# Tilting at Windmills: *Brown II* and the Hopeless Quest to Resolve Deep-Seated Social Conflict Through Litigation

Gerald N. Rosenberg*

Like the Masters and Apprentices of Jedi Knights and Sith Lords, major Supreme Court cases often come in pairs. But unlike their "Star Wars" counterparts, the second decision seldom receives the same acknowledgment and attention as the first. For example, *Roe v. Wade*[1] was decided along with *Doe v. Bolton,*[2] but the latter case, although vitally important to the implementation of the constitutional right to abortion announced in *Roe*, is seldom commemorated. Similarly, the 1954 *Brown*[3] decision is celebrated as one of the Supreme Court's greatest decisions, but the 1955 decision of the same name (*Brown II*)[4] is often overlooked. In 2004, there were numerous commemorations of the fiftieth anniversary of *Brown* throughout the country, yet the fiftieth anniversary of *Brown II* in 2005 was hardly noted. Focusing on the lead cases of *Roe* and *Brown* rather than the follow-up cases of *Roe* and *Brown II* is understandable because the former set out the constitutional principles while the latter apply them. But for principles to matter, they must be implemented. Thus, it is fitting that the University of Minnesota Law School and *Law & Inequality: A Journal of Theory and Practice* have chosen to focus on the fiftieth anniversary of *Brown II*.

## I. Introduction

On May 31, 1955, the U.S. Supreme Court announced its decision in *Brown v. Board of Education* (*Brown II*).[5] The issue in *Brown II* was how to implement the Court's decision in the first *Brown* case, decided a year earlier on May 17, 1954, that racial

* Associate Professor of Political Science and Lecturer in Law, University of Chicago Law School.

1. 410 U.S. 113 (1973).
2. 410 U.S. 179 (1973).
3. 347 U.S. 483 (1954).
4. 349 U.S. 294 (1955).
5. *Id.*

segregation in public elementary and secondary schools was unconstitutional.[6] In its 1954 *Brown* decision, the Court requested further argument on the issue of implementation.[7] At the re-argument, the lead plaintiff, the National Association for the Advancement of Colored People ("NAACP"), took a position that they called "generous in the extreme."[8] Although urging immediate desegregation, the NAACP was willing to forego immediate implementation if the Court set a firm deadline for desegregation no later than September 1956.[9] In contrast, the Southern states argued against either immediate desegregation or any firm deadline for doing so.[10] They argued for giving discretion to local district courts and officials with no deadline or timetables.[11] The United States, arguing as an *amicus*, took a middle position, arguing that desegregation should be as "prompt as possible."[12]

The position that some of the Southern states took before the Supreme Court was extraordinary. In essence, they made it clear that they would not conform to any decision requiring desegregation.[13] Consider the colloquy between Chief Justice Warren and a lawyer for South Carolina, S. E. Rogers:

> Warren: "But you are not willing to say here that there would be an honest attempt conform to this decree, if we did not leave it to the district court?"
>
> Rogers: "No, I am not. Let us get the word 'honest' out of there."
>
> Warren: "No, leave it in."
>
> Rogers: "No, because I would have to tell you that right now we would not conform – we would not send our white children to Negro schools."[14]

Rogers admitted in response to questions that this would result in no desegregation, "perhaps not until 2015 or 2045."[15] Thus, re-

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6. *Id.* at 298.

7. 347 U.S. at 495-96.

8. MICHAEL KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 313 (2004).

9. *Id.* at 313, 316.

10. *Id.* at 314.

11. *Id.* at 313.

12. LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 745 (Philip B. Kurland & Gerhard Casper, eds., 1975).

13. KLARMAN, *supra* note 8, at 316.

14. ARGUMENT: THE ORAL ARGUMENT BEFORE THE SUPREME COURT IN BROWN V. BOARD OF EDUCATION OF TOPEKA, 1952-1955 414 (Leon Friedman, ed., 1969).

15. JACK W. PELTASON, FIFTY-EIGHT LONELY MEN 16 (1961).

argument ended with at least one Southern state stating it would not conform to a Court decision requiring desegregation.

In *Brown II*, the Court remanded the cases to the district courts from which they originated and ordered them to take "such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases."[16] Clearly, the Court didn't accept the NAACP's call for either immediate desegregation or a firm deadline. On the other hand, it did order the lower federal courts to desegregate the public schools with "all deliberate speed." Although the Supreme Court didn't back away from *Brown*, it didn't press forward either.

Supporters of desegregation have consistently criticized the decision. Calling *Brown II* "misguided,"[17] Klarman has recently written that the "justices chose vagueness and gradualism."[18] Charles Ogletree is harsher, understanding *Brown II* as "a critical compromise, which . . . undermined the broad purposes of the campaign to end racial segregation immediately and comprehensively."[19] Olgetree argues that with the "all deliberate speed" standard, the Court's "reluctance to take a more forceful position on ending segregation immediately played into the hands of the integration opponents."[20] The essential argument of *Brown II*'s critics is that by not requiring immediate desegregation, nor setting a firm date for desegregation, segregationists were encouraged to evade the decision and resist desegregation.[21] The underlying assumption is that if the Court had acted more forcefully, desegregation would have occurred.[22]

In this Article, I argue that this "legalist" criticism misses the underlying political factors at work. It is overly legalistic because it focuses too narrowly on the Court to the exclusion of the larger society. It unduly privileges the Court and abstracts it from the broader political, social, and economic world in which it operates. To look to the words of the Court as the cause of the lack of desegregation is to look in the wrong place. To sharpen my point: it would not have mattered what the Court ordered in *Brown II*

16. 349 U.S. at 301.
17. KLARMAN, *supra* note 8, at 320.
18. *Id.* at 313.
19. CHARLES OGLETREE, ALL DELIBERATE SPEED xiii (2004).
20. *Id.* at 11.
21. *See* OGLETREE, *supra* note 19.
22. *See generally* KLARMAN, *supra* note 8, at 319.

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 enemies.

Arguments about "what ifs" are suggestive rather than definitive. Exploring a counterfactual–asking what would have happened if the Supreme Court had ordered immediate desegregation–cannot produce unassailable findings. But this is the problem faced by the legalist critics of *Brown II*. To support my argument that the language of *Brown II* was irrelevant to desegregation, I can examine what actually happened in the wake of *Brown II* and highlight the factors involved. I can also explore other decisions involving segregation to see if strength of judicial language produces compliance. Doing so strongly suggests that the language of *Brown II* played little role in accounting for subsequent events.

## II. Lack of Implementation

The argument starts by examining the implementation of *Brown* in the eleven Southern[23] and six Border[24] states and the District of Columbia that legally required or allowed racial segregation of public schools. What implementation? By the 1963-64 school year, barely one in one hundred African-American children in the eleven Southern states of the Old Confederacy was in a school with Whites.[25] Excluding Texas and Tennessee, which accounted for most of the desegregation, fewer than one-half of 1% of African-American school children were in school with Whites.[26] That is, almost a decade after *Brown*, nothing had changed for nearly ninety-nine out of every one hundred African-American children in those states. They still attended all Black schools.[27]

There was some implementation in the Border states. The District of Columbia led the way with 97% of its African-American school children in school with Whites in the 1956-57 school year.[28]

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23. The Southern states are Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia.

24. The Border states are Delaware, Kentucky, Maryland, Missouri, Oklahoma, and West Virginia.

25. GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 50 (1991).

26. *Id.*

27. For both an aggregate and a state-by-state breakdown of desegregation, see *id.* at 345-47 (Appendix 1).

28. *Id.*

The six Border states moved more slowly, only reaching the 50% figure in the 1964-65 school year, a full decade after *Brown*.[29]

While the record in the Border states was better, nowhere was *Brown* fully implemented. The decision was widely and openly flouted. To the legalist critics, this can be explained by *Brown II*'s vague and loose standard. If only the Court had required immediate desegregation or set a firm date for it, these critics argue, desegregation would have occurred. However, there is a powerful alternative explanation for the lack of desegregation that focuses on the lack of broader support throughout the country for school desegregation. Political and social forces (both local and national) did not support desegregation, providing no pressure for compliance.[30] The Supreme Court, acting alone, lacked the power to implement *Brown*.

## III. Why No Implementation

A closer look at these factors suggests seven reasons why it would not have mattered what the Court said in *Brown II*.

### *A. Congress*

Congress never supported the Court's decision. In fact, a sizable number of its members did just the opposite. In 1956, in a remarkable document entitled "A Declaration of Constitutional Principles" (commonly referred to as the *Southern Manifesto*), 101 members of Congress attacked the *Brown* decision as an exercise of "naked power" with "no legal basis."[31] They pledged themselves to "use all lawful means to bring about a reversal of this decision which is contrary to the Constitution and to prevent the use of force in its implementation."[32] Two House members from North Carolina refused to sign the document. They were rewarded by the voters with early retirement.[33] It was not until 1964 that a majority of Congress committed to ending segregation throughout the country.

### *B. The President*

Presidents did little better. The immensely popular World War II hero Dwight Eisenhower was president in 1954 when

29. *Id.*
30. *Id.* at 72-93, 105-06.
31. *Id.* at 78 (quoting 102 CONG. REC. 4460 (Senate), 4515-16 (House)).
32. 102 CONG. REC. 4460 (Senate), 4515-16 (House).
33. ROSENBERG, *supra* note 25, at 78 n.12.

*Brown* was decided and remained in office throughout the 1950s. However, he never lent his prestige to the decision. As Roy Wilkins, the Executive Director of the NAACP at the time put it, "if he had fought World War II the way he fought for civil rights, we would all be speaking German today."[34] Similarly, although President Kennedy is generally considered to have supported desegregation, he took little concrete initiative in school desegregation and other civil rights matters until pressured by events.[35]

### *C. State Legislation*

There was an old saying in the South, "as long as we can legislate, we can segregate."[36] In response to *Brown*, Southern state legislators enacted hundreds of new laws requiring and preserving segregation.[37] By 1957, at least 136 new segregation laws and constitutional amendments had been added to the books.[38] Virginia went the furthest, practicing "massive resistance" which included such steps as closing the public schools and re-opening them as segregated private academies.[39]

### *D. Local Courts*

Another old Southern saying, "litigate and legislate," focused on the judiciary.[40] In the U.S. system, state and local judges are selected locally, meaning they share local beliefs and culture. In the South, this meant that many judges were committed to upholding segregation.[41] They had myriad ways of doing so, ranging from upholding state legislation supporting segregation to interminable foot-dragging to outright prejudice. Indeed, several of the cases litigated with *Brown* in the early 1950s were still being litigated more than a decade later in the 1960s.[42]

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34. ROY WILKINS, STANDING FAST: THE AUTOBIOGRAPHY OF ROY WILKINS 222 (1984).

35. ROSENBERG, *supra* note 25, at 76-77.

36. HARRELL R. RODGERS, JR. & CHARLES S. BULLOCK III, LAW AND SOCIAL CHANGE: CIVIL RIGHTS LAWS AND THEIR CONSEQUENCES 72 (1972).

37. ROSENBERG, *supra* note 25, at 79.

38. GARY ORFIELD, THE RECONSTRUCTION OF SOUTHERN EDUCATION 17-18 (1969).

39. ROSENBERG, *supra* note 25, at 79.

40. RODGERS & BULLOCK, *supra* note 36, at 72.

41. *See* ROSENBERG, *supra* note 25, at 84-93.

42. For example, as late as 1963, *Briggs v. Elliott*, 103 F. Supp. 920 (E.D.S.C. 1952), and *Davis v. Prince Edward County*, 103 F. Supp. 337 (E.D. Va. 1952)-two of the original school desegregation cases, commenced in 1951 and 1952 respectively-were still being litigated. Other school desegregation cases noteworthy for

*E. Southern Governors*[43]

Given the position taken by Southern judges and legislators, it is no surprise that Southern governors opposed desegregation as well. Often expressing themselves in strong language, many governors took extraordinary actions to prevent desegregation and made extraordinary statements. Although there is no dearth of examples, consider the action of Arkansas Governor Orval Faubus, who ordered the National Guard to stand at the door of Central High School in Little Rock to prevent the implementation of a federal court order requiring desegregation.[44] Consider also the words of Alabama Governor George Wallace in 1963, nearly a decade after *Brown*: "I draw the line in the dust and toss the gauntlet before the feat of tyranny and I say segregation now, segregation tomorrow, segregation forever."[45] Somewhat less poetically, Mississippi Governor Ross Barnett announced his opposition to desegregation this way: "Ross Barnett will rot in a federal jail before he will let one nigra cross the sacred threshold of our white schools."[46]

*F. Private Groups*[47]

Elected and appointed officials usually reflect the preferences of the electorate. The deep-seated opposition to ending segregation exemplified by the actions and words of many Southern legislators, judges, and governors, was widely supported by White Southerners. Not only did they elect and re-elect vociferous supporters of segregation to public office, but they also took steps to reinforce segregation. These ranged from economic coercion and harassment to explicit refusal to follow federal court decisions to violence.

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seemingly interminable litigation include *Singleton v. Jackson Mun. Separate Sch. Dist.*, 348 F.2d 729 (5th Cir. 1965), in which approximately thirty opinions and orders were issued over a seven-year period, and *United States v. Montgomery County Bd. of Educ.*, 395 U.S. 225 (1969), in which there were seventy-seven docket entries between 1964 and 1969.

43. For an excellent study of how Southern governors based campaigns on enforcing segregation, see EARL BLACK, SOUTHERN GOVERNORS AND CIVIL RIGHTS: RACIAL SEGREGATION AS A CAMPAIGN ISSUE IN THE SECOND RECONSTRUCTION (1976).

44. REED SARRAT, THE ORDEAL OF DESEGREGATION 57-59 (1966).

45. U.S. COMM'N ON CIVIL RIGHTS, FEDERAL ENFORCEMENT OF SCHOOL DESEGREGATION app. A at 2 (1969).

46. SARRAT, *supra* note 44, at 7.

47. *See* ROSENBERG, *supra* note 25, at 82-84.

*G. Violence*

The final factor that made the Court's language irrelevant was violence. In 1955, when *Brown II* was decided, the Southern states had a fully developed system of apartheid. To many White Southerners, desegregation was a threat to their way of life. Organized White violence against Blacks to reinforce the apartheid system holds a long and tragic history in the South. In the wake of both *Brown* decisions, and later the civil rights movement, White groups arose to enforce segregation through violence. Some, like the White Citizen's Councils, purported to be non-violent. Others, like the Ku Klux Klan, both preached and practiced violence. From the murders of Emmet Till (1955) and Medgar Evers (1963) to the attacks on the Freedom Riders (1961) and the Birmingham church bombing (1963), White violence against Blacks took a heavy toll. In the summer of 1964, Mississippi alone witnessed brutal attacks against African-Americans and civil rights workers including thirty-five shootings, sixty-five bombings (including thirty-five churches), six murders, and eighty beatings.[48]

Overall, these seven factors go a long way to explaining why desegregation did not occur in the wake of *Brown II*. They illustrate that political and social forces (local and national) did not support the Court, providing no pressure for compliance. In such a situation, the language of the Court was irrelevant.

## IV. Change

The bleak picture painted above does not tell the whole story. By 1972, more than 91% of African-American school children in the eleven Southern states were in integrated schools.[49] Many "legalist" critics of *Brown II* argue that desegregation occurred because the Court finally tightened its language.[50] In cases like *Cooper v. Aaron*,[51] *Goss v. Board of Education*,[52] *Griffin v. County*

48. ROSENBERG, *supra* note 25, at 82.

49. *Id.* at 50 tbl.2.1.

50. *See* GARY ORFIELD ET AL., DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION 8 (1996); GARY ORFIELD, MUST WE BUS? SEGREGATED SCHOOLS AND NATIONAL POLICY 13-15 (1978); J. HARVIE WILKINSON III, FROM BROWN TO BAKKE: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954-1978 11 (1979).

51. 358 U.S. 1, 16 (1958) (holding that suspension of desegregation is not justified by violence, or threat of violence, in response to desegregation).

52. 373 U.S. 683, 688 (1963) (invalidating one-way student transfers from schools where a transferee's race is a minority to one where it predominates).

*School Board,*[53] *Green v. County School Board,*[54] *Alexander v. Holmes County Board of Education,*[55] and *Swann v. Charlotte-Mecklenburg Board of Education,*[56] the Court rejected excuses for maintaining segregation, required the adoption of plans for immediate desegregation, and expanded remedies to include busing. To the legalist critics, this shows that the language of the Court was vitally important to desegregation.

The problem with this analysis is that, once again, it is too Court-centered. Examining the broader picture shows that desegregation occurred principally because Congress acted, supplying incentives for desegregation and imposing costs for maintaining segregation. The court-centered explanation neglects fundamental changes in the political, social, and economic context. Title VI of the 1964 Civil Rights Act[57] permitted the U.S. Department of Health, Education, and Welfare ("HEW") to cut off federal funds to programs in which racial discrimination was practiced, and the 1965 Elementary & Secondary Education Act[58] provided a great deal of federal money to generally poor Southern school districts. By the 1971-72 school year, federal funds comprised 12% to 27.8% of Southern state school budgets, up from 4.6% to 11.1% in the 1963-64 school year.[59] This combination of federal funding and Title VI gave the executive branch a tool to induce desegregation when it chose to do so. When HEW began threatening to cut off funds to school districts that refused to desegregate, dramatic change occurred. By the 1972-73 school year, over 91% of African-American school children in the eleven Southern states were in integrated schools, up from 1.2% in the 1963-64 school year.[60] With only the constitutional right in force in the 1963-64 school year, no more than 5.5% of African-American children in any Southern state were in school with Whites.[61] By

53. 377 U.S. 218, 225 (1964) (invalidating the closing of Prince Edward County public schools to avoid desegregation and the use of state tuition grants and tax credits to support private segregated education for White children).

54. 391 U.S. 430, 439 (1968) ("The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*." (emphasis in original)).

55. 396 U.S. 19, 20 (1968) (holding that school districts may not "operate a dual school system based on race or color").

56. 402 U.S. 1, 30 (1971) (upholding the power of district judges to include busing as part of a remedial decree).

57. 42 U.S.C.A. § 2000d (2003).

58. 20 U.S.C. § 2701 et seq. (1994).

59. ROSENBERG, *supra* note 25, at 99 tbl.3.2.

60. *Id.* at 50 tbl.2.1.

61. *Id.* at 345-47 app.1.

the 1972-73 school year, when economic incentives were offered for desegregation and costs imposed for failure to desegregate, in no Southern state were fewer than 80% of African-American children in integrated schools.[62]

Federal funding was not the only economic inducement for desegregation in the late 1960s and early 1970s. Another powerful factor at work was the desire of many Southern communities to attract industry and the belief that a peaceful, desegregated school system was an important inducement.[63] Thus, the less industrialized South had a strong economic incentive to desegregate. Also, there had been cultural change in the South. The Civil Rights Movement changed the country, and the South was no exception. By the late 1960s and the early 1970s, rabid support of segregation had weakened.[64] In such a changed cultural context, powerful economic incentives could overcome weakened cultural barriers.

Courts played a role in this process. Once Congress acted, the judicial system was given a set of tools with which it could work.[65] This suggests, however, that it was not the language of the courts but the actions of Congress that played the key role, as well as broader economic and cultural changes. After Congress acted, school districts that violated court orders risked not only the loss of federal funds but also an important competitive advantage in attracting new industries. In contrast, school districts that desegregated maintained eligibility for federal funds, and their communities could make a stronger pitch for new industry.[66] School desegregation occurred in the years 1968-72, then, because a set of conditions provided incentives to desegregate and imposed costs for failing to do so. When those conditions were lacking, as in the first decade after *Brown*, constitutional rights were flouted. The language of judicial decisions was largely irrelevant.

## V. Other Cases

The argument that the language of *Brown II* was not responsible for the lack of desegregation is also supported by

62. *Id.* at 99 tbl.3.2.

63. *Id. at* 101-02.

64. *See id.* at 102.

65. *See* ROSENBERG, *supra* note 25, at 72-106 (providing an overview of how Congressional action allowed courts to play a role in ending segregation, particularly through orders that withheld federal funding and created a legitimate reason for politically exposed officials to initiate desegregation programs).

66. *See id.* at 101-02.

examining other civil rights cases in the period before Congress passed the 1964 Civil Rights Act. Even when the Court used clear, strong, and unequivocal language, little change occurred. I consider voting rights, transportation, and the Little Rock crisis that led to *Cooper v. Aaron*.[67]

*A. Voting Rights*

In the late 1950s and early 1960s, the United States brought dozens of voting rights suits in the South under the 1957 and 1960 civil rights acts alleging that African-Americans were systematically being denied the right to vote.[68] Even though many legal victories were achieved, very little registration occurred.[69] In 1963, the U.S. Civil Rights Commission concluded that five years of litigation under the acts had "not provided a prompt or adequate remedy for wide-spread discriminatory denials of the right to vote."[70] The Commission cited the efforts in one hundred counties in eight states where, despite the filing of thirty-six voting rights suits by the Department of Justice, registration of African-Americans increased a measly 3.3% from approximately 5% in 1956 to 8.3% in 1963.[71] Another study found that eight years of litigation under the two acts in the forty-six most heavily segregated Southern counties resulted in the registration of only 37,146 Blacks out of 548,358 eligible, a mere 6.8%.[72]

The negligible results of these legal victories finally led administration officials to the conclusion that litigation to achieve voting rights for African-Americans in the South was fruitless.[73] The problem was not with lack of legal victories or with weak, compromised, judicial holdings. Rather the problem was that White Southerners were not going to grant African-Americans the right to vote, regardless of what courts said. In congressional testimony, U.S. Attorney General Robert F. Kennedy acknowledged the point, noting that the "problem is deep rooted and of long standing. It demands a solution which cannot be

67. 358 U.S. 1 (1958).

68. U.S. COMM'N ON CIVIL RIGHTS, CIVIL RIGHTS '63: 1963 REPORT OF THE U.S. COMMISSION ON CIVIL RIGHTS 15, 37-50 (1963).

69. *Id.* at 15; RODGERS & BULLOCK, *supra* note 36, at 24.

70. U.S. COMM'N ON CIVIL RIGHTS, *supra* note 68, at 13.

71. *Id.* at 13-15.

72. Note, *The Congress, The Court and Jury Selection: A Critique of Titles I and II of the Civil Rights Bill of 1966*, 52 VA. L. REV. 1069, 1088 n.108 (1966).

73. *Literacy Tests and Voter Requirements in Federal and State Elections Before the Subcomm. on Constitutional Rights of the Comm. on the Judiciary*, 87th Cong. 261 (1962).

provided by lengthy litigation . . . ."[74]

The solution was to forego litigation and entice Congress to act. It did so in 1965, passing the Voting Rights Act.[75] The crux of the Act by-passed state officials and provided for direct federal action to enable African-Americans to vote.[76] The results were striking. In the first few months after passage of the Act, more than 300,000 African-Americans in the South were registered.[77] There was a 45% increase in the number of Southern African-Americans registered to vote, measured from the period just before passage of the Act to just after it.[78] When Congress acted, change occurred. When courts acted, no matter how forcefully they stated the law, little changed.

### *B. Transportation*

Judicial attempts to desegregate interstate transportation show the same results. Despite several Supreme Court cases banning segregation in transportation and in facilities used by interstate travelers, interstate travel in the South remained segregated. In 1946, in *Morgan v. Virginia,*[79] the Court invalidated as to interstate passengers a Virginia law requiring segregated seating in all passenger motor carriers.[80] In 1960, in *Boynton v. Virginia,*[81] the Court held that if bus companies made services available to interstate passengers as a regular part of their transportation, then segregation in the use of the facilities was prohibited.[82] As one commentator put it, by 1960, if not earlier, the Court "clearly established" that laws requiring segregation in interstate transportation and facilities were unconstitutional.[83]

The Court's holdings and language may have been clear, but segregation was unaltered.[84] The dramatic and courageous

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74. *Id.* at 264.

75. 42 U.S.C. § 1973 (1965).

76. *Id.*; ROSENBERG, *supra* note 25, at 59.

77. ROSENBERG, *supra* note 25, at 61.

78. Id. at 60-63.

79. 328 U.S. 373 (1946).

80. *Id.* at 386.

81. 364 U.S. 454 (1960).

82. *Id.* at 462-63.

83. Louis Lusky, *Racial Discrimination and the Federal Law: A Problem in Nullification*, 63 COLUM. L. REV. 1163, 1168 (1963).

84. For greater detail, see ROSENBERG, *supra* note 25, at 64-65; CATHERINE A. BARNES, JOURNEY FROM JIM CROW: THE DESEGREGATION OF SOUTHERN TRANSIT (1983).

Freedom Rides of the spring of 1961 showed that the strength of judicial rulings has little relation to actual behavior. On May 4, 1961, an integrated group of thirteen "Freedom Riders" left Washington, D.C., on regularly scheduled Greyhound and Trailways buses, with a public itinerary through Virginia, North Carolina, South Carolina, Georgia, Alabama, Mississippi, and Louisiana.[85] Their trip was intended to show that segregation in public interstate travel had not ended.[86] On Sunday, May 14, the attack on the Riders in Birmingham, Alabama and fire-bombing of one of the buses outside of Anniston, Alabama, demonstrated the extreme violence of the Freedom Ride.[87] It is harder to imagine a more vivid illustration that interstate travel remained segregated. It was not until the passage of the 1964 Civil Rights Act[88] that such segregation finally came to an end.[89] As with voting rights, when Congress acted, change occurred. When courts acted without political support, little changed.

### *C. Little Rock*

A final example of the fact that even clear, strong, and unequivocal language from the Supreme Court would not produce change, absent political support, comes from the events at Central High School in Little Rock, Arkansas in 1957. In response to a federal district court decision requiring desegregation of the school, Governor Faubus and the Arkansas legislature took steps to block the desegregation.[90] Dramatically, the governor ordered the National Guard to stand in the doorway and physically prevent nine African-American students from entering the school.[91] The ensuing violence made it impossible for the African-American students either to enter or remain in the school.[92] In response to this explicit defiance of a federal court order, President Eisenhower ordered the 101st Airborne Division to Little Rock to guarantee the safety of those nine courageous young African-Americans.[93] The federal troops stayed for the remainder of the school year.[94]

85. ROSENBERG, *supra* note 25, at 142.
86. *Id.*
87. *Id.* at 64.
88. 42 U.S.C. §§ 2000e et seq. (2005).
89. ROSENBERG, *supra* note 25, at 123, 128.
90. PELTASON, *supra* note 15, at 191.
91. *Id.* at 167-68.
92. SARRATT, *supra* note 44, at 59.
93. *Id.*
94. *Id.*

The lower court decision was appealed to the Supreme Court, which convened in a special session for only the fifth time in thirty-eight years to hear the case.[95] In *Cooper v. Aaron*, the Court upheld the desegregation order in unequivocal terms, writing that the "constitutional rights of respondents [Black students] are not to be sacrificed or yielded to the violence and disorder which" was occurring.[96] This was, as the opinion stated, "enough to dispose of the case,"[97] but the Court continued for several pages to underline its determination that *Brown* be followed.[98] It reminded the parties that Article VI of the Constitution makes the Constitution the "supreme Law of the Land" and unearthed the 1803 case, *Marbury v. Madison*,[99] and Chief Justice Marshall's words in that case that it is "emphatically the province and duty of the judicial department to say what the law is."[100] Finally, in an unprecedented move, all nine justices individually signed the opinion.[101] It is hard to imagine stronger language or a stronger holding. Indeed, supporters of the role of the Court point to Little Rock and *Cooper v. Aaron* as examples of how clear and unequivocal judicial language produces results.

What were the results? Although the presence of the United States military allowed the nine African-American children to attend Central High School, little desegregation occurred. Once federal troops left, so did any hope of more than token desegregation. Indeed, as of June 1963, six years after Governor Faubus' defiance of the federal court order, only 69 out of 7,700 students (less than 1%) at the supposedly desegregated, "formerly" White, junior and senior high schools of Little Rock were Black.[102] In contrast, Governor Faubus' active defiance of court decisions requiring desegregation brought him national popularity.[103] He was re-elected governor in a landslide in 1958.[104] He was also honored by Americans in December 1958, chosen as one of the ten men they most admired by respondents in a national Gallup poll.[105]

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95. PELTASON, *supra* note 15, at 187.

96. 358 U.S. 1, 16 (1958).

97. *Id.* at 17.

98. *Id.* at 19-20.

99. 5 U.S. (1 Cranch) 137 (1803).

100. *Cooper*, 358 U.S. at 18 (1958) (quoting Article VI of the Constitution and Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)).

101. *Id.*

102. WILLIAM BRINK & LOUIS HARRIS, THE NEGRO REVOLUTION IN AMERICA 41 (1963).

103. ROSENBERG, *supra* note 25, at 129.

104. *Id.* at 78.

105. 2 GEORGE H. GALLUP, THE GALLUP POLL: PUBLIC OPINION 1935-1971 1584

As with *Brown II*, the problem was not with the language of the judicial decision. Instead, it lay with the lack of political support for desegregation.[106]

## V. Conclusion: The Irrelevant Court

I have argued that the language of *Brown II* was irrelevant to desegregation. Because the political support necessary to dismantle the apartheid system was lacking in 1955, it would not have mattered what standard the Court adopted. It was not until the mid-1960s that Congress and the President were willing to make the massive commitments necessary to end apartheid. When those commitments were made, desegregation occurred. Without those commitments, little changed. To focus on judicial holdings is to stick one's head in the sand of law books and judicial decisions and ignore the political world in which law operates.

Given *Brown's* lack of impact, why is it widely held in such high regard? Along the same lines, given the irrelevance of the holding of *Brown II*, why is it so roundly criticized? I suggest there are two reasons. First, since the mid-1960s, the United States has become officially committed to being a non-segregated society. *Brown* stands as a constitutional symbol of that commitment. This is a noble vision, one of which Americans can be proud. To the extent that *Brown II* failed to live up to this vision by failing to require immediate desegregation, it is seen as a blemish on the official commitment.

There is, however, an additional reason which is much less noble. Celebration of *Brown*, and criticism of *Brown II*, privileges lawyers and courts. If *Brown* ended segregation, and if lawyers made *Brown* possible, then lawyers and courts are heroes and we should look to them for social change. *Brown II* is thus criticized for undercutting this heroic vision. This is a less noble vision because it is wrong. As I have shown, it was the actions of Congress and the President, not the courts, that ended segregation in practice. Without political support, court decisions will not produce social change. To valorize lawyers and courts encourages reformers to litigate for social change. But if political support is lacking, the effect of this vision is to limit change by deflecting claims for reform away from substantive political battles, where success is possible, to harmless legal ones where it is not. In this way, courts play a deeply conservative ideological function in

(1972).

106. *Id.* at 1568-69 (evincing this lack of support).

defense of the status quo. When social reformers succumb to the "lure of litigation" they forget that deep-seated social conflicts cannot be resolved through litigation. The legalist criticism of *Brown II* encourages us to look to legal solutions for political and cultural problems. That is no more likely to succeed than tilting at windmills is likely to subdue enemies.

Courts are not all-powerful institutions. They were designed with severe limitations and placed in a political system of divided powers. To adopt a "legalist" critique of *Brown II* abstracts the Court from the political and cultural system in which it operates. Blaming the holding of *Brown II* for the failure of desegregation clouds our vision with a naive and romantic belief in the triumph of rights over politics. And while romance and even naivete have their charms, they are not best exhibited in courtrooms nor in scholarship.