strategy to coincide with this sentiment, and keeping themselves ready to adjust their tactics to take advantage of new openings when sentiment developed in favorable directions. As a result, the NAACP campaign had two defining characteristics: it tended toward pragmatism and, at times, caution; and it was overwhelmingly successful at winning major cases. Yet its approach to the implementation decision, influenced by the heady atmosphere created by their great victory in the 1954 decision, broke from its traditional caution. In its implementation ruling the Supreme Court gave control of desegregation to the lower federal courts and chose not to impose strict time deadlines for desegregation. While not necessarily a defeat for the NAACP, the ruling was clearly at odds with what it had asked for.

In rallying around the principle of forthwith desegregation, the NAACP lawyers emphasized in their arguments the rapid progressive changes that were already taking place. For example, James Nabrit, arguing the Washington, D.C., case, told the Court that since Brown, progress toward integration had been “amazing.” He concluded that “a firm decision calling for forthwith integration will be accepted and will be complied with by the South where I have lived all my and life and thus, in spite of all their protestations and the attitude which many of them generally genuinely have, they will follow the decision of this Court just as other Americans follow the law.”

Marshall too called for a “firm hand” in ordering desegregation. He noted that “it matters not whether that firm hand is executive, legislative or judicial,” concluding that “the district court, once properly instructed by this Court, will be the type of firm hand.” “I have no doubt whatsoever,” he told the Court, “that the people in South Carolina and North Carolina, once the law is made clear, will comply with whatever that court [the Forth Circuit] does.” The white primary cases had “raised terrific racial feeling and it worked out.” In the higher education cases the state attorneys general had predicted the same catastrophes that they were again predicting in the public school cases, and “not a single prediction came true,” except that several states had yet


to begin the desegregation process. Within the twelve states that had made efforts to fall in line with the Court’s holding in these earlier cases, there was “only one untoward incident.” The same held true in the desegregation of interstate transportation facilities following the Henderson decision. “Dire predictions” were made, “and we have less trouble than we had before.” Whenever faced with a major social problem, Marshall told the justices, “the history of our Government shows that it is the inherent faith in our democratic process that gets us through, the faith that the people in the South are no different from anybody else as to being law-abiding.”

Marshall was not necessarily being naive here. He read the briefs submitted by the states and heard the oral arguments of their attorneys general in which they made it perfectly clear that the state governments were powerfully opposed to desegregation. There was surely an element of lawyerly rhetorical persuasion in these comments, with Marshall trying to paint a picture for the justices that would make them as comfortable as possible with agreeing to his argument for immediate desegregation. Yet his comments cannot be reduced simply to tactics. For he was saying in this forum the same things he was saying elsewhere, and the same things racial liberals across the country were saying when given the chance. The dominant opinion among racial liberals was, despite the protestations from segregationists to the contrary, that the process of segregation was gaining strength and that future successes would surprise the doubters. In short, while vocal resistance was not difficult to find in the days and months following the ruling, it was not strong enough to shake the lessons racial liberals had worked so hard to instill as part of the national discourse during the past decade.

At the time of Brown II, some thought the most notable aspect of the ruling was the unequivocal reiteration it contained in support of the basic principles announced in Brown I. Harvard Law School Dean Erwin N. Griswold described the decision as “wise, moderate and

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71 Id. at 395, 396, 398, 399; see also id. at 436; Thurgood Marshall, An Evaluation of Recent Efforts to Achieve Racial Integration in Education Through Resort to the Courts, 21 J. NEGRO EDUC. (1952), reprinted in THURGOOD MARSHALL: HIS SPEECHES, WRITINGS, ARGUMENTS, OPINIONS, AND REMINISCENCES 149 (Mark V. Tushnet ed., 2001) (“[I]n each university case the local white student bodies have openly showed their willingness to accept Negro students. Despite the dire predictions of horrible catastrophes by die-hard state officials, the admission of qualified Negroes has been smooth and without incident.”); id. at 154 (“Many of the people who believe that segregation is invalid and should be declared unconstitutional are moved by this threat of a few Southern governors. It seems to me that the best answer to this threat is that the same threat was made by the attorneys-general of the Southern states while the Sweatt and McLaurin cases were pending in the Supreme Court. . . . The record shows that no state universities were closed and nothing happened except that Negroes were admitted just as if they had been attending the schools for years back.”); Thurgood Marshall, The Rise and Collapse of the ‘White Democratic Primary,’ 26 J. NEGRO EDUC. 249, 254 (1957) (noting that the success with legal attacks on white primary indicated that southern state efforts to circumvent Brown were destined to fail); School Bells and Liberty Bells, CHI, DEF., Sept. 11, 1954, at 9 (noting that the “great fears of strife and even violence” in the wake of the integration of southern colleges “have vanished like the dreams of an anxious sleeper”).
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statesmanlike, and a logical and sound development from the court’s decision of a year ago.”

While the New York Times front page account of the ruling emphasized its lack of deadlines and its “flexible formula” for desegregation, it also noted that the opinion “plainly warned those who disagreed with the ruling not to attempt to frustrate today’s judgment by unreasonable or unnecessary delays.” Although there was certainly disappointment that the Court did not issue a more forceful ruling—liberal senator Hubert Humphrey criticized the decision on these grounds, for example—the dominant reaction of the liberal establishment was that the Court had issued a statesmanlike and wise opinion.

Thurgood Marshall did not get the immediate desegregation with strict timetables he had asked for in his arguments, but even he was still largely satisfied with what the Court had produced. At a press conference in New York soon after the decision came down, the NAACP released a statement that noted: “We see nothing in the language of the opinion which sustains the view of some Southern states that delay in compliance may be of indefinite length.” In a private conversation a few days later, Marshall declared: “The more I think about it, I think it’s a damned good decision! . . . [T]he laws have got to yield! They’ve got to yield to the Constitution.” “You can say all you want,” he concluded, “but those white crackers are going to get tired of having Negro lawyers beating ‘em every day in court. They’re going to get tired of it.”

The summer following the implementation decision, Marshall and Robert Carter published an article in which they explained that although the NAACP did not get exactly what it had asked for from the Court, “the formula devised is about as effective as one could have expected. The net result should be to unite the country behind a nationwide desegregation program, and if this takes place, the Court must be credited with having performed its job brilliantly.”

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72 3 College Heads Praise Decision,” N.Y. TIMES, June 1, 1955 (article including quotations from various figures in academia, all of whom were supportive of Brown II).

73 Luther Huston, No Deadline Set, N.Y. TIMES, June 1, 1955.


75 N.A.A.C.P. Lauds Decision on Bias, N.Y. TIMES, June 1, 1955.

76 Richard Kluger, Simple Justice: The History of Brown v. Board of Education and Black America’s Struggle for Equality 746-47 (1976) (quoting Marshall in transcribed conversation with Carl Murphy); see also Jack Greenberg, Crusaders in the Courts: How a Dedicated Band of Lawyers Fought for the Civil Rights Revolution 225 (1994) (quoting LDF minutes, June 1, 1955) (Marshall explaining that the district-by-district approach that Brown II would require “was inevitable,” but the two Brown decisions “give us the tools with which we may secure compliance at the lower court level”).

77 Robert Carter & Thurgood Marshall, The Meaning and Significance of the Supreme Court Decree, 24 J. NEGRO EDUC. 397 (1955); see also Tushnet, supra note 13, at 268 (quoting Marshall in March 1956 as saying, “We’ve got the other side licked. It’s just a matter of time.”).

Later in life Marshall would say that he was “shattered” by the 1955 decision. “They gave us nothing and then told us to work for it. I thought I was the dumbest Negro in the United States,” he recalled. Cass Sunstein, Did Brown Matter? NEW YORKER, May 3, 2004, at 103. Yet contemporary evidence indicates that Marshall, while surely disappointed by not convincing the
immediate aftermath of the Brown decisions, Marshall’s optimism was more the rule than the exception among the decision’s supporters.

The signs of an emerging resistance movement deriving from the school desegregation decisions remained for a time largely unrecognized by most of the nation, including the members of the Supreme Court. The Ku Klux Klan was slowly regaining strength after being largely out of business by the early 1950s. Incidents of racial intimidation began to increase. After several years in the South without any lynchings, three occurred in 1955, including the unpunished murder of fourteen-year-old Emmett Till. At the time these developments appeared to be just death rattles of the Jim Crow South, what Lubell described as a “rear-guard action.” Only after the mobilization of massive resistance, when these stirrings became a major resistance movement, could these events be seen as for what they proved to be: ominous harbingers of things to come.

II. MASSIVE RESISTANCE

Between May, 1954, and when the Southern Manifesto was issued in 1956, was a year not only of relative peace but a year of substantial integration in the border states, where you would expect it. What you would have expected further would have been that in time you would have had a gradual process supported in the North and resisted in the South, but at any rate a continuing process. Then came an act of warfare and, secondly, a shattering attitude of apathy or neutrality on the part of the northern political leadership.

—Alexander Bickel (1964)

“The initial reaction to the Court’s decision,” observed Alexander Bickel, “augured very well indeed for full acceptance, following a period of readjustment that would itself do no violence to principle.” This hopefulness dissolved in the years following Brown II, and “by the fall of 1958, the segregation problem in the South looked like the American Algeria.” While segregationists countered Brown with attempts at legal refutation, by challenging the Court’s reliance on psychology or even going so far as to defend a state’s right to “interposition,” massive resistance, at it most effective, was a dynamic, mobilized political and social movement. As explained by one of the attorneys who argued on behalf of South Carolina before the Court in Brown: “Our only hope, at present, lies not in carrying on the battle in the courts by the presentation of legal defense, but in taking the battle to the people and using the same

Court to follow the NAACP recommendation for immediate desegregation, was generally satisfied with the implementation decree.

Belknap, supra note ___, at 27-31.

The Proper Role of the United States Supreme Court in Civil Liberties Cases, 10 Wayne L. Rev. 457, 488 (1964) (comments of Alexander Bickel).

Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 254 (1962).

Id. at 255.

See, e.g., Newby, supra note ____.

psychological and sociological warfare that has been so successfully carried on against us, i.e., the principles of mass psychology expressed through organized public opinion." Or, in the words of a Georgia segregationist group, they must “unbrainwash the people who believe that integration is right.”

Beginning in 1956 a series of highly publicized acts of organized resistance to school desegregation took place. In February of that year, a young black woman named Autherine Lucy attempted to enroll in the University of Alabama, resulting in several days of violence instigated by white mobs and Lucy’s expulsion from the school. Although the NAACP won a court order requiring the university to enroll her, Lucy decided she had had enough and chose to drop her challenge. NAACP lawyer Jack Greenberg described the entire experience as “traumatizing” for the legal team. It led Thurgood Marshall to suggest that the NAACP simply stop pursuing cases in the Deep South, since even if the courts could be convinced to issue strong desegregation rulings, white resistance would prevent implementation. In March almost all southern members of Congress (including a number who had initially counseled moderation in response to *Brown*) put their names on a statement, soon to be known as the Southern Manifesto, denouncing the desegregation ruling as “a clear abuse of judicial power.” In an effort to resuscitate William Graham Sumner’s “folkways” argument against reform, the statement argued that “restated time and again,” the separate-but-equal principle “became a part of the life of the people of many of the States and confirmed their habits, traditions, and way of life.” The Manifesto helped transform scattered discontent and prevalent uncertainty into a united, even “respectable” movement, as southern politicians rallied behind their shared opposition to “forced” integration of schools.

In the fall of 1956 violence erupted during the attempted desegregation of the public high school in Clinton, Tennessee. Then, in the fall of 1957, a national drama emerged from the showdown between the federal government and the Arkansas government concerning the integration of Little Rock’s Central High School. By this point could there be no mistaking the significance of the organized, energized resistance. This resistance, whose very existence contradicted much of what racial liberals had been saying for the past decade, constituted a fundamental challenge to the place of racial liberalism in the civil rights reform movement.

The scope of massive resistance, its growing strength and boldness, caught most of the nation by surprise. Whereas *Life* had embraced the optimistic appraisals for the prospects of

84 Id. at 170-71.
85 Id. at 171.
88 Id.
89 See, e.g., *Klarman, supra* note ___, at 385-442; *Bartley, supra* note 83.
Explaining Massive Resistance

integration in the immediate aftermath of the first Brown opinion, describing the decision as not only right but “inevitable,” by mid-1956, with the southern resistance effort gaining momentum, the national magazine adopted a different tone. “Not in recent times has any issue so divided the U.S. people as has the Supreme Court’s historic decision on segregation. Galvanized by the court’s edict, the nation has clashed in explosive debate.” The article drew on the same Sumnerian tension of “folkways” and “stateways” that the signers of the Southern Manifesto highlighted: “The court, in now interpreting the law, has reversed centuries of tradition. But most citizens wonder how and how soon the conflict between conscience and custom will be resolved.”

Ironically, considering all the segregationist talk about the limited efficacy of “stateways,” a centerpiece of massive resistance was state law. For example, one of the most effective legal maneuvers designed to avoid integrating schools were the pupil placement laws. Under these laws, states granted power to make school assignments to local school boards (Virginia created a state-wide pupil placement board). These boards initially assigned students to their old (i.e., racially segregated) schools, and then allowed transfer requests, which, when they would result in integration, they denied on facially non-racially-discriminatory grounds (e.g., place of residency, educational achievement, parents’ preferences, overcrowding). Occasionally, however, transfers were approved to demonstrate “compliance. Thus, the burden of integration is placed on the individual black families, with plentiful obstacles between the initial request and a possible assignment to a white school. The end result: limited, token integration of selected schools, with the vast majority of students still attending single-race schools.

But the era of massive resistance was characterized not only by a deep segregationist commitment to state-level legal action, but also to violence and intimidation that worked outside

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90 A Historic Decision For Equality, LIFE, May 31, 1954, at 14; see also A Head Start on Racial Equality, LIFE, May 31, 1954, at 16 (praising President Eisenhower’s commitment to desegregating Washington, D.C.). The optimistic tone demonstrated in the Brown stories had also been evident in the magazine’s account of the 1950 Supreme Court decisions desegregating higher education, Sweatt v. Painter, 339 U.S. 629 (1950); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950). See Race Prejudice is Dying, LIFE, Jun 19, 1950, at 34; see also White Supremacy, LIFE, Aug. 4, 1952, at 30 (“White supremacy . . . is no longer the key to political power in the South. On the contrary, the majority of Southerners now know it to be a lost cause. . . . The majority of Southerners now think like the majority of Northerners on the race question (and know more about it . . . White supremacy has lost its political importance.”).
91 LIFE, Aug. 27, 1956, at 114.
92 Id.
95 See PELTASON, supra note ___, at 79-80.
formal legal channels. Soon after Brown II was announced, Emmett Till, a fourteen-year-old black boy from Chicago who was visiting relatives in Mississippi, was viciously beaten and murdered for supposedly whistling at a white woman. Families that pursued desegregation suits regularly faced intimidation and economic reprisals.

A key assumption, prevalent at the time of Brown, that massive resistance destroyed was that compliance to a desegregation mandate would spread from the border states to the upper South and, eventually, to the Deep South. Once this process was underway, the Deep South, often termed the “hard core” of support for segregation, would be increasingly isolated in its commitment to Jim Crow, and would eventually fall into line with the national norm, and with this segregation would end. Sociologists often emphasized that while the Deep South posed more significant obstacles to desegregation than other segregated regions, this was a matter of degree, which could be managed, not a fundamentally distinct problem.96

But this process did not play out as supporters of school desegregation had hoped. While there was substantial border state desegregation, this only seemed to make resistance in the South more intransigent.97 But, as John Bartlow Martin described in his 1957 account of the new emerging reality of massive resistance (titled The Deep South Says “Never”), the states of the upper South, rather than following the pattern of general compliance of the border states, was siding with the resistance of the Deep South. “At the outset, the Deep South resistance probably was buying time. Not today. And they believe they have desegregation stopped.”98

Thus, the critical expectation of those who advocated for Brown and who voiced such optimistic predictions in its immediate aftermath proved wrong. The Deep South states did not follow the moderation characteristic in the initial reaction of the rest of the South. The upper South and the border states did not lead the way. In fact, the exact opposite occurred: the unrepentant resistance to desegregation that was always strong in South Carolina, Mississippi, and Georgia spread to the rest of the South, to Florida, Texas, and to the states of the upper South.

Furthermore, the Court rulings seemed to do little to move national attitudes. National opinion remained relatively static in the years following Brown,99 disproving predictions in the immediate wake of the decision that the nation would rally behind the decision. The dominant

96 See, e.g., Guy B. Johnson, bk rev. of James H. Tipton, Community in Crisis: The Elimination of Segregation from a Public School System (1953), in Social Forces 98-99 (1953) (“Although the Central City [an unidentified Midwestern city] situation is unlike the South in certain ways, the basic attitudes and administrative problems are actually very much like those which will have to be faced in the South.”).
98 Id. at 169.
tone of the nation was most likely captured in Eisenhower’s skepticism toward top-down civil rights reform and his calls for more evolutionary educational reforms.  

The segregationists had won “the first round in the battle for compliance,” conceded an African American congressman the spring of 1957. As the fall approached, supporters of school desegregation were in retreat. As Anthony Lewis described the situation: “Voluntary desegregation, which had occurred in hundreds of school districts in the first three years after the decision, had some to an almost complete stop. Legally, southern devices to delay integration were proliferating. Politically, a unified southern voice was speaking out against the Court and its ruling, while President Eisenhower and his Administration said nothing in their support.” John Roche, who had such high expectations for the Court playing out its educational function, now was forced to reconsider his earlier assumptions. Writing in the early 1960s, he looked back and concluded: “By 1960 it was clear that little short of physical force or a clear willingness to employ force by the federal government would dislodge segregation in the Black Belt states of Mississippi, Alabama, and South Carolina, while most of the others had established at best token desegregation, usually in the big cities.”

The Court expected some resistance from the South,” Warren wrote in his memoirs. “But I doubt if any of us expected as much as we got.” The justices, like so many supporters of

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100 See Milton R. Konvitz & Theodore Leskes, A Century of Civil Rights 255 (1961) (“In the six years immediately following Brown v. Topeka, President Eisenhower, by his statements and by the things he left unsaid, reflected the views and sentiments of large sections of the American people who were inclined to question the efficacy of law as an instrument of social control and advancement in the field of race relations.”).

101 KLARMAN, supra note __, at 348.


104 EARL WARREN, THE MEMOIRS OF EARL WARREN 290 (1977). See also Dennis J. Hutchinson, Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958, 68 GEO. L.J. 1, 59-60 (1979) (“At the time [of Brown II] . . . the Justices had no clear vision of precisely how Brown should, and could, be implemented; nor was it apparent what action would be taken by enemies or allies of the decision.”).

Warren attributed much of the resistance to Eisenhower’s inaction. WARREN, supra, at 289-91. “[I]f Eisenhower had said that . . . it should be the duty of every good citizen to help rectify more than eighty years of wrongdoing by honoring [the Court’s] decision . . . we would have been relieved, in my opinion, of many of the racial problems which have continued to plague us.” Id. at 291. Warren also thought, following Frankfurter’s lead, that a carefully worded, non-accusatory opinion would have an effect. He soon realized this reasoned faith was overly optimistic. As his clerks would later recall him saying, in a rare display of anger: “It doesn’t matter what God damn reasons we give, they react depending on whether they like the result or not. No matter how carefully we work on it, state our most basic reasons as clearly and simply as we can, it doesn’t make any headway against the opposition we run into.” ED CRAY, CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN 291 (1997) (quoting Gerald Gunther interview with Ed Cray, Mar. 25, 1993).
school desegregation, had assumed that support (or at least reluctant compliance) would spread from the fringes of the South into the “hard core” states. The mobilization of massive resistance, which few of the justices and few racial liberals saw coming, led the Court to essentially get out of the school desegregation business for almost a decade. (This was also a period in which the Court was under congressional assault for its decisions protecting the rights of alleged subversives.) The decision in the Little Rock case, Cooper v. Aaron (1958), with its ringing assertion of judicial authority (“No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it”), had more to do with the institutional integrity of the Court than any kind of redefinition or expansion of Brown. The case did contain a plea of sorts, describing the justices hope that the decision would help turn “[o]ur constitutional ideal of equal justice under law” into “a living truth.”

Commentators recognized that the Court had made a tactical retreat in the face of overwhelming forces. The most notably signal of this was the Court’s approval of pupil placement laws. In his 1961 study of federal judges in the South on whom much of the burden of implementation was placed, J.W. Peltason found a similar pattern of initial assertiveness followed by retreat. “In the days immediately following the Supreme Court’s disposition of the original suits, judges were telling southern communities that there was no way out—each community could decide how it should be done, but it must integrate the public schools. In the face of segregationist onslaught, judges backed down. Since 1957 the judges have approved programs that will keep most Negroes in segregated institutions until long beyond the time when even those now starting first grade will have graduated.” The Supreme Court’s unwillingness to reenter the fray, and its approval of pupil placement laws in 1958, further encouraged federal judges to approve token integration plans, which were, Peltason noted, “a far cry from the ‘full compliance’ ‘at the earliest practicable date’ and complete desegregation ‘with all deliberate speed’ which was promised by the Supreme Court’s 1955 decision.”

The most accurate predictor of these developments was Justice Black—who had been predicting violence and resistance in each of the major desegregation cases since 1950. In the previous cases he had been wrong. With Brown, he appeared prescient. During deliberations, he had predicted that “some counties won’t have negroes and whites in the same school [in] this generation.” Douglas conference notes, Brown II, Apr. 16, 1955, Box 1150, Douglas Papers.

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105 CITE NEEDED
106 See Walter Murphy, Congress and the Court (1962); C. Herman Pritchett, Congress Versus the Supreme Court, 1957-1960 (1961).
107 Cooper v. Aaron, 358 U.S. 1, 18 (1958).
108 Id. at 20.
111 Id. at 245; see also Klarman, supra note ___, at 329 (“Even in the face of blatant defiance by the white South, a majority of the justices was inclined toward accommodation and gradualism.”).
pupil placement laws, Peltason argued, marked “the most important pro-segregation legal victory since Plessy v. Ferguson.”\footnote{Peltason, supra note ___, at 86.} It would not be until 1964, with the civil rights movement at the peak of its influence, that the Court reentered the fray and gave stricter guidelines to desegregation plans with its decision in Griffin v. County School Board of Prince Edward County.\footnote{377 U.S. 218 (1964). See generally Klarmann, supra note ___, at 321-43.}

The ineffectiveness of Brown in the Deep South was stunning. In the five states of the Deep South there were 1.4 million black schoolchildren. Not one attended a racially mixed school in the years between 1954 and 1960.\footnote{Klarmann, supra note ___, at 349.} In the Upper South the numbers were only marginally better, representing only token efforts at compliance.\footnote{Id.}

III. EXPLAINING AWAY MASSIVE RESISTANCE

Those who resisted the characterization of the school desegregation experiment as calling into question the capacity of law to break down Jim Crow offered many ways of explaining massive resistance. Some downplayed the seriousness of southern opposition by highlighting integration success stories outside the Deep South. Or, by the late 1950s, with the massive resistance in full effect, many school desegregation supporters sought to understand where the breakdown in the expected processes of legal reform took place. Some blamed the Supreme Court for failing to adequately explain its ruling or for being insufficiently forceful in its implementation decree. Others laid blame on the failure of leadership in the executive branch. And some focused on the political pathologies in the South, which submerged the emergence of the “lawful majority” and allowed racist demagogues to take over the region. The common theme of all these efforts to explain massive resistance was that they preserved the basic principle behind Brown, i.e., that legal reform was the necessary centerpiece of racial change. It was not necessarily the principle of the capacity of law that was at fault, but the execution of that principle.

A. Finding Success Stories

Commentators who were supportive of school desegregation filled social science journals, law reviews, popular periodicals, and newspapers with stories of the successful integration efforts, in higher education\footnote{See, e.g., Merrimon Cuninggim, Integration in Professional Education: The Story of Perkins, Southern Methodist University, 304 Annals Amer. Acad. Pol & Soc. Sci. 109 (1956).} and in public schools in the border states and in some southern cities. By continuing to publicize the places in which desegregation was taking place, with often little fanfare and no violence, advocates hoped to counter the increasingly ominous stories emerging from the South, where whites were mobilizing against federal intervention into their segregated school systems. These stories were often used to refute the belief, most prominently espoused by President Eisenhower, that Brown had set back racial progress.
Perhaps the most prominent school desegregation success story to emerge in the post-
Brown period was Washington, D.C., which desegregated its schools in the fall of 1954.\footnote{117} According to one early account, the “decisiveness and clarity” of the Supreme Court’s ruling in Brown, combined with failure of last-minute litigation efforts to block integration and a firm stance by school officials against a white student anti-integration demonstration resulted in the success in the nation’s capital.\footnote{118} The first year experience seemed to reinforce the assumption that the Court’s ruling was the critical step toward actual desegregation. “Throughout [the year], it remained clear that the Supreme Court decision was unmistakable, that Washington school problems would not wait, that the city was an interracial one, that the desegregation process once started is irreversible.”\footnote{119}

Other urban centers outside the Deep South also supplied powerful case studies for successful school integration. For example, a study of school desegregation of Kansas City, published in 1956, concluded that that city’s experience was “on the whole, a story of a job well done.”\footnote{120} The portrait of the city’s desegregation was one of a city relieved, a city that would be willingly guided by the law. “It would seem that Kansas City, like many communities, conforms almost gratefully when the law, either economic or constitutional, has been firmly laid down. It looks as if the difficulty for Kansas Citians is in taking the responsibility for decisions of this kind; they are content to go along with what they know to be right if a court or other authority so commands.”\footnote{121}

Why was desegregation generally succeeding in the Border States? According to one account, a common element among areas that complied was the leadership of officials: “Almost immediately after the decision was handed down, governors, attorneys general and state boards of education declared for prompt compliance and pledged their best efforts to accomplish it peacefully. In these days the segregationists were off balance and the integrationists had things pretty much their own way. In some cases, the official attitude softened somewhat when citizen opposition began to lift its head. But generally the border state officials from the first held the position that the law had been defined by the Court and it was up to the states to go along.”\footnote{122} Other factors that encouraged success included “[e]xtensive community preparation”\footnote{123} and

\begin{itemize}
\item [118] Osborne, supra note ___, at 86.
\item [119] Id.
\item [120] Martin Loeb, Kansas City Does Its Duty, 4 SOCIAL PROBLEMS 161, 161 (1956).
\item [121] Id. at 162; see also Study Reveals Mixing Progress, CHI. DEF., Mar. 5, 1956, at 9 (reporting study of sociologist Alfred McClung Lee that “‘peaceful’ [school] desegregation is taking place in scores of communities in Texas, West Virginia, Missouri, Oklahoma, Arkansas and Delaware”).
\item [122] Robert L. Lasch, Along the Border, in WITH ALL DELIBERATE SPEED: SEGREGATION-DESEGREGATION IN SOUTHERN SCHOOLS 61 (Don Shoemaker ed., 1957).
\item [123] Id. at 62.
\end{itemize}
“difference in general community attitudes” toward law and order. Whether there was an explicit court order or not seemed to have little predictive effect on resistance.

NAACP lawyers continued pressed litigation, even as, by the late 1950s, this path was drying up as a productive route to desegregation. In a study of civil rights reform published in 1959, Jack Greenberg, an attorney with the NAACP’s Legal Defense and Educational Fund who would succeed Thurgood Marshall as the organization’s head, began his comprehensive survey of the civil rights landscape with a chapter titled “The Capacity of Law to Affect Race Relations.” This chapter’s thesis—really, the thesis of the entire book—was “that law often can change race relations, that sometimes it has been indispensable to changing them, and that it has in fact changed them, even spectacularly. Indeed, it might be said that in many places law has been the greatest single factor inducing racial change.” By the late 1950s, with the South in open revolt against Brown, this kind of willful rejection of the reality of massive resistance was becoming more and more difficult to maintain.

B. The Legitimacy Debate

Among legal scholars, much attention following the Court’s ruling was dedicated to a debate over the legitimacy of the decision. Warren’s decision immediately faced criticism not only by those who disagreed with the desegregationist conclusion, but also by some supporters of school desegregation who felt that the rationale behind the ruling was insufficiently expressed. Opponents often focused on the social science in the Brown opinion as evident that the Court was “making” law, so defenders sought to demonstrate that the social science was not necessary to the ruling, that more traditional techniques of constitutional interpretation supplied sufficient grounds for the decision. Some even suggested that a more strongly reasoned opinion might have been more effective in swaying the South. “The decisions call for mighty diastrophic change,” wrote Yale Law Professor Charles L. Black in 1960. “We ought to call for such change only in the name of a solid reasoned simplicity that takes law out of artfulness into art. Only such grounds can support the nation in its resolve to uphold the law declared by its Court; only such grounds can reconcile the white South to what must be.”

C. The Attack on Gradualism

Perhaps the most common explanation for the failures of Brown was that the fault lay with the Court’s implementation decree. Some suggested that the Court waited too long to issue its implementation ruling, that it should have taken advantage of the relative lull following the first Brown decision; or perhaps the Court should never have detached the remedy from the right,
that it should have included a remedial scheme in *Brown I*. But by the late 1950s the most common attack on the judicial tactics in school desegregation was that the justices badly erred in refusing to define clear deadlines for desegregation and for apparently accepting gradualist implementation plans with its “all deliberate speed” formulation in *Brown II*. In its effort to appease the South, to be as conciliatory as possible and to reach out to southern moderates, the Court’s gradualism allowed, even encouraged, the development of organized white southern resistance.¹³⁰ In other words, the flaw was not with the legalist principle behind *Brown*, that judicial leadership in this fraught area could be effective, but with the execution of that judicial leadership.

**D. Failure of Leadership**

A prominent target for frustration among school desegregation supporters was the President. Some emphasized that stronger executive leadership would have cut off incipient southern opposition before it could gain strength. Eisenhower was personally opposed to *Brown*. He said privately that he believed it had set back racial progress by decades, and in public he conspicuously refused to say that the decision was right, limiting himself to bland statements about respecting the Court and carrying out his duty to enforce the law. With southern defiance ascendant, many targeted Eisenhower’s failure of leadership as a critical factor in the floundering desegregationist project. The failure of presidential leadership, Alexander Bickel lamented, meant that “the Court’s normal capacity for bringing out a latent consensus [in support of desegregation] was crippled.”¹³¹ The combination of judicial allowance of gradualism and lack of executive branch support was fatal, Charles Black argued. “When the court will not insist that legal rights be implemented by normal legal remedies, or when the executive will not back up the courts in the normal way, I think the typical citizen hardly feels he is dealing with ‘law’ at all. He cannot show respect for a law that does not respect itself; his respect for law is given no outlet.”¹³²

**E. The Undemocratic South**

The other standard explanation for the ineffectiveness of *Brown* was to emphasize the breakdown of democratic politics in the South. In a region overtaken by segregationist demagogues, the normal workings of legal reform had fallen apart. Civil rights advocates had assumed that the success of the Court’s decision would be based in the strengthened position it would give moderates and liberals in the South, who would now, with the backing of federal law, be able to assume a more influential position in southern society. That this did not happen was not necessarily because of limitations on the efficacy of the law or the Supreme Court as an educational institution, but because the normal pathways of influence for the law and the Court had been interrupted.¹³³

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¹³⁰ See, e.g., Oscar Handlin, *Civil Rights After Little Rock*, 24 COMMENTARY 392, 396 (1957) (“[M]oderation works only with moderates. . . . The time for moderation has passed.”).

¹³¹ *The Proper Role of the United States Supreme Court in Civil Liberties Cases*, 10 WAYNE L. REV. 457, 488 (1964).


¹³³ The breakdown of the democratic process in the South also contributed to increased interest in malapportionment in southern legislatures.
The decisions in the public school cases have provoked more threats of evasion and defiance than any in recent years. William Graham Sumner’s dictum that “stateways cannot change folkways” is gaining new popularity. Any prediction about the extent to which these threats will be successful would be almost worthless.

— Rayford W. Logan (1956)

The triumph of Brown was, ironically, also a new challenge to the premise that the law could lead the battle against racial prejudice. Court-mandated school desegregation soon inspired organized resistance—including widespread rejection of federal law—that refuted the ideological heart of racial legalism. Those who had been arguing for the past decade that the nation was ready for change and that the strength of the law would effectively bring outliers in line with national opinion were not prepared for massive resistance. Thus Brown was at once a triumphant achievement of the campaign to re-envision the capacity of the law, even as it became a new point of departure for a powerful reconsideration on the legalist position.

For some supporters of the civil rights project of the 1950s and 1960s, the experience of implementing school desegregation, with dramatic victories, frequent disappointments, and practically no integration in the Deep South for at least a decade following Brown, led to a more chastened vision of the capacity of the law. They began to wonder whether laws, particularly court decisions, were, in fact, as effective at moving society as had been assumed before Brown. Perhaps race relations had not developed as far as many had been hoped. Where was the underlying commitment to fairness and equality, the “American Creed,” that Gunnar Myrdal had assured the nation was present? Compared to the decade following World War II, the picture of the nation that emerged in the late 1950s was less idealistic about the capacity of the law, about the possibility of interracial cooperation, and about the ideological homogeneity of the American people.

After Brown, some commentators began to move away from the characterization of the decision as reflecting a clear trend in American society toward an increased recognition of racial equality and toward integration. The school desegregation decisions “have caused a deeper schism between North and South than any since Reconstruction days,” explained the authors of a 1957 study of desegregation. “Brown v. Board of Education was admittedly a radical decision.” In contrast to the immediate reception of the decision, when the Court’s action was widely described as “inevitable,” now it was the segregationist backlash was the inevitability. “[I]n spite of the gradualism authorized by the Court in moving toward the goal of racial

134 Rayford W. Logan, The United States Supreme Court and the Segregation Issue, 304 ANNALS AMER. ACAD. POL & SOC. SCI. 10, 16 (1956).
136 Id. at xi.
integration in the schools,” C. Herman Pritchett wrote in 1961, “it was inevitable that resistance to compliance with the decision would be bitter, violent, and fed by the deepest well-springs of passion and emotion.”137 The “difficulties of adjustment” to Brown were “many, serious and even explosive.”138

In response to the overwhelming support among southerners in Congress for the “Southern Manifesto” in March 1956, the New York Times correspondent in the South, John Popham, who in preceding years had been emphasizing the progress of racial moderation in the South, now sounded a note of measured skepticism, emphasizing the gradual working out of social processes more than legal reform as the key to the demise of Jim Crow: “Educational advances and other factors will promote regard for the Negro as a member of the community with basic civil rights. . . . Such psychological factors cannot be dealt with by court decrees alone. . . . [I]t would appear that the desegregation issue will not be decided simply on the basis of the Supreme Court’s order. . . . [M]uch of the South is not prepared at this time to accept integrated schools. A slow, evolutionary program with wise social engineering adjusted to local conditions is likely to be the answer.”140

This kind of call for education and gradualism was the centerpiece of Eisenhower’s civil rights position. And, for many frustrated civil rights advocates, Eisenhower’s skepticism toward the law seemed to be a common assumption of the day. “In the six years immediately following Brown v. Topeka, President Eisenhower, by his statements and by the things he left unsaid, reflected the views and sentiments of large sections of the American people who were inclined to question the efficacy of law as an instrument of social control and advancement in the field of race relations.”141

Arthur Schlesinger wrote a foreword to John Bartlow Martin’s 1957 book The Deep South Says “Never”142 in which he expressed considerable skepticism toward the efficacy of federal law to uproot southern racial mores. “In retrospect, one is now compelled to wonder whether the Fabian approach of the Vinson Court—which sought to secure the result by construing the doctrine of ‘separate but equal’ literally instead of reversing it—might not have been wiser than the strategy of the Warren Court of meeting the issue head-on.”143 The problem with Brown was that it “sounded the signal for united resistance; and it converted a complex and

139 “John Popham brought to the project a belief that his native land was educable and filled with progressive, creative people who were open to new ideas.” GENE ROBERTS & HANK KLIBANOFF, THE RACE BEAT: THE PRESS, THE CIVIL RIGHTS STRUGGLE, AND THE AWAKENING OF A NATION 110 (2006). See generally id. at 91-92, 106-08, 110-11, 154, 184-85 (describing Popham’s sanguine appraisal of southern potential to end Jim Crow).
143 Id. at v-vi.
multi-faceted question into what too many Southerners apparently regard as a life-or-death issue of Southern patriotism.”

Schlesinger considers that perhaps the exact opposite approach—to “carry the decision through at once, before resistance was given the chance to organize and solidify”—would have been more efficacious, although he quickly returns to his cautions toward uprooting southern mores. He suggests that tackling voting rights rather than school desegregation would have been advised (it “would not have detonated social and sexual anxieties in nearly so violent a form”). And he warned that for “humility” in approaching the problem. “Northerners should not rush to self-righteous judgment on the South. . . Nothing will contribute less to a resolution of this infinitely difficult question than self-righteousness, whether Northern or Southern, whether white or Negro—self righteousness and its bitter offspring, hatred.”

After the Brown decisions failed to break the southern commitment to Jim Crow (perversely, it appeared to do the exact opposite), some integrationists reassessed their tactics. But the lessons of Brown did not just point in the direction of gradualism emphasized in Popham’s and Schlesinger’s account. Obviously, law was limited in moving public opinion. What was needed, some concluded, was popular mobilization behind the opinion. “[T]he basic support of the American people . . . [the Court] must have in full measure if the promise of the School Segregation Cases is to be fulfilled,” wrote Yale Law Professor and NAACP consultant Louis Pollak in a 1957 article titled “Supreme Court Under Fire.” The task of implementation was far more daunting than it had appeared before Brown. It would require “years of affirmative co-ordinated action by judges, lawyers, administrators, legislators, teachers, parents, and children.” The Supreme Court alone—deference to the rule of law alone—would not be nearly enough. The process would require, according to another law professor, “harsh shocks of adjustment.” The first two years after Brown “may now be regarded in retrospect as the preliminary skirmishes for what promises to be a long and bitter war of horatory declamation, legal maneuver, even physical violence. It now seems likely that the earlier prediction of ‘a generation of litigation’ may prove to have been a realistic appraisal of a difficult situation.”

A. Scholarship

Finally, when the 1950’s were nearly over, the cries of the anguished South and its allies helped inaugurate a current of sober and scholarly discussion. . . . This development is healthy and hopeful.

— Robert G. McCloskey (1960)

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144 Id. at vi.
145 Id.
146 Id. at vii.
148 Id. at 434.
In the aftermath of Brown, more measured assumptions about the role of law in shaping social behavior gained prominence among legal scholars, historians, and social scientists. A new tone appeared in the work of scholars writing in the midst of massive resistance, reflecting a reconsideration of the high optimism that characterized racial legalism in the decade after WWII. For instance, the post-Brown period saw social psychologists questioning the overly optimistic conclusions toward the possibility of inter-group contact that had been promoted following WWII. A new emphasis was placed on the necessary preconditions for the effective functioning of the contact theory. The contact hypothesis only worked, social psychologists emphasized, when the contact took place under the right circumstances. Other studies suggested that compulsory integration was less effective than had been assumed at breaking down prejudicial attitudes, and that the key achieving the tolerance benefits of inter-group contact was to maximize opportunities for “voluntary entry into a self-structured equality situation.”

Kenneth Clark emphasized the difference between “desegregation” (“a social process that involves the removal of racial barriers and restrictions in the enjoyment of any public or private accommodation or service”), which could be accomplished by law, and “integration (“an individual process [that] involves changes in attitudes and feelings and the removal of fears, hatreds, and suspicions”), which requires more evolutionary educational changes.

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153 The starting point for theoretical inquiry into the conditions necessary for successful contact is GORDON W. ALLPORT, THE NATURE OF PREJUDICE (1954). See, esp., id. at 261-82 (listing four necessary conditions: common goals, inter-group cooperation, equal status, and authority sanction or support). For recent support of Allport’s basic framework, see the work of Thomas Pettigrew.

Contact theory has been attacked and defended ever since its genesis in the early postwar period. In a recent controversial article, political scientist Robert Putnam declared it largely moribund. Robert D. Putnam, E Pluribus Unum: Diversity and Community in the Twenty-first Century, 30 Scandinavian Pol. Stud. 137, 142 (2007) (“For progressives, the contact theory is alluring, but I think it is fair to say that most (though not all) empirical studies have tended instead to support the so-called ‘conflict theory’, which suggests that, for various reasons—but above all, contention over limited resources—diversity fosters out-group distrust and in-group solidarity.”). For contrasting assessments of contact theory, see Thomas F. Pettigrew, The Intergroup Contact Hypothesis Reconsidered, in CONTACT AND CONFLICT IN INTERGROUP ENCOUNTERS 169-95 (Miles Hewstone & Rupert Brown eds., 1986); Thomas F. Pettigrew & Linda R. Tropp, A Meta-Analytic Test of Intergroup Contract Theory, 90 J. Personality & Soc. Psych. 751 (2006).

154 Ernest Q. Campbell, Some Social Psychological Correlates of Direction in Attitude Change, 35 Social Forces 335, 339 (1958); see also CHARLES H. STEMBER, EDUCATION AND ATTITUDE CHANCE: THE EFFECT OF SCHOOLING ON PREJUDICE AGAINST MINORITY GROUPS (1961) (suggesting latent intolerance is greater than opinion polls reveal).

“Integration it appears, takes time—must be gradual. Desegregation, however, is a necessary antecedent to integration and can be and probably must be brought about in a relatively short period of time.”

Historian C. Vann Woodward’s thesis from The Strange Career of Jim Crow—that race relations derived more from institutional practices than cultural norms, and that the appearance of Jim Crow laws marked a fundamentally new and more repressive stage in southern race relations—came under fire as scholars unearthed prejudicial attitudes and discriminatory practices that thrived without the imprimatur of Jim Crow laws. Woodward would spend much of his career qualifying some of the more sweeping statements about the role of the law in Strange Career and refuting its simplistic cooptation. As massive resistance took form, he would reconsider his assertion that the South follow the Court’s lead.

As he had done with his emphasis on the role of law in constructing the foundations of Jim Crow in the 1890s, in the era of massive resistance Woodward sought to locate historical precedents to help guide the nation through this difficulty. The present struggle, he suggested,

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156 Id. at 198.
158 See, e.g., Woodward, supra note ___, at 237-38. Strange Career contains more nuanced assessments of the capacity of the law, see, e.g., Woodward, supra note ___, at 150 (“Let us belatedly give William Graham Sumner his due. Even if he were in error about his inscrutable ‘folkways’ and their imperviousness to legislation, he was surely right that law is not the whole story.”), although these were often pushed aside in the rush to use his work as a platform to civil rights reform. In subsequent editions of his book, Woodward would try to further emphasize these more qualified assessments. In his preface to the 1966 edition, Woodward wrote, “I want to stress that law is not the whole story,” C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW xiii (3d ed. 1974) (quoting from Preface to the Second Revised Edition); and in, beginning with the 1966 edition, he italicized his concession that “laws are not an adequate index of the extent and prevalence of segregation and discriminatory practices in the South,” id. at 102. See also Howard N. Rabinowitz, More Than the Woodward Thesis: Assessing the Strange Career of Jim Crow, 75 J. Am. Hist. 842, 846-47 (1988) (describing qualification of Woodward’s argument through subsequent editions).

159 Compare Woodward, supra note ___, at 149 (“A unanimous decision, [Brown] has all the moral and legal authority of the Supreme Court behind it, and it is unthinkable that it can be indefinitely evaded.”), with C. Vann Woodward, The Great Civil Rights Debate, 24 COMMENTARY 283, 284 (1957) (“Not until Congress reaches a major decision would popular opinion be fully aroused and expressed.”); C. Vann Woodward, The South and the Law of the Land, 26 COMMENTARY 369, 371 (1958) (“Comfortable assurances about respect for the law being ingrained in the character of the South are misleading in this instance and lend a false color of optimism to the outlook.”).
“might even be called the Second Reconstruction—though one of quite a different sort.”

He was critical of “Negro intellectuals” who looked back on Reconstruction “as if it were in some ways a sort of Golden Age.”

But Reconstruction, be countered, was hardly the period of “heroic leaders and deeds, of high faith and firm resolution, a time of forthright and passionate action, with no bowing to compromises of ‘deliberate speed’ that proponents of this “nostalgic view” presented. While this era “will always have a special and powerful meaning for the Negro,” Woodward “seriously doub[ed] that it will ever serve satisfactorily as a Golden Age—for anybody. There is too much irony mixed with the tragedy for that.”

Yet in this period of irony and tragedy, he clearly saw some guidance for the present confrontation with massive resistance, for the newly empowered freedmen were “remarkably modest in their demands, unaggressive in their conduct, and deferential in their attitude.”

In the wake of massive resistance, Woodward’s interpretation of American history took on a more tragic tone, with the ironic risks of reform assuming center stage. In a 1957 article he criticized those who would look back on Reconstruction “as if it were in some ways a sort of Golden Age” for African American progress.

His 1960 collection of essays, The Burden of Southern History, contained an at times almost sorrowful lament for the failure of American idealism. The “tacit conviction that American ideals, values, and principles inevitably prevail in the end”—the premise of Myrdal’s An American Dilemma (1944), and a motivating sentiment behind the Brown litigation—failed to explain the experience of the South. The southern experience was one of “defeat and discontinuity.” And in the southern experience, Woodward suggested, there were lessons for better understanding our national experience, for the South supplied “a warning that an overwhelming conviction in the righteousness of a cause is no guarantee of its ultimate triumph, and that the policy which takes into account the possibility of defeat is more realistic than one that assumes the inevitability of victory.”

Woodward, like his fellow historian Arthur Schlesinger

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161 Id. at 240.
162 Id.
163 Id. at 237.
166 Id.
167 Woodward, supra note __, at 168.
(and like Martin Luther King), looked to the work of theologian Reinhold Neibuhr to help explain the uneven, tragic, ironic road to social progress.\footnote{See also Black, Paths to Desegregation, supra note ___, at 159 ("Let us give up one great illusion that often hovers over discussions of this subject: the vain imagining of an easy way. No social evil of this hugeness and long-rootedness can be plucked out without pain. . . . There will be some violence, some suffering, whatever is done.").} 

By the early 1960s, John Roche had toned down his enthusiasm for the Court’s leadership role. “I do not see judicial decisions as the key to social change,” he wrote in the introduction to The Quest for the Dream, his 1963 study of American race relations.\footnote{JOHN P. ROCHE, THE QUEST FOR THE DREAM: THE DEVELOPMENT OF CIVIL RIGHTS AND HUMAN RELATIONS IN MODERN AMERICA vii (1963).} Having studied the implementation ordeal, Robert J. Steamer, writing in 1960, came to much the same conclusion. “Basically what the statistical record to date shows is that appreciable changes from segregation to desegregation have been made only in those areas where the change probably would have been made without the Brown decision. The Supreme Court merely served as a catalyst. What the Court precipitated in all but six of the seventeen segregated states was a general bitterness, some violence, but virtually no desegregation . . . The conclusion seems inescapable that if, as a matter of national policy, the United States wishes to terminate racial segregation in the public schools, a new approach to the problem is now in order.”\footnote{Robert J. Steamer, The Role of the Federal District Courts in the and Segregation Controversy, 22 J. Pol. 417 (1960).} He, like Woodward, described the post-Brown years as a “tragic era.”\footnote{Id. at 250.}

A prominent scholarly product of this period was political scientist Robert McCloskey’s classic study of the Supreme Court,\footnote{ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT (1960).} which portrayed the Court as a deeply political institution, and therefore a deeply fragile institution, whose legitimacy must be carefully guarded if it were to remain “a vital factor in the American political system.”\footnote{Id. at 421.} The lessons of history counseled caution for the Court, for “no useful purpose is served when judges seek all the hottest political cauldrons of the moment and dive into the middle of them. Nor is there much to be said for the idea that a judicial policy of flat and uncompromising negation will halt a truly dominant political impulse.”\footnote{R. McCloskey, The American Supreme Court 147 (4th ed. 2005).} Writing in 1958, McCloskey was strikingly tentative, almost fatalistic, in assessing Brown. “The decision had done much good and no doubt some harm,” he wrote. “Whether it would ultimately achieve the moral end it contemplated was a question locked, in Justice Story’s words, ‘in the inscrutable purposes of Providence.’”\footnote{Id. at 146.} At another point, he described the Court in the segregation cases as “press[ing] forward at a rate that seems perilous and perhaps self-defeating,”\footnote{Id. at 251.} and he concluded his book with a warning: “It would be a pity if
the judges, having done so much, should now once more forget the limits that their own history so compellingly prescribes.”

In the face of massive resistance, “the judicial process had reached the limit of its capacity,” Yale Law Professor Alexander Bickel conceded in his 1962 classic The Least Dangerous Branch. Perhaps no legal scholar in the decades following Brown more thoroughly and thoughtfully probed the limitations of Supreme Court-defined law than Bickel. His central contribution was to identify and defend the need to recognize expediency in the judicial formulation of legal principles. In the years following Brown, he articulated a theory of the role of the Court in American society that explicitly balanced principle and pragmatism. He argued for the Court to practice its “passive virtues” of avoiding particularly contentious issues, so as to avoid getting entangled with volatile policy disputes and thus weakening its institutional status. While his central frame for his theory of judicial review was what he famously labeled the “counter-majoritarian difficulty,” i.e., the tension between judicial activism and democratic values, he was also particularly sensitive to the limitations of judicial declarations in society. The Court must do more than simply reflect “the most widely shared values” of a society, for to do so would abandon the Court’s necessary leadership role; it would reduce the Court to a Sumnerian institution that had to wait for folkways to adjust before declaring a new rule of law. Rather, “the Court should declare as law only such principles as will—in time, but in a rather immediate foreseeable future—gain general assent. . . . The Court is a leader of opinion, not a mere register of it.”

Bickel envisioned a dialogic relationship—“a continuing colloquy”—between a Court, translating fundamental principles into legal commands, and society (including the elected branches). This sensitivity to the need for principled pragmatism in the use of the law only increased over the coming years, as Bickel emphasized ideas of tradition and custom as the basis for legal development. “Law is the principle institution through which a society can assert its values.” In contrast, the Warren Court was dominated by an approach that was “moral, principled, legalistic, ultimately authoritarian.” Its leading figure was Justice Black, who Bickel described as “an imperialist of law.” Bickel turned to Edmund Burke as a guide for an alternative conception of the role of the courts, a more chastened understanding of the relationship between legal principle and custom. “The foundation of government is . . . not in imaginary rights of men,’ Burke argued, ‘but in political convenience, and in human nature. . . .’ Government thus stops short ‘of some hazardous or ambiguous excellence,’ but is the better for

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178 Id.
181 Id. at 239.
182 “[T]he rule of principle in our society is neither precipitate nor uncompromising . . . leeway is provided to expediency along the path to, and alongside the path of, principle . . .” Id. at 244.
184 Id.
185 Id. at 10-11.
it.” 186 From this, Bickel identified the circumscribed role of the judiciary: “The Court’s first obligation is to move cautiously, straining for decisions in small compass, more hesitant to deny principles held by some segments of society than ready to affirm comprehensive ones for all, mindful of the dominant role the political institutions are allowed, and always anxious first to invent compromises and accommodations before declaring firm and unambiguous principles.” 187

Another outgrowth of this era was that scholars from a variety of fields challenged the previous generations emphasis on consensus as the defining characteristic of American society. Roche derided consensus-based scholarship as having converted “a vibrant, dynamic, and violent society, in which men have fought out with all available weapons the crucial issues of their time, into a peaceful, even somnolent, process of brotherhood and compromise, an extended Quaker meeting.” 188 John Higham wrote his critical analyses of “consensus history” during the massive resistance era. 189 Political scientists reconsidered the principles of pluralist theory, based on the idea that minority constituencies could create coalitions that could pressure political change. 190 A basically stable system evolved from this dynamic of varying, competing interest groups, creating, in the words of Robert Dahl, one of the most notable proponents of this theory, a system of “minorities rule.” These theories fit well within the racial liberal worldview since they provided a mechanism in which previously oppressed minorities could exert the political influence necessary to advance their position in American society, and they seemed to explain the NAACP’s triumph in Brown, but their assumption of a functioning system of reform seemed incapable of explaining the rise of massive resistance; it seemed ever more incapable of explaining the frustration with the political system that drove the extra-institutional protests of the civil rights movement.

Beginning in the late 1950s, James W. Vander Zanden published a series of studies of the leading elements of massive resistance that emphasized the need to take this movement seriously, and not dismiss it as an aberrational reaction to social change, as an atavistic remnant of a dying society. “Resistance is not simply a function of cultural persistence,” he argued in a 1959 article; rather, it should be understood as a social movement. 191 As to massive resistance, “the movement is already four-and-a-half-years old and gives every promise of continuing vitality in the years ahead.” 192 In contrast to the work of the previous generation of consensus scholarship, scholars in the 1960s tried to incorporate fundamental ideological divisions as a part of American life. “[W]e cannot say without qualification that consensus on fundamental

186 Id. at 19.
187 Id. at 26.
188 Id. at 15; see also id. at 106-07.
192 Id. at 315; see also James W. Vander Zanden, The Klan Revival, 65 J. AM. SOC. 456 (1960).
principles is a necessary condition for the existence of democracy,” concluded James W. Prothro and Charles M. Grigg.  

Some social scientists suggested the need to return to an analysis of social divisions that returned to the materialist approach that had been common a generation before but had been largely marginalized in the postwar period. The real difference between the “hard core” white resisters to desegregation and more moderate elements that would fall in line with legally mandated change, argued Melvin Tumin in 1958, were material circumstances—education, occupation, income—not self-perception and self-image. So to address the concerns of the hard core, it would be better to offer reforms that address material inequalities rather than to push for gradualist remedies designed to assuage white segregationist psyches.

B. Activism

The enforcement of the law is itself a form of peaceful persuasion. But the law needs help.

— Martin Luther King, Jr. (1958)

One group who were particularly shaped by the failed promises of Brown were young African American in the South. They had been told that the Supreme Court had ended segregation in schools, yet most continued to attend, year after year, the same separate schools. When they saw the drama of the Little Rock “nine,” the black students who integrated Central High School under the protection of federal troops, they saw not the power of the law so much as heroic public defiance in the face of injustice. Then, in 1960, this generation of African American students decided to pursue a new approach to achieving racial change, an approach that would not rely on laws and legal institutions. The student sit-in movement of 1960 was in large part a reaction to the failures of school desegregation and the limited achievements of civil rights reform. As much as possible, student demonstrators pushed the law to the side, recognized (without necessarily accepting) the disjuncture between morality and legality, and worked to change minds more than laws. Rather than focusing on legal reform, they spoke more of ridding society of offensive practices that were designed to subjugate and humiliate African Americans. And the best way to attack these practices was to appeal to the conscience of whites—not to “force” them to change through legal compulsion, but to convince them to see the injustice of their way of life.

Martin Luther King, Jr., immediately grasped the significance of the massive resistance as an assault upon legal liberalism. He envisioned his developing theory of the need for direct action protest as a much needed alternative to the NAACP’s project of school desegregation.

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195 Id.  
197 See Christopher W. Schmidt, Divided By Law: The Sit-ins, the NAACP, and the Role of the Courts in the Civil Rights Movement (unpublished paper, on file with author).

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litigation, which by the late 1950s had stalled in the face of legal delays interspersed with occasional token efforts at integration. To King, the students sitting at lunch counters, like the participants in the bus boycotts he led in Montgomery, were “seeking to dignify the law and to affirm the real and positive meaning of the law of the land.”\textsuperscript{198} In rejecting the idealistic vision of the law that pervaded the NAACP’s work leading up to \textit{Brown},\textsuperscript{199} he adopted instead an explanation for the relationship between law and prejudicial attitudes that balanced an appreciation of the value of legal change with a call to go beyond just changing laws. “The law tends to declare rights—it does not deliver them. A catalyst is needed to breath life experience into a judicial decision by the persistent exercise of the rights until they become usual and ordinary in human conduct.”\textsuperscript{200} In his commencement address at Lincoln University in June 1961, King, in describing the value of nonviolent protest, posed the rhetorical question, “Does this bring results?” His first piece of evidence to demonstrate the efficacy of “creative protest” was the sit-ins: “In less than a year, lunch counters have been integrated in more than 142 cities of the Deep South, and this was done without a single court suit”—an observation perhaps intended to counter skeptics like Marshall. And the sit-ins accomplished this “without spending millions and millions of dollars.”\textsuperscript{201}

King’s vision of social justice demanded not only legal reform, through recognized institutional channels such as litigation and lobbying, but also social protest, through non-violent protest. The invaluable contribution of King to the struggle for racial equality stemmed from his skepticism toward the efficacy of legal change when it was unaccompanied by organized social action. “On the subject of human nature,” King was, in the perceptive assessment of historian David L. Chappell, “close to the modern conservatism of Edmund Burke . . . [He] leaned toward a prophetic pessimism about man.”\textsuperscript{202} His vision, a potent mixture of prophetic radicalism and philosophical realism, resonated in the post-\textit{Brown} years, when the limited accomplishments of school desegregation litigation undermined the central claim of those most committed to more formal, legal-centric approaches to social reform.

\textsuperscript{198} \textit{Interview on “Meet the Press”} (April 17, 1960) in \textit{5 The Papers of Martin Luther King, Jr.}, 428, 430 (1992).

\textsuperscript{199} Although King suggested that he too had bought into the hopeful lure of racial liberalism when the decision first was announced. Martin Luther King, Jr., \textit{The Time for Freedom Has Come}, N.Y. TIMES. MAG., Sept. 10, 1961, at 118 (“When the United States Supreme Court handed down its historic desegregation decision in 1954, many of us, perhaps naively, though that great and sweeping school integration would ensue.”).

\textsuperscript{200} \textit{Id.} at 119. \textit{See also} Martin Luther King, Jr., \textit{The Ethical Demands for Integration} (Dec. 27, 1962), in \textit{A Testament of Hope: The Essential Writings and Speeches of Martin Luther King, Jr.}, 117, 124 (James M. Washington ed. 1986) (“A vigorous enforcement of civil rights laws will bring an end to segregated public facilities which are barriers to a truly desegregated society, but it cannot bring an end to fears, prejudice, pride, and irrationality, which was the barriers to a truly integrated society.”).

\textsuperscript{201} Martin Luther King, Jr., \textit{The American Dream} in \textit{A Testament of Hope: The Essential Writings and Speeches of Martin Luther King, Jr.}, 214 (James M. Washington ed. 1986).

CONCLUSION

*Brown* has become a symbol with strikingly paradoxical implications, representing at once a faith that the majesty of the law can lead the nation in a new direction and a recognition that legal proclamations rarely change society. In the traditional account, the decision represents the vision of the law and the courts as the leading forces of progressive legal reform: *Brown* has become the centerpiece of the idea that legal norms can change social norms and that the Supreme Court’s unique ability to redefine the law in the face of public resistance is one of the greatest weapons of progressive social development. Laura Kalman has labeled this belief, which dominated legal academia for several generations following *Brown*, “legal liberalism.”203 To a generation of lawyers,” Kalman writes, “*Brown* served as a ‘sign that law (and therefore we) could play a part in building a better society.’”204 And a faith in the power of the law remains powerful today. “Laws often alter attitudes,” columnist Steve Chapman recently wrote, “inducing people to accept things—such as racial integration—they once rejected.”205 Yet *Brown* has come to symbolize not only the capacity of the law, but its polar opposite—that legal reform can often have a minimal (and perhaps counterproductive) role in moving social attitudes and customs. Advocates of this conclusion have drawn on the work of revisionist scholars who have argued that *Brown*, this supposed icon of effective, socially transformative judicial leadership, is in fact more illustrative of the opposite conclusion, that the courts are often particularly ineffective at shifting social behavior. As this article has sought to demonstrate, *Brown*’s dichotomous symbolic life first took shape in the era of massive resistance.

The skepticism toward the capacity of the law to uproot white supremacy that racial liberals had fought against in the years leading up to *Brown* and that received a partial revival in the massive resistance years would explode in the disillusionment of late 1960s, dominating much of the debate over litigation and the courts on both the left and the right. A new appreciation for the deeply entrenched nature of racial inequality came to the foreground. By the late 1960s, the reaction against the idealistic vision of the law as leading the nation toward a new era of racial egalitarianism was in full effect. “It will not be enough to get more court orders,” federal Judge Frank M. Johnson wrote in 1968, after over a decade of efforts at school desegregation with relatively little results. “The courts and the police power of all the states, cities, and federal government cannot by themselves overcome emotional and psychological obstacles to school and faculty desegregation, nondiscriminatory housing, equal job opportunities, and other governmental action or policy . . .”206 In the same year, NAACP lawyer Robert Carter reassessed the school segregation battle. “Few in the country, black or white, understood in 1954 that racial segregation was merely a symptom, not the disease; that the real sickness is that our society in all of its manifestations is geared to the maintenance of white

204 Id. at 2 (quoting Mary Ann Glendon, *A Nation of Lawyers* 155 (1994)).
superiority.” In the face of entrenched white supremacy, the Supreme Court was severely limited, “[f]or whatever the Court does, our society is composed of a series of insulated institutions and interests antithetical to the Negro’s best interest. Effective regulations and control of these institutions and interests must come not from the Supreme Court but from the bodies politic.” Conservative voices too echoed this renewed appreciation for the limits of legal reform. “For the essence of racial discrimination was social not political,” wrote Philip B. Kurland, a law professor who was a regular critic of the Warren Court’s aggressive role in social policymaking. “No laws were required to effectuate segregation; it would exist without them. Jim Crow was not the creature of state governments; state governments were the creatures of Jim Crow.”

By the 1970s, the debate seemed to have come full circle. “In school integration,” wrote James W. Prothro, “folkways dominate stateways.” Stuart Scheingold’s classic 1974 critique of the “myth of rights” was in large part an effort to make sense of the limits of law in leading social change. His was not an argument for the incapacity of law, for the law “casts a shadow of popular belief that may ultimately be more significant, albeit more difficult to comprehend, than the authorities, rules, and penalties that we ordinarily associate with the law.” Yet, contrary to the claims of racial liberals at the time of Brown, law and legal rights were tools for the exercise of pressure and power, not “accomplished social facts or . . . moral imperatives.” “Legal norms may not induce acquiescence; they may not be self-authenticating but they do seem capable of exercising an independent influence on political attitudes. A legal strategy may therefore contribute to the process of political realignment but in a more unpredictable and inconclusive way than is implied by the myth of rights.” Again, echoes of William Graham Sumner’s folkways were sounded, as Scheingold offered his conclusion that “[f]undamental change in its most profound form has to do with a transformation of culture.”

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208 *Id.* at 248.
212 *Id.* at 3.
213 *Id.* at 6.
214 *Id.* at 147.
215 *Id.* at 218; see also Paul Gewirtz, *Remedies and Resistance*, 92 Yale L.J. 585, 587 (1983) (“[R]esistance cannot be ignored. Among the difficulties—indeed, the anguish—necessarily endured by those seeking to produce change in the world is that at times they must cede ground because of opposition. Remedies for violations of constitutional rights are not immune from that reality.”).
This chastened vision continues today. Legal scholars have recently offered a sustained reevaluation of the ability of the courts, particularly the Supreme Court, to change society. In its starkest form, revisionists have questioned whether the courts have any significant independent role in moving social behavior. This position has been articulated most starkly in the work of Gerald Rosenberg, whose 1991 book *The Hollow Hope* directly attacked conventional wisdom on *Brown*. Rosenberg argued that *Brown* did little to contribute to the cause of civil rights, that it was not until Congress committed itself to the issue that the tangible change occurred. “In terms of judicial effects,” he concludes, “*Brown* and its progeny stand for the proposition that courts are impotent to produce significant social reform.” More recently, Rosenberg has criticized the “hopeless quest to resolve deep-seated social conflict through litigation.” This argument was picked up in more nuanced form by Michael Klarman, whose “backlash” thesis posited that while *Brown* had minimal impact in those areas it has generally been associated with influencing—desegregating schools, shaping public opinion, inspiring civil rights activism—it did have another, powerful (if somewhat perverse) effect: it moved southern politics in a more reactionary direction. This led to the public, violent confrontations in Birmingham, Selma, and countless other battlegrounds of the civil rights movement, and this, in turn, mobilized national opinion behind the cause of civil rights.

It is a sad fact that, as Lani Guinier has pointed out, in many ways it was the defenders of segregation in *Brown* “whose prognostications came closest to describing current realities.” For this reason that the more pessimistic assessments of the capacity of the law to improve race relations that have arisen from the left in the post-civil rights movement era have mirrored in many ways the language of the segregationists attacking *Brown* in an earlier era. Today, according to Orly Lobel, “contemporary critical legal consciousness” is based on “a now-axiomatic skepticism about law’s ability to produce social transformation.” This revisionist

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217 Id. at 71.
218 “[I]t would not have mattered what the Court ordered in *Brown II* because there was insufficient political support for desegregation. The problem was not in the Court but in the broader society itself. Looking to the courts to overcome racism and racial segregation has a romantic allure but is no more likely to succeed than tilting at windmills is likely to subdue its enemies.” Gerald N. Rosenberg, *Tilting at Windmills: Brown II and the Hopeless Quest to Resolve Deep-Seated Social Conflict Through Litigation*, 24 Law & Ineq. 31, 33-34 (2006).
scholarship has marked a partial revival of the view that law is limited as a tool of social reform. The more chastened vision of the effect of Supreme Court decisions on American society—and, by extension, the power of the redefinition of legal norms to affect social behavior and attitudes—is not the apologia for the status quo that characterized the social Darwinists in the late nineteenth and early twentieth centuries. Revisionist scholars generally come from the progressive side of the political spectrum. They advocate for social reform, only they urge social reformers to focus their energies on those institutions that are most advantageous to their causes, which are often not the courts. They generally draw a sharp distinction between judicial and legislative reform, with the limitations of the former not always applicable to the latter—a distinction that was swallowed up by Sumnerian assumptions about laws of all forms, judicial, legislative, executive, being ineffective in the face of entrenched “folkways.”

Those who resist this strong skepticism toward litigation and judicial action often recapitulate themes that first emerged in efforts to defend Brown and the efficacy of the law in the massive resistance period. Many who question the power of the courts to shape social policy argue that other institutional actors—legislators and executive branch officials—can indeed affect (in some positive and predictable way) social practices even in the face of considerable popular resistance. Furthermore, modern-day defenders of the capacity of the law have rightly emphasized the subtle ways in which the law can operate, influencing social interactions, shaping consciousness. So even if a legal mandate from the Supreme Court may have little direct influence, new legal norms seep into society, making some options seem more legitimate or feasible, while discouraging others—and thus affecting (if not necessarily dictating) social practices, customs, and attitudes.\textsuperscript{222} And recent scholarship has also sought to revive the critique of consensus ideology that emerged in the late 1950s and 1960s. Robert Post and Reva Siegel advocate a principle of “democratic constitutionalism,” in which cultural debate and constitutional conflict are recognized as a central site of rights formation.\textsuperscript{223} Backlash to legal pronouncements are not necessarily something to be feared or avoided. Struggle over

\textit{Law and the Litigation Process: The Paradox of Losing by Winning}, 33 \textsc{Law & Soc. Rev.} 869, 869 (1999) (“Law and society scholars increasingly question the capacity of law to produce social change.”). The most sustained critique of the capacity of the law has emerged from those fighting for economic justice among the poor. A seminal work in this field is Stephen Wexler, \textit{Practicing Law for Poor People}, 79 \textsc{Yale L.J.} 1049 (1970). The skepticism toward law-centered activism within this field derives from a combination of concerns about the incapacity of law and concerns with the power imbalance of the lawyer-client relationship. Cummings & Eagley, \textit{supra}. This latter theme has also been raised in the context of school desegregation litigation. Derrick A. Bell, Jr., \textit{Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation}, 85 \textsc{Yale L.J.} 470 (1976).

\textsuperscript{222} See, e.g., Michael W. McCann, \textit{Reform Litigation on Trial}, 17 \textsc{Law & Soc. Inquiry} 715, 729-42 (1994) (summarizing “dispute-centered” tradition of legal analysis, which recognizes the “constitutive capacity of law”).

fundamental constitutional conflicts may have a beneficial role in the constitutional system. Backlash may have “potentially constructive effects.”

Efforts in the late 1950s and early 1960s to explain the rise of massive resistance thus established narratives for engaging with the question of the capacity of the law that still guide debate today.

\[224\] Id. at 375; see also id. at 379 (“Viewed from the system perspective of the overarching American constitutional order, backlash seeks to maintain the democratic responsiveness of constitutional meaning.”).