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**Brown's Legacy: The Promises and Pitfalls of  
Judicial Relief**

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# Brown's Legacy: The Promises and Pitfalls of Judicial Relief

Deborah Jones Merritt

## **Abstract**

Brown v. Board of Education marked a turning point for both civil rights and judicial activism. During the half century since Brown, social activists of all kinds have sought policy changes from the courts rather than legislatures. That trend has produced social benefits but, over time, it has also shifted political power to elites. This essay explores the possibility of retaining Brown's promise for racial equality while reinvigorating an electoral politics that would better represent many of the people Brown intended to benefit.

## *Brown's* Legacy: The Promises and Pitfalls of Judicial Relief

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*Brown v. Board of Education* (1954) is one of the greatest achievements of the American judicial system. It decisively declared racial segregation in the schools unconstitutional, inaugurating the modern civil rights era. Citizens around the world, not just in the United States, view *Brown* as a twentieth-century political landmark.

In addition to advancing equality, *Brown* initiated a new type of judicial decisionmaking. After *Brown*, courts increasingly used the federal Constitution to achieve progressive social ends, and they issued detailed orders to implement those goals. Desegregation, bussing, prison reform, environmental protection, and many other judicial actions stemmed from *Brown's* inspiration. The period from 1960 through the present has been an era of judicial policymaking, quite distinct from the New Deal era that preceded it and that relied primarily on legislation to achieve social ends.

This era of judicial supremacy has many advantages. The impact of *Brown* was magnificent. Christian prayer was unlikely to leave our schools without judicial intervention. Some state courts have achieved more equitable school financing systems, a result that would have been highly unlikely from elected legislators. Policies that benefit political minorities of any type often are easier to wrest from the courts than from legislatures.

Appellate courts also appear more receptive than legislatures to serious economic, moral, legal, and constitutional arguments. Legislative caucuses, senate hearings, and

statehouse floors do not promote serious study or discussion. Focused litigation often is easier and cheaper than mobilizing grassroots support for legislative change. And there is something very moving—and quintessentially American—about the image of a single individual standing up for his or her rights, taking that case to court, and prevailing on a principle that reshapes public policy.

But the dominance of courts during the last half century has a downside as well. As political scientists have pointed out, judicial power can serve the interests of elites by helping to marginalize more democratic forms of policymaking. Matthew Crenson and Benjamin Ginsberg (2002) recently tagged this trend the “downsizing” of democracy. While paying lip service to democratic participation, Crenson and Ginsberg argue, elites increasingly govern through courts, regulatory agencies, and other means that require little consensus building or democratic support.

Although courts have vindicated both the downtrodden and the powerful during the last fifty years, three factors make them particularly attentive to elites. First, elites understand the obscure customs of judicial process and are comfortable invoking that process. Second, elites can afford to hire the lawyers needed to navigate legal channels. And, finally, judges respond well to the highly intellectual arguments that elites compose. For all of these reasons, *Brown*’s legacy is double edged. It promises relief to racial minorities and other disempowered groups in some cases, but also gives elites the power to evade democratic controls.

Crenson and Ginsberg offer the recent tobacco settlements as a compelling example of elites governing through the courts. In the settlements, tobacco companies agreed to pay state governments more than \$230 billion over the next twenty-five years.



Those revenues substantially eased budget crises in many states, allowing some states to cut taxes on the middle classes and wealthy. Relatively little of the revenue has gone to antismoking programs; one study suggests that only 5% of the settlement revenues have been used that way (Crenson & Ginsberg, 2002, p. 161). Instead, well-off taxpayers have been the primary beneficiaries of these settlements.

Tobacco companies have also benefited. The companies have passed through the cost of the settlement to smokers: largely working class and lower middle class smokers who are addicted to nicotine. These individuals now pay both the health and financial costs of their addiction, with little in the way of government programs to assist their addiction or prevent their children from becoming addicted. On the contrary, state governments have now become tacit allies of the tobacco industry. If tobacco revenues fall, then the states won't collect future settlement payments and will have to raise taxes.

Viewed in this way, the tobacco settlement was a way for elites to shift rising health care costs off themselves and onto low-income smokers, with several billion dollars for wealthy trial lawyers thrown into the bargain. The state litigants and their lawyers may not have plotted the scenario that way, but they secured this result because only elites (state governments on one side, tobacco companies on the other) participated in the settlement negotiations. Low-income smokers had no adequate representation in the tobacco litigation.

Our national debate over racism and affirmative action has begun to show some of the same unhealthy focus on litigation, with elites benefiting from that strategy. White elites increasingly have turned litigation in this area to their advantage, crafting constitutional arguments that paint affirmative action as reverse discrimination and

deflecting claims that the Constitution should remedy de facto housing segregation or economic inequalities in education. These conservative arguments withstand scrutiny only in the sterile world of appellate courts and constitutional theory; in the real world of persistent racism and increasing inequality, they would be unpersuasive. Elites have succeeded on these issues in the courts precisely because they have been able to exclude the reality of racism from the discussion.

Even the recent judicial victory for affirmative action in higher education (*Grutter*, 2003) has troubling implications. The decision endorsed a labor-intensive admissions process that is most suitable for selective, elite colleges rather than large state universities. The process, moreover, rewards students who can eloquently portray diversity of any type. White children from wealthy families, raised with designer backgrounds and tutored by pricey admissions counselors, benefit from the admissions processes endorsed by this decision as much as the most advantaged minority students will.

The case, moreover, was telling in terms of the outpouring of support it generated from both liberal elites and more conservative corporate and military elites. The litigation generated a record number of amicus briefs. Faculty members and students held rallies and teach-ins around the country; many journeyed to Washington when the case was argued. The case appears to have been one of the top ten political events of 2003; on campuses, it may have attracted even more attention than the Iraq war did.

The support for affirmative action in *Grutter* was admirable, and may even have helped tip the balance of decision. But where are the same academic, corporate, and military elites when states cut funding for elementary schools in poor, predominantly

minority districts? Or refuse to overturn property tax funding for education? Or reject stronger laws against housing discrimination? Why don't elites march on statehouses as readily as they march on courthouses?

An unhappy possibility is that elites are comfortable with affirmative action in higher education, but would be challenged by more direct remedies for racism and inequality. When universities implemented affirmative action plans in the late 1960's, they concurrently began to expand the size of their classes (Merritt, 1998, p. 1060). More white students have gained admission to selective colleges, law schools, and medical schools after affirmative action than before it. Despite the constant griping of white applicants rejected by some universities, whites have suffered relatively little from affirmative action in higher education (Kane, 1998; Bowen & Bok, 1998).

At the same time, these elites have been able to assure themselves that they are enlightened, tolerant people who live in an integrated society. Selective colleges have just the "right" mix of white and minority students, enough African American and Latino students to give the campus an urbane, cosmopolitan air without threatening the white campus majority. Whites have also benefited from affirmative action by learning to work compatibly with minorities and by grooming enough well educated minorities to serve as business and military leaders, keeping rank-and-file minority workers complacent. The *Grutter* briefs themselves stressed these benefits of affirmative action.

Since the Supreme Court decided *Grutter* in June 2003, public discussion of racism and affirmative action has declined dramatically. The issues have barely surfaced in the Presidential campaign. From the public debate, one would think that deaths in Iraq, increasing poverty, cuts in state budgets and social programs, widening inequality,

and election fraud are all race neutral trends. Even the fiftieth anniversary of *Brown* did little to awaken serious discussion of ongoing racism and racial disparities.

It seems that, having secured the racial comfort of their campuses, officer corps, and corporate recruiting programs—a comfort, I hasten to add, that allows only modest participation of racial minorities—the professors, generals, and CEO’s have gone back to their libraries, maps, and budgets. No one is wrestling seriously with the deep inequalities and persistent racism that mark our society.

Nor will the courts solve those problems. The courts have steadfastly refused to recognize constitutional principles that would address the difficult issues of endemic racism. And, in truth, these are problems that require broader societal solutions than courts can supply. Without real democratic pressure and concerted action, we will not resolve the roots of racism.

The elites, however, have already obtained the remedy they sought—affirmative action in higher education—from the courts. What will bring them back into the political process to fight alongside the disadvantaged for greater equality? Lawsuits do not require the bargaining that the legislative process entails. Elites can obtain their desired ends from the courts without promising, in return, to support the agendas of their allies. This is the dark side of relying primarily on courts for social change: in the end, the courts may serve the ends of elites without requiring those elites to include less empowered citizens in their social agenda.

*Brown* is not to blame for these troubles. The decision was a true watershed in racial equality, a beacon for all the world to follow. It capped a brilliant litigation strategy that justifiably inspired others. But we have forgotten since the triumph of



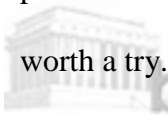
*Brown* that elites have an uncanny ability to assert themselves. During the last fifty years, they have done so in part by seizing the coattails of *Brown* itself.

How can we reverse this trend, forcing more policymaking into an arena in which minorities can better assert their interests? Since *Brown*, the political, economic, and social power of racial minorities has grown. The percentage of white citizens is declining in the United States, while that of nonwhites is growing. A half century of civil rights laws has improved political participation by minorities. Disenfranchisement has not ended, but it has diminished significantly. A half century of progress since *Brown* has laid the foundation for more effective policymaking outside the courts.

Minorities and whites who want to complete the mission started by *Brown* must turn now to legislatures, school boards, and other organizations that represent diverse political interests. Only by forging alliances in those arenas can we pursue the agenda of equality. The well of judicial reform has run dry.

At first glance, legislative politics seems an impossible alternative to the courts. Large campaign contributors appear to rule their legislators. Money likewise controls ballot issues and public referenda. Partisan bickering deadlocks Congress and many state legislatures. And sound bite politics seems to numb the minds of otherwise rational voters. How can true reform possibly occur in such a system?

These complaints are legitimate, but Crenson and Ginsberg remind us that elites *want* us to believe that the political process is hopelessly flawed. Stymied by that belief, opponents won't even try to assert their power. The truth is that we don't know how powerful the forces of equality could be if they flexed their political muscle. It is at least worth a try.



Several recent trends suggest new hope for reinvigorated and widespread political participation. Smith (2004) points out that the internet has allowed the rapid exchange of political information. It has also promoted real discussion among people from very different backgrounds, people who wouldn't even recognize one another on the street. Street protests have also acquired a new character. Protests against the U.S. invasion of Iraq galvanized citizens around the world, who participated in protests coordinated by internet and cell phone. Equally striking, the demographics of these protesters are quite varied. Senior citizens have marched beside teenagers; whites with African Americans and Latinos. The antiwar protests of the Viet Nam era mirrored sharp cultural schisms in the U.S. The current protests seem to bring together people with very different cultural, social, and economic interests.

The 2004 Presidential campaign is generating still more novel types of political participation. Both parties are focusing on grassroots organizing, particularly in the swing states. These efforts combine old-fashioned canvassing with sophisticated databases attempting to pinpoint sympathetic voters. Meanwhile, the advocacy group Move On has pioneered a form of political organizing that may have far-reaching impact. During the summer and fall of 2004, Move On organized thousands of "house parties" nationwide. Individual citizens posted on the web the availability of their homes for parties centered on voter registration and other political activities. Any citizen could register to attend these parties. The result was neighborhood groupings of people who often did not know one another, and who might not meet again after the party. Yet for a time they shared face-to-face political discourse and worked toward a common end.

In an age of gated communities, locked doors, terrorism, and civic apathy, it is almost unthinkable that suburbanites would open their homes to strangers who simply signed up for a political gathering on the web—yet it happened. The Move On parties, like other features of the recent political landscape, suggest a new appetite for hands-on political involvement and community coalition building. This is a hopeful sign for furthering the cause of racial equality.

In sum, as we celebrate *Brown*, we must also look to new forms of political engagement to develop *Brown*'s full legacy. The civil rights leaders who built the strategy behind *Brown* chose the right strategy for their time. It was essential that the United States Supreme Court declare the fundamental principle of equality and begin enforcement of that principle. Today, the times demand a different tactic. Courts may still play a role in finishing the battle that *Brown* began, but grassroots politics, community organizing, elected officials, and even global networks of protesters will play a more essential role. These are the new political forces with the power to challenge elites.

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Deborah Jones Merritt is the John Deaver Drinko/Baker & Hostetler Chair in Law at The Ohio State University, as well as the Director of the University's interdisciplinary John Glenn Institute for Public Service and Public Policy. Merritt holds courtesy appointments in Public Policy and Management, Sociology, and Women's Studies. She is well known for her scholarly and advocacy work on equality and affirmative action. In 2003, she coauthored an amicus brief supporting affirmative action in the University of Michigan lawsuits; her brief represented the views of the American Sociological Association, the Association of Black Sociologists, and three other social science organizations.