Courts, Politics, and Remedies: Reflections on *Brown v. Board of Education*

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Brown v. Board of Education is rightly celebrated as one of the greatest achievements of our judicial system. In addition to decisively declaring segregation unconstitutional, the case heralded a series of significant judicial decisions in which courts made significant policy pronouncements. Often these decisions were enforced with remedies that were more far-reaching than previous jurists would have contemplated. In this sense, *Brown*'s legacy reaches far outside the movement for racial equality, to include rights for women, gays, and people with disabilities—as well as environmental rights, workplace rights, and medical rights. The period from 1960 through the present has been an era of judicial policy making—quite distinct from the New Deal era that preceded it and that relied primarily on legislation to achieve social ends.

Increased flexibility of judicial remedies has been part of this trend. Courts can have a powerful impact on public policy simply by awarding—or withholding—money damages. But more flexible remedies enhance the courts' policymaking power.

As law professors, we tend to see the expansion of both judicial remedies and judicial policymaking as an unmixed blessing. Judicial decisions are our primary intellectual diet. We are comfortable with appellate judges and how they reason. We know that judicial decisionmaking inevitably encompasses policymaking, so we don't

balk at that idea. We devote much of our research and writing to fashioning new constitutional or common law rights and remedies—and persuading judges to adopt them. Indeed, most of us would be distinctly uncomfortable if we had to sell our ideas to legislators and lobbyists rather than to judges and law clerks.

Our preoccupation with the courts parallels that of many political activists. Consider how many interest groups, from the Sierra Club to the Center for Individual Rights, now use litigation as a primary means of achieving public policy. Consider how many letters you get from these groups—whatever your political interests—noting the importance of the Supreme Court and the significance of the next appointment to that Court. Sometimes it seems as if Justice O'Connor—or her successor as the swing vote on the Court—is the most important policymaker in America. And, indeed, there are press reports describing her that way.

As law professors, we are part of a much larger political climate that has embraced the courts as a primary means of achieving public policy. There are many good things about that trend. 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. In general, it seems easier to get appellate courts to take intellectual arguments seriously than to drag those eloquent theories through the mud of legislative caucuses, hearings, and statehouses. Litigation is much easier, and probably cheaper, than mobilizing grassroots support or winning election. 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 there is a downside to everything, and I want to explore some of the negatives of this trend. Matthew Crenson and Benjamin Ginsberg, political scientists at John Hopkins University, view our increasing reliance on the courts as part of a process in which Americans have "downsized democracy," transferring power away from ordinary citizens and concentrating it in the hands of elites. Crenson and Ginsberg argue that, although elites have always dominated our political process, in earlier days they needed the consent of a majority of citizens to govern. Without widespread citizen support, our government could not wage war or collect sufficient revenue. Before the expansion of government, ordinary citizens even performed a variety of administrative tasks that allowed government to do its business.

Crenson and Ginsberg argue that elites no longer need widespread citizen support to govern. Most government functions, including the military, have become highly professionalized. We no longer rely upon citizen soldiers or citizen notaries. And elites are now able to obtain the policy ends they most desire through the courts and back corridors of regulatory agencies—processes that they, but not ordinary citizens, understand well. Even if elites can't obtain the ends they desire, because political sentiment is against them, they have as much or more sway with courts and regulatory agencies as with more democratic processes. Although politicians still urge citizens to vote, Crenson and Ginsberg conclude, and give patriotic speeches about the need for all Americans to participate in our government, they really don't want us to participate—and

most of them actually hope we don't vote. That, of course, is the response most Americans have now adopted.

This is a provocative, even sinister, picture. It is at war with our image of the judicial process allowing the "little person"—the Gideons of the world—to prevail. Instead, Crenson and Ginsberg suggest that social policy litigation is controlled by elites, who use the courts to obtain political ends that a majority of the public might not support. If that's true, then as law professors, we are certainly part of the problem. How much truth is there in this picture?

Crenson and Ginsberg are correct that interest groups who use the courts do not necessarily represent the interests of even the people those groups purport to represent. The Sierra Club may claim to represent me and other nature lovers in court, but what assures that representation? Strategy and arguments are plotted in law offices and conference rooms, not among the grassroots members. Unless I read all of my mail very closely, I may not even know about the lawsuits that are maintained in my interest. Often, the organizations have institutional interests that differ from those of their members.

More troubling, the groups that pursue social policies through the courts do tend to represent elite interests. This is true of both liberal and conservative groups. The Sierra Club and other environmental organizations represent the interests of people who can afford to think about hiking trails and mountain views. Who represents the residents of trailer parks who want to post signs advertising their home businesses? The Center for Individual Rights is careful to choose white plaintiffs from working class backgrounds when they challenge affirmative action in higher education. But higher education itself is

reserved for about half the American public—and most of the beneficiaries of the Center's litigation are well-off whites who seek admission to more selective colleges.

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. These revenues substantially eased budget crises in many states—and allowed 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. 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 pay now the health and full 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 scenario may not have been plotted that way from the beginning, but it worked out that way because the players in any process will find a way to satisfy their interests, and the only players in this process were the elites. Low-income smokers really had no adequate representation.

In a different way, I worry that our national debate over racism and affirmative action shows some of the same characteristics—an unhealthy focus on litigation as a strategy and on issues that matter to elites. The recent lawsuits against the University of Michigan were extraordinary in many ways, including the outpouring of support from faculty and students at elite colleges and universities. A record number of amicus briefs, many of them from scholarly associations, were filed in the case. Faculty and students held rallies and teach-ins around the country. Many journeyed to Washington when the case was argued. These lawsuits were premiere political events—perhaps among the top ten political events of 2003.

I believe that affirmative action in university admissions is vitally important. In fact, I've devoted a fair amount of time to that issue over the years, and coauthored an amicus brief in the *Grutter* case. But it is an issue that matters primarily to elites. Only a small number of colleges and university programs have sufficiently selective admissions for affirmative action to matter. Certainly it is important—crucially important—to admit diverse students to the top colleges, law schools, and medical schools in the country. But is equally important—probably more important—to improve the quality of primary and secondary education in urban and rural schools. What concerns me is that, although all of us in higher education and other elite circles recognize that, we don't spend a lot of time addressing the issue. What if the outpouring of support that went into the Michigan cases were devoted to lobbying efforts to get our legislatures to raise taxes and improve the quality of education for inner city children? Couldn't we have the same impact on that front?

There is an uncomfortable truth in what Cremson and Ginsberg say. As elites, we get much of what we want through the courts, regulatory agencies, and our own economic power. The Michigan cases, after all, didn't just protect minority students' access to elite colleges and universities. They also protected the interests of white elites in maintaining a racially diverse environment that is integrated at a level that makes us most comfortable. Does our very comfort with this world, our satisfaction when we walk across campus and see a "critical mass" of minority students, make us less likely to go outside our world and champion the interests of minority children still trapped in the ghetto?

The key difference between making policy through the courts and making policy through the legislature is that litigation doesn't require alliances across social and economic lines. Elites at universities were able to protect our vision of the world by joining with other elites. Ivy league universities joined with Midwestern publics. Bar associations joined with medical associations. We all joined with military commanders. But no one had to gather support from mothers in housing projects or miners in Appalachia.

What if elites had to go to legislatures for the social policies they desired? Over time, we would have to form more alliances with those mothers in housing projects and miners in Appalachia. To get the results we want, we might have to push harder for the results they want as well. Increased funding for city schools might move ahead of funding for higher education. It is much easier for elites to rely upon courts, where we largely control the agenda, than to work with such alliances.

Of course, our legislative system is not very healthy right now. Campaign contributors have too much influence. Partisan bickering seems to deadlock Congress and state legislatures. Not much gets done these days on any legislative floor. Embracing our legislators is hardly a quick fix to Crenson and Ginsberg's critique of judicial policymaking.

But that, Crenson and Ginsberg argue, is exactly the point. Legislatures are lackluster right now because that serves the interests of elites. Elites don't need legislatures because they have the courts, regulatory agencies, and their own economic clout. It's the non-elites who need legislatures and should work to take them back. The power of the vote is still incredibly strong, if only it is exercised.

Maybe the lesson for us, as one part of society's elite machinery, is that as we continue to celebrate the power of the courts and the legacy of *Brown*, we should also consider the power of legislatures, of political alliances, and of grassroots movements. *Brown* was not just a court case or a litigation strategy. It was deeply rooted in a grassroots civil rights movement—and it served the interests of that movement. As we work towards social ends today, we should keep that history in mind. Society entrusts elites with enormous power. Do we use that power only for our own ends? Or are we willing to form alliances with others? And what is the most appropriate political venue for forming those alliances?

Matthew A. Crenson and Benjamin Ginsberg, Downsizing Democracy: How America Sidelined Its Citizens and Privatized Its Public (Johns Hopkins University Press 2002).