Democracy is a slippery term. I shall make no effort at a formal definition here. . . . But it would be scholastic pedantry to define democracy in such a way as to deny the title of "democrat" to Jefferson, Madison, Lincoln, Brandeis, and others who have found the American constitutional system, including its tradition of judicial review, well adapted to the needs of a free society. As Mr. Justice Brandeis said,

> the doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of governmental powers among three departments, to save the people from autocracy.

It is error to insist that no society is democratic unless it has a government of unlimited powers, and that no government is democratic unless its legislature had unlimited powers. Constitutional review by an independent judiciary is a tool of proven use in the American quest for an open society of widely dispersed powers. In a vast country, of mixed population, with widely different regional problems, such an organization of society is the surest base for the hopes of democracy.

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DAVID O'BRIEN

From *Storm Center*

Professor David O'Brien's fine book on the Supreme Court touches on many landmark cases in constitutional law. Few are more important than Brown v. Board of Education of Topeka, Kansas. *Today's students of American government often take* Brown *for granted, since they've lived with the Court's ruling their whole lives; thus they may forget the dramatic events surrounding the 1954 decision. In this excerpt O'Brien revisits the first* Brown *case, as well as* Brown II, *exploring the delicate relationship between the Court and public opinion. He then goes back to President Franklin Roosevelt's infamous 1937 "court-packing" scheme to illustrate another aspect of the impact of public opinion on the judiciary. Unlike the citizenry's direct and immediate reaction to Congress and the president, the communication of views between the public and the judiciary is less easy to measure, O'Brien acknowledges. Yet the Supreme Court lies, as it should, at the heart of the process that resolves the nation's monumental political issues.*

"WHY DOES the Supreme Court pass the school desegregation case?" asked one of Chief Justice Vinson's law clerks in 1952. *Brown v. Board of Education of Topeka, Kansas* had arrived on the Court's docket in 1951, but it was carried over for oral argument the next term and then consolidated with four other cases and reargued in December 1953. The landmark ruling did not come down until May 17, 1954. "Well," Justice Frankfurter explained, "we're holding it for the election"—1952 was a presidential election year. "You're holding it for the election?" The clerk persisted in disbelief. "I thought the Supreme Court was supposed to decide cases without regard to elections." "When you have a major social political issue of this magnitude," timing and public reactions are important considerations, and, Frankfurter continued, "we do not think this is the time to decide it." Similarly, Tom Clark has recalled that the Court awaited, over Douglas's dissent, additional cases from the District of Columbia and other regions, so as "to get a national coverage, rather than a sectional one." Such political considerations are by no means unique. "We often delay adjudication. It's not a question of evading at all," Clark concluded. "It's just the practicalities of life—common sense."

Denied the power of the sword or the purse, the Court must cultivate its institutional prestige. The power of the Court lies in the pervasiveness of its rulings and ultimately rests with other political institutions and public opinion. As an independent force, the Court has no chance to resolve great issues of public policy. *Dred Scott v. Sandford* (1857) and *Brown v. Board of Education* (1954) illustrate the limitations of Supreme Court policy-making. The "great folly," as Senator Henry Cabot Lodge characterized *Dred Scott*, was not the Court's interpretation of the Constitution or the unpersuasive moral position that blacks were not persons under the Constitution. Rather, "the attempt of the Court to settle the slavery question by judicial decision was simple madness." . . . A hundred years later, political struggles within the country and, notably, presidential and congressional leadership in enforcing the Court's school desegregation ruling saved the moral appeal of *Brown* from becoming another "great folly."

Because the Court's decisions are not self-executing, public reactions inevitably weigh on the minds of the justices. . . .

. . . Opposition to the school desegregation ruling in *Brown* led to bitter, sometimes violent confrontations. In Little Rock, Arkansas, Governor Orval Faubus encouraged disobedience by southern segregationists. The federal National Guard had to be called out to maintain order. The school board in Little Rock unsuccessfully pleaded, in *Cooper v. Aaron* (1958), for the Court's postponement of the implementation of *Brown's* mandate. In the midst of the controversy, Frankfurter worried that Chief Justice Warren's attitude had become "more like that of a fighting politician than that of a judicial statesman." In such confrontations between the Court and the country, "the transcending issue," Frankfurter reminded the brethren, remains that of preserving "the Supreme Court as the authoritative organ of what the Constitution requires." When the justices move too far or too fast in their interpretation of the Constitution, they threaten public acceptance of the Court's legitimacy.

The political struggles of the Court (and among the justices) continue after the writing of opinions and final votes. Announcements of decisions trigger diverse reactions from the media, interest groups, lower courts, Congress, the President, and the general public. Their reactions may enhance or thwart compliance and reinforce or undermine the Court's prestige. Opinion days thus may reveal something of the political struggles that might otherwise remain hidden within the marble temple. They may also mark the beginning of larger political struggles for influence in the country. . . .

When deciding major issues of public law and policy, justices must consider strategies for getting public acceptance of their rulings. When striking down the doctrine of "separate but equal" facilities in 1954 in *Brown v. Board of Education (Brown I)*, for instance, the Warren Court waited a year before issuing, in *Brown II*, its mandate for "all deliberate speed" in ending racial segregation in public education.

Resistance to the social policy announced in *Brown I* was expected. A rigid timetable for desegregation would only intensify opposition. During oral arguments on *Brown II*, devoted to the question of what kind of decree the Court should issue to enforce *Brown*, Warren confronted the hard fact of southern resistance. The attorney for South Carolina, S. Emory Rogers, pressed for an open-ended decree—one that would not specify when and how desegregation should take place. He boldly proclaimed

> Mr. Chief Justice, to say we will conform depends on the decree handed down. I am frank to tell you, right now [in] our district I do not think that we will send—[that] the white people of the district will send their children to the Negro schools. It would be unfair to tell the Court that we are going to do that. I do not think it is. But I do think that something can be worked out. We hope so.

"It is not a question of attitude," Warren shot back, "it is a question of conforming to the decree." Their heated exchange continued as follows:

CHIEF JUSTICE WARREN: But you are not willing to say here that there would be an honest attempt to conform to this decree, if we did leave it to the district court [to implement]?

MR. ROGERS: No, I am not. Let us get the word "honest" out of there.

CHIEF JUSTICE WARREN: No, leave it in.

MR. ROGERS: No, because I would have to tell you that right now we would not conform—we would not send our white children to the negro schools. . . .

Agreement emerged that the Court should issue a short opinion-decree. In a memorandum, Warren summarized the main points of agreement. The opinion should simply state that *Brown I* held radically segregated public schools to be unconstitutional. *Brown II* should acknowledge that the ruling creates various administrative problems, but emphasize that "local school authorities have the primary responsibility for assessing and solving these problems; [and] the courts will have to consider these problems in determining whether the efforts of local school authorities" are in good-faith compliance. . . .

Enforcement and implementation required the cooperation and coordination of all three branches. Little progress could be made, as Assistant Attorney General Pollack has explained, "where historically there had been slavery and a long tradition of discrimination [until] all three branches of the federal government [could] be lined up in support of a movement forward or a requirement for change." The election of Nixon in 1968 then brought changes both in the policies of the executive branch and in the composition of the Court. The simplicity and flexibility of *Brown*, moreover, invited evasion. It produced a continuing struggle over measures, such as gerrymandering school district lines and busing in the 1970s and 1980s, because the mandate itself had evolved from one of ending segregation to one of securing integration in public schools. . . .

"By itself," the political scientist Robert Dahl observed, "the Court is almost powerless to affect the course of national policy." *Brown* dramatically altered the course of American life, but it also reflected the justices' awareness that their decisions are not self-executing. The rulings [in] *Brown* . . . were unanimous but ambiguous. The ambiguity in the desegregation rulings . . . was the price of achieving unanimity. Unanimity appeared necessary if the Court was to preserve its institutional prestige while pursuing revolutionary change in social policy. Justices sacrificed their own policy preferences for more precise guidelines, while the Court tolerated lengthy delays in recognition of the costs of open defiance and the pressures of public opinion. . . .

Public opinion serves to curb the Court when it threatens to go too far or too fast in its rulings. The Court has usually been in step with major political movements, except during transitional periods or critical elections. It would nevertheless be wrong to conclude, along with Peter Finley Dunne's fictional Mr. Dooley, that "th' supreme court follows th' iliction returns." To be sure, the battle over FDR's "Court-packing" plan and the Court's "switch-in-time-that-saved-nine" in 1937 gives that impression. Public opinion supported the New Deal, but turned against FDR after his landslide reelection in 1936 when he proposed to "pack the Court" by increasing its size from nine to fifteen. In a series of five-to-four and six-to-three decisions in 1935–1936, the Court had struck down virtually every important measure of FDR's New Deal program. But in the spring of 1937, while the Senate Judiciary Committee considered FDR's proposal, the Court abruptly handed down three five-to-four rulings upholding major pieces of New Deal legislation. Shortly afterward, FDR's close personal friend and soon-to-be nominee for the Court, Felix Frankfurter, wrote Justice Stone confessing that he was "not wholly happy in thinking that Mr. Dooley should, in the course of history turn out to have been one of the most distinguished legal philosophers." Frankfurter, of course, knew that justices do not simply follow the election returns. The influence of public opinion is more subtle and complex.

Life in the marble temple is not immune from shifts in public opinion. . . . The justices, however, deny being directly influenced by public opinion. The Court's prestige rests on preserving the public's view that justices base their decisions on interpretations of the law, rather than on their personal policy preferences. Yet, complete indifference to public opinion would be the height of judicial arrogance. . . .

"The powers exercised by this Court are inherently oligarchic," Frankfurter once observed when pointing out that "[t]he Court is not saved from being oligarchic because it professes to act in the service of humane ends." Judicial review is antidemocratic. But the Court's power stems from its duty to give authoritative meaning to the Constitution, and rests with the persuasive forces of reason, institutional prestige, the cooperation of other political institutions, and, ultimately, public opinion. The country, in a sense, saves the justices from being an oligarchy by curbing the Court when it goes too far or too fast with its policy-making. Violent opposition and resistance, however, threaten not merely the Court's prestige but the very idea of a government under law.

Some Court watchers, and occasionally even the justices, warn of "an imperial judiciary" and a "government by the judiciary." For much of the Court's history, though, the work of the justices has not involved

major issues of public policy. In most areas of public law and policy, the fact that the Court decides an issue is more important than what it decides. Relatively few of the many issues of domestic and foreign policy that arise in government reach the Court. When the Court does decide major questions of public policy, it does so by bringing political controversies within the language, structure, and spirit of the Constitution. By deciding only immediate cases, the Court infuses constitutional meaning into the resolution of the larger surrounding political controversies. But by itself the Court cannot lay those controversies to rest.

The Court can profoundly influence American life. As a guardian of the Constitution, the Court sometimes invites controversy by challenging majoritarian sentiments to respect the rights of minorities and the principles of a representative democracy. The Court's influence is usually more subtle and indirect, varying over time and from one policy issue to another. In the end, the Court's influence on American life cannot be measured precisely, because its policy-making is inextricably bound up with that of other political institutions. Major confrontations in constitutional politics, like those over school desegregation, school prayer, and abortion, are determined as much by what is possible in a system of free government and in a pluralistic society as by what the Court says about the meaning of the Constitution. At its best, the Court appeals to the country to respect the substantive value choices of human dignity and self-governance embedded in our written Constitution.

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PETER IRONS

From *Brennan vs. Rehnquist*

The U.S. Supreme Court today is different than it was when President Franklin Roosevelt called the justices "Nine Old Men." The Court's membership now includes justices who are black, female, and young, and they come from different regions, religions, and socioeconomic backgrounds. Yet the fundamental issues faced by the Court have not changed. Legal scholar Peter Irons examines a primary philosophical battle on the Supreme Court: individual and minority rights protected by an active judicial branch versus majority power, expressed by strong legislative and executive branches, with the Court exercising judicial restraint. The battle was never better illustrated than in the contrast between Justice William J. Brennan (d. 1990) and Chief Justice William H. Rehnquist (d. 2005).