

2015

## Judicialization of Political Conflict: Evidence of Brown v. Board Of Education's Effect in Newspaper Opinion

Neal Allen

*Wichita State University, Department of Political Science, neal.allen@wichita.edu*

Follow this and additional works at: <https://scholarship.law.slu.edu/plr>



Part of the [Law Commons](#)

---

### Recommended Citation

Allen, Neal (2015) "Judicialization of Political Conflict: Evidence of Brown v. Board Of Education's Effect in Newspaper Opinion," *Saint Louis University Public Law Review*. Vol. 34 : No. 2 , Article 9.

Available at: <https://scholarship.law.slu.edu/plr/vol34/iss2/9>

This Article is brought to you for free and open access by Scholarship Commons. It has been accepted for inclusion in Saint Louis University Public Law Review by an authorized editor of Scholarship Commons. For more information, please contact [Susie Lee](#).

**JUDICIALIZATION OF POLITICAL CONFLICT: EVIDENCE OF  
*BROWN v. BOARD OF EDUCATION*'S EFFECT IN NEWSPAPER  
OPINION**

NEAL ALLEN\*

The United States Supreme Court, with its landmark racial integration case, *Brown v. Board of Education*,<sup>1</sup> stimulated a heated debate in the editorial pages of Southern newspapers. This debate encompassed arguments not just about the rightness or wrongness of the decision, but also included discussion of the roles of courts, states, and law in the American constitutional system. For example, S.F. Moody of Birmingham, Alabama wrote on June 16, 1954 about the proper application of Article V, Section 4 of the US Constitution, the republican guarantee clause:

A state is not a republic in which the ruler or group of rulers, dedicated to rule at will, can truly tell the subjects that the sovereignty resides in himself or the group possessed with the powers to rule. Likewise, when the court directs social problems and abolishes traditions in the name of law when there is no law covering such matters, there is a complete denial of a republican form of government.<sup>2</sup>

Moody's letter, arguing for a more restrained role for courts, drew a response from Charles M. Kidd of Birmingham, who argued on June 22 that

[t]he Supreme Court of the United States is given complete power to exercise the law in connection with our Constitution, and concerning any action which will in the long run improve our country. . . . Could we venture so far as to say that our republic is downfalling? Certainly not, but we could say and should say that our republic is even strengthened by this decision abolishing segregation.<sup>3</sup>

This exchange is indicative of the kind of debate stimulated by the Supreme Court with its *Brown* decision. This article analyzes Southern editorials and

---

\* Neal Allen, Assistant Professor of Political Science, Wichita State University, neal.allen@wichita.edu.

1. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

2. S.F. Moody, Jr., Letter to the Editor, *Court's Decision Accused of Being Tyrannical*, BIRMINGHAM NEWS, June 16, 1954, at 10.

3. Charles M. Kidd, Letter to the Editor, *Nation Strengthened by Supreme Court Decision*, BIRMINGHAM NEWS, June 22, 1954, at 14.

letters to the editor and finds a sizable and substantively distinctive effect of *Brown* on discussion of race. I find that the Court stimulated an increase in the volume of discussion of racial issues and reoriented that discussion of race to constitutional issues.

This article presents a theory of “judicialization” that identifies and describes the effect of a Supreme Court opinion outside of the judicial system. My focus is on how a decision shapes and transforms debate, instead of how much compliance or support follows a decision. I am most directly concerned with how, and to what extent, the Court can affect political debate, and how it affected Southern political debate with *Brown v. Board of Education*, in particular. When the Court judicializes political conflict, it reshapes it in the form of the appellate legal process.<sup>4</sup> Discussion in a given issue area that previously focused on the desirability or effectiveness of a given public policy is now also focused on issues of constitutionality. Participants in the debate, after the judicializing decision from the high court, argue about the constitutionality of public policy, the proper role of governing entities like states and the federal government, and the proper theory used to interpret the Constitution.

A decision like *Brown* expands the scope of constitutional argument, involving more political actors in the process of judicial review. Appellate courts engage in two processes: statutory interpretation and judicial review. While statutory interpretation is concerned with whether a given piece of legislation is being interpreted and applied correctly, judicial review is the process of testing whether a given action of government is consistent with the Constitution. Judicial review is concerned with the Constitution as higher law, and what kind of legislation or execution of legislation is impermissible under that higher law.

When individual citizens, like the Alabamians cited above, debate the proper application of the Constitution to a particular public policy like school segregation, they are engaged in a kind of constitutional interpretation. This expanded judicial review debate lacks the concrete mechanism for finality that appellate courts possess. Supreme Court justices debate over the proper application of judicial review, and they eventually vote for one of the competing interpretations. The issuance of an opinion or opinions brings the discussion to a close, at least until the justices decide to begin the process again. Debate outside the Court has no means of ending debate; discussion continues as long as there are people interested in discussing. The only means of achieving finality are elections, but only if those elections are contested on the same issues as the judicialized public debate, and the elections produce a

---

4. See GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 7 (1991).

stable governing majority of representatives who are committed to a common constitutional and policy vision.<sup>5</sup>

A major component of this judicialized political debate, stimulated but not controlled by a Supreme Court opinion, is the social/political doctrine. This paper argues that when a Court opinion stimulates discussion, that discussion often takes the form of constitutional doctrine. These doctrinal arguments are legal in focus, but arise from core commitments of parts of society and politics. While white Southerners responded to *Brown* with an alternate constitutional vision, that vision was influenced and motivated by regional commitments to white supremacy and institutional structures that protected white supremacy.<sup>6</sup> Thus that doctrine was social and political, as well as legal. The arguments that interested groups put forth in response to a Supreme Court opinion will articulate and reveal existing social/political doctrine. This doctrine will have the characteristics of constitutional doctrine, with theories of interpretation, identification of sacred higher law texts, conceptions of institutional design, and logical arguments. These doctrinal positions will support, oppose, or both support and oppose the Court opinion.

Here it is significant not merely that in the 1950s the Court stimulated increased opposition to school integration in the South.<sup>7</sup> The form of argument used by Southern defenders was legal and constitutional, opposing the foundations of the Court's integration arguments.<sup>8</sup> White Southern leaders did not merely disagree with Chief Justice Warren's assertion that separate institutions were inherently unequal, or that all citizens were entitled to equal treatment from federal and state government.<sup>9</sup> White Southerners presented a developed alternate constitutional doctrine, still working with the Constitution as the primary sacred text.<sup>10</sup> Defenders of segregation added to their interpretive theory new sacred texts, like the Kentucky and Virginia Resolutions and the writings of John C. Calhoun.<sup>11</sup> They offered a state-centered creation story to counter the Marshallian nationalist origins assumed

---

5. *See id.* at 160–62.

6. LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 46–48, 60–62 (2000).

7. *See* MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 389–408 (2004).

8. POWE, *supra* note 6, at 60–62.

9. *See id.* at 58–62.

10. *See id.*

11. *Id.*; *see also* Thomas Jefferson, *Kentucky Resolutions* (Nov. 10, 1798, Nov. 14, 1799), *reprinted in* 5 *THE FOUNDERS' CONSTITUTION* 131–35 (Philip B. Kurland & Ralph Lerner eds., 1987); James Madison, *Virginia Resolution* (Dec. 21, 1798), *reprinted in* 5 *THE FOUNDERS' CONSTITUTION* 135–36 (Philip B. Kurland & Ralph Lerner eds., 1987); JOHN C. CALHOUN, *I WORKS OF JOHN C. CALHOUN* (1853).

for the Union by Warren.<sup>12</sup> White southerners also grounded their thinking in the concept of interposition, which was at the core of their understanding of institutional design.<sup>13</sup>

The presentation of social/political doctrine is an important component of the effect of a transformative Court opinion, because it allows for a kind of communication between the Court and its adversaries, in a type of discourse that is shaped by the arguments and institutional characteristics of the judiciary. The presentation of arguments in a doctrinal form by Court opponents allows for debate with groups in government and society who support the general issue position of the Court, but for different reasons or from different perspectives. This article makes use of newspaper opinion as a sample and reflection of the broader debate about race stimulated by *Brown*, and uses the theory of judicialization to analyze this data.

### I. DATA AND METHODS

This article is an empirical examination of the Court's indirect effect, testing whether the judicialization model discussed above describes discussion of race in the 1950s South. To provide data demonstrating *Brown's* effect on political debate in the South, I examine every editorial or letter to the editor mentioning or discussing race or segregation in five Southern daily newspapers from 1950 to 1956. I examine two large metropolitan papers, the *Richmond News-Leader* and the *Birmingham News*. I also look at three smaller papers published in small cities, the *Bryan (TX) Eagle*, the *Florence (SC) Morning News*, and the *Meridian (MS) Daily Star*.

I argue that *Brown* should increase the frequency and constitutional content of debate on Southern editorial pages, and that the debate will take the form of an alternate constitutional doctrine to that propounded by the Supreme Court. From my judicialization theory I derive three empirical implications, or expectations. First, I expect that Southern newspapers will publish more editorials and letters about race and segregation after *Brown* is issued than before the decision, owing to increased attention to the issue of race once segregation is under perceived threat. Second, I expect that more editorials and letters to the editor concerning race will discuss constitutional issues after *Brown* than before the decision, with elite and mass political actors adopting the discourse and subject matter of constitutional interpretation. Third, I expect that the editorials and letters to the editor, taken together, will take a doctrinal position on race and segregation, and present constitutional arguments to support that position.

---

12. POWE, *supra* note 6, at 58–60.

13. *Id.*

The evidence found for the third expectation, involving the substantive content of editorials and letters to the editor, is the core finding of this article. The first two quantitative expectations, however, support the qualitative argument in that they help to establish that judicialization is prevalent and significant. If discussion was reshaped by the Court into a form paralleling appellate courts, but such discussion was sparse and infrequent, then the content of discussion would not be crucial to an understanding of *Brown's* effect. If editorials and letters making constitutional arguments made up only a small fraction of the increase in discussion of race, then judicialization would likewise not be very significant to a full understanding of *Brown's* effect. Findings of frequency and constitutional focus, however, are evident and supportive of qualitative findings.

The first two expectations lend themselves to some basic descriptive statistics, and the third (while possibly not a hypothesis, but a theoretical proposition) requires more interpretive evidence. The data set collected from Southern newspapers 1950–56 provides data supporting all three expectations. Editorials and letters to the editor speak to the concerns of this inquiry, in that they are public expressions of argumentative positions about race in the era of *Brown v. Board of Education*. As arguments, they consist, with varying degrees of logic and complexity, of propositions supported by evidence. As arguments, they can demonstrate the importance of constitutional concerns in discussion before and after the Supreme Court decisions.

The selection of data is not random, which limits claims about its representativeness of Southern or American opinion in the 1950s. This nonrandomness, however, is also an asset for this inquiry. Writers of editorials and letters to the editor chose to express their opinions publicly, evidencing some degree of thought about the issue of race.<sup>14</sup> Thus these data are unlikely to reflect what public opinion researchers call “non-attitudes”—statements that do not reflect well-thought-out opinions, but merely on-the-spot reactions to posed questions.<sup>15</sup> Writers of editorials and letters in this data set are likely to

---

14. See TAEKU LEE, MOBILIZING PUBLIC OPINION: BLACK INSURGENCY AND RACIAL ATTITUDES IN THE CIVIL RIGHTS ERA 106 (2002). Lee makes similar use of nonrandom data to analyze historical public opinion. He uses letters to the president as a proxy for informed public opinion, sampling one of every twenty letters from 1948–65. He argues that this data is more indicative of public opinion than survey responses, since letter data is created by individuals who have thought about an issue and formed an opinion, instead of being created by an interaction between an individual and a survey. The kind of effects that are the subject of my qualitative analysis would not be evident in a survey, but are evident in editorials and letters sent to newspapers.

15. JAMES S. FISHKIN, WHEN THE PEOPLE SPEAK: DELIBERATIVE DEMOCRACY & PUBLIC CONSULTATION 3–4 (2009).

have been active and thoughtful participants in a national and regional conversation, and likely to shape discussion about race and segregation.<sup>16</sup>

I focus on debate in the South for both theoretical and practical reasons. While the eleven former Confederate states were not the only states operating segregated school systems, the South was home to the largest concentration of blacks in America, and to the most entrenched and pervasive form of racial segregation.<sup>17</sup> Thus reaction to *Brown* was most pronounced in Southern states, even though only one of the five desegregation cases decided on May 17, 1954 was from a Southern state.<sup>18</sup> *Brown* was regarded as a direct challenge to regional customs, traditions, and ways of life, and thus provoked a massive reaction.<sup>19</sup> Focusing on the South allows me to examine reaction to the Supreme Court's decision in a relatively unfiltered form, since white Southern opposition to integration became dominant in many Southern states before other important events involving integration, like the 1957 integration of Little Rock High School in Arkansas and the protest movements of the 1960s.<sup>20</sup> Also, focusing mainly on Southern reactions allows me to assemble a data set of five newspapers from different parts of the South, making my sample a more representative regional sample, instead of having one Southern paper in a larger national data set.

The five-newspaper data set is representative of the 1950s South in several important ways. While all five papers are dailies, the Richmond and Birmingham are major metropolitan dailies, while the Florence, Meridian, and Bryan papers are small city dailies. Having data from large and small papers captures both metropolitan and rural opinion. Small city papers are the best approximation of a rural paper for this inquiry, since most small-town papers are weekly and would not provide enough data and also may not be available on microfilm. The five papers are also differentiated by subregion, with Birmingham, Alabama, Meridian, Mississippi, and Florence, South Carolina in the Deep South, and Richmond, Virginia and Bryan, Texas in the Peripheral South.

The states served by the five papers examined here also differ in their immediate connection to the Supreme Court decision in 1954. Clarendon County, South Carolina was the origin of *Briggs v. Elliott*, one of *Brown*'s companion cases.<sup>21</sup> School districts in Virginia and Texas were the subject of

---

16. See LEE, *supra* note 14, at 106.

17. See C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 128 (3d ed. 1974).

18. KLARMAN, *supra* note 7, at 292.

19. See NUMAN V. BARTLEY, *THE RISE OF MASSIVE RESISTANCE: RACE AND POLITICS IN THE SOUTH DURING THE 1950S*, at 67 (1969).

20. See KLARMAN, *supra* note 7, at 390–91.

21. *Briggs v. Elliott*, 342 U.S. 350 (1952).

desegregation orders issued by federal judges in 1956.<sup>22</sup> Court-ordered integration did not come to Alabama and Mississippi for over a decade after *Brown* and *Brown II*, the 1955 implementation decision.<sup>23</sup> The data set includes one paper, the *Richmond News-Leader*, which was a regional and national leader in forming a counterargument to the Court on integration.<sup>24</sup> Thus many letters are written in response to editorials in that paper about integration, and are therefore once-removed from *Brown* in the causal chain. The Richmond paper provides the strongest example of the judicialized debate, but the other four papers provide corroborating evidence.<sup>25</sup> All these important differences among the five chosen newspapers make the data set as representative as possible, considering the labor required to sort through six and a half years of each newspaper, a period encompassing over 2,000 days of coverage.<sup>26</sup>

I chose the period from June 1, 1950 to November 31, 1956 for reasons of substance and practicality. The foremost advantage of studying newspaper opinion in that time period is that *Brown* occurs in the middle of it, on May 17, 1954.<sup>27</sup> Thus I can track change in response to Supreme Court action. Also *Brown* is the only major Supreme Court decision on race in the period,<sup>28</sup> although there is some discussion of the 1950 *Sweatt v. Painter* decision, which ordered that state law schools be integrated, in the beginning of the period.<sup>29</sup> Also, the Little Rock crisis of 1957 is outside of the scope of the data set, as are all major direct action protest events except for the Montgomery bus boycott of 1955. The regional and temporal features of the five-newspaper data set allow for a focus on *Brown* as the event that caused increases in, and transformation of, the discussion of race.

I constructed this data set with a two-step sorting process. First I collected every editorial or letter to the editor that discussed race. An opinion piece was classified as discussing race if it used the words “Negro” or “colored,” or if it referred specifically to a particular race or ethnicity, or to racial minorities.

---

22. KLARMAN, *supra* note 7, at 414.

23. ROSENBERG, *supra* note 4, at 50–54.

24. POWE, *supra* note 6, at 58–60; KLARMAN, *supra* note 7, at 395, 417.

25. *See infra* Table 1.

26. The number of days of editorial opinion examined differs slightly from paper to paper, since some did not publish on Sunday, or did not have an editorial page on Sunday. Also some papers did not publish on certain holidays. The data set also does not include opinion from February 1–15, 1953 of the *Richmond News-Leader*, due to a missing reel in the microfilm collection of the Center for Research Libraries.

27. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

28. The only Supreme Court cases that are frequently discussed in the newspaper opinion under review here are the cases that became the *Brown* decision, in particular *Briggs v. Elliott* in South Carolina. *See Briggs v. Elliott*, 132 F.Supp. 776 (E.D.S.C. 1955).

29. *Sweatt v. Painter*, 339 U.S. 629 (1950).



Explicit discussion of “civil rights” qualified as race discussion, as did any explicit or implicit mention of segregation or integration. Pieces using terms like “FEPC,” the acronym for the Fair Employment Practices Commission, were included if in context the writer was referring to the FEPC in its dealings with racial discrimination, since that federal agency dealt with other kinds of discrimination. Mentions of “the Supreme Court’s recent decision” were only classified as discussion of race if the context made clear that the decision discussed was *Brown* or another race relations decision. This sorting collected 648 editorials and 791 letters, taken from over 10,000 daily editions of the five newspapers. Table 1 lists the breakdown of editorials and letters by newspaper.<sup>30</sup> All papers usually published several editorials, although the Richmond and Bryan papers occasionally published only one. The Bryan and Florence papers published letters so infrequently that they do not provide data useful for this analysis. The Meridian paper normally printed one letter to the editor, and the Richmond and Birmingham papers, most days, printed several, with Richmond occasionally printing more than a dozen.

I then coded the observations for the presence of one or more of four frames: constitutional, economic, religious, and Cold War. Many scholars, notably Gamson, have discussed the importance of frames as conceptual structures that condition the presentation and reception of information and argument.<sup>31</sup> I argue that the Supreme Court discussed race using a constitutional frame, and Southerners responded with arguments presented through a constitutional frame. Editorials and letters also show use of other frames as well, although they are not as prevalent as the constitutional frame.

An opinion piece was coded as constitutional, or as using a constitutional frame, if it discussed one of the following issues or topics: the Supreme Court or other courts, the constitutionality of government actions, interpreting the Constitution, the structure of the political system, or the relationship between political institutions like states and the federal government. A piece was coded as using an economic frame if it discussed the national or local economy, employment, economic prosperity or growth, or the connection between race and economics. A piece was coded as religious if it discussed race with reference to Christianity or another religion, supported an argument with reference to religious authority, or if the writer used phrases like “God help us” or “Almighty God” when discussing racial issues. A piece was coded as using a Cold War frame if the writer linked racial issues to the Soviet Union, communism, or socialism. Some editorials and letters used more than one frame, and were coded as such.

---

30. See *infra* Table 1.

31. WILLIAM A. GAMSON, TALKING POLITICS 4–7 (1992).

## II. FINDINGS

Concerning frequency, my theory generates an expectation that there will be more editorials and letters to the editor that discuss race after *Brown* than before the decision. Analysis of the newspaper data follows the expected pattern. Table 2 presents the frequency of editorials before and after May of 1954.<sup>32</sup> The five newspapers published 4.5 editorials per month before the decision, and 13.9 per month after, more than tripling after May of 1954.<sup>33</sup> Since the *Richmond News-Leader* devoted such a large part of its editorial pages to presentation of the constitutional argument against integration, devoting the entire editorial page to the theory of “interposition” for months in late 1955 and early 1956, I also analyzed the editorial data without the Virginia paper.<sup>34</sup> Table 3 presents those results, showing an increase from 3.4 editorials per month before the decision to 9.5 per month after, nearly the same percentage increase as the full sample.<sup>35</sup> Table 1 shows the number of editorials by year, with years designated in distance from May of 1954.<sup>36</sup> The fifth year, beginning with the month of the Supreme Court decision, shows the sharpest increase in discussion.<sup>37</sup>

Letters to the editor that discuss race also increase in number after *Brown*, and the increase is much larger than that observed in editorials.<sup>38</sup> Table 4 shows these results, with an increase from 2.2 letters per month before the decision to 22.0 per month after,<sup>39</sup> and Table 2 shows the increase in editorials

32. See *infra* Table 2. For purposes of quantitative analysis, the entire month of May 1954 is counted as after the Supreme Court decision, even though it was handed down on the 17th and reported in newspapers on the 18th. When the data are analyzed by year, the years used begin with May of the calendar year. If considering the entire month of May 1954 as after the decision would have any effect on the findings of this paper, it would be to slightly reduce the observed impact of *Brown*. Since May 1–17 is such a small part of the time studied, any effect on analysis is minimal or nonexistent.

33. See *infra* Table 2.

34. See Frances L. Baer, *Resistance to Public School Desegregation Arkansas, Little Rock, and Beyond*, in *LAW & SOCIETY RECENT SCHOLARSHIP* 61, 61–80 (Melvin I. Urofsky ed., 2008).

35. See *infra* Table 3.

36. See *infra* Table 1.

37. See *infra* Table 1 and Table 2. Both Table 1, showing frequency of editorials, and Table 2, showing frequency of letters, show the highest frequency in 1955 and 1956, not in 1954. This might be a result of a lagged effect of *Brown*, or an effect of *Brown II*, in June 1955. Two events, however, may explain the lagged increase. Discussion of race in Birmingham spiked in response to the attempt of a black student, Autherine Lucy, to enter the University of Alabama. See generally DR. JACK KUSHNER, *COURAGEOUS JUDICIAL DECISIONS IN ALABAMA* 75 (2011). In Virginia, discussion of race increased surrounding a special session of the state legislature, and letters increased in response to a series of editorials, discussed below, that attempted to influence that special session. See generally BENJAMIN MUSE, *VIRGINIA’S MASSIVE RESISTANCE* 24–38 (1961). Both these events, however, were to a great extent results of *Brown*.

38. See *infra* Table 4.

39. See *infra* Table 4.

by month.<sup>40</sup> This tenfold increase is much larger than the threefold increase observed in editorials. The difference might be due to the fact that newspaper editorial writers, as members of the Southern elite, were likely aware of the potential threats to segregation, from both courts and non-Southerners in the legislative and executive branches. Thus editorial writers began the 1950s with a substantial interest in racial issues, with *Brown* contributing to an increased focus in the middle of the decade. The decision was a greater shock to the mass of Southern whites, who could no longer count on their elected leaders to prevent a challenge to segregation coming from the national government.<sup>41</sup>

I also analyzed the letter to the editor data without the *Richmond News-Leader*, which provided over two-thirds of the letters.<sup>42</sup> Table 5 presents those results. The sample with Richmond removed, which is mostly Birmingham letters, showed an increase from .69 letters per month before *Brown* to 5.9 letters per month after the decision.<sup>43</sup> The increase was similar, but slightly smaller in percentage terms, than that observed in the full sample.<sup>44</sup>

My second empirical expectation derived from my judicialization theory is that a larger percentage of editorials and letters to the editor will present constitutional arguments, or utilize constitutional frames, after the decision than before. To capture such an increase I calculate the percentage of editorials that are coded as constitutional for each year studied. I designate year periods from May of 1954 in order to capture the effect of *Brown*. Table 6 presents the results of this analysis, showing that in the fifth year studied constitutional editorials jumped from 19% to 45% of total editorials discussing race.<sup>45</sup> Table 7 presents a more focused analysis, with 23% of editorials before *Brown* making constitutional arguments, and 47% making constitutional arguments

---

40. See *infra* Table 2.

41. I must make one caveat to my treatment of letters to the editor as data indicative of Southern mass opinion in the 1950s. These letters are a clearly nonrandom sample not just because the writer had to decide to submit a letter, but also because a newspaper editor had to decide to print the letter. I have no way of knowing how many letters sent to the five newspapers in my sample were not printed, or whether the unprinted letters differ in substantively important ways from the printed letters. The printed letters, however, are from both supporters and opponents of the Supreme Court; some make constitutional arguments, some do not. This diversity leads me to infer that editors were not excluding certain letters based on the argument of writers. Also the quantitative and qualitative findings of this article are robust enough to be valid even if there was some substantive filtration of letters. I am using the letter and editorial data to advance a particular empirical interpretation of *Brown*'s effect, not to paint an exactly representative picture of Southern public opinion in the 1950s.

42. See *infra* Table 5.

43. See *infra* Table 5.

44. Compare *infra* Table 5, with *infra* Table 4.

45. See *infra* Table 6.

after.<sup>46</sup> Table 8 presents the same analysis with data from the *Richmond News-Leader* removed, with a greater percentage increase, from 10% to 33%.<sup>47</sup>

Letters to the editor show a parallel increase in the proportion of constitutional argumentation after *Brown*. Table 9 shows the percentage of constitutional letters by year, with years after May 1954 showing a higher percentage of letters making constitutional arguments.<sup>48</sup> Table 10 shows that before *Brown*, letters making constitutional arguments constituted 21% of the total, and after the decision were 55% of the total.<sup>49</sup> Table 11 presents results for the sample without Richmond letters, showing an increase from 3% to 41%.<sup>50</sup>

If *Brown* had the judicializing effect that I claim here, the constitutional frame should be more prevalent than other frames after the decision. Tables 12 and 13 show such a relationship, with use of constitutional frames outnumbering use of the other three frames after May of 1954.<sup>51</sup> The only other frame that is significantly more common after the decision is the religious frame in the letters sample.<sup>52</sup> While the constitutional frame is nearly three times as prevalent, the religious frame is used in 127 out of 683 letters after *Brown*.<sup>53</sup> Much of this use of religious frames comes from the argument that segregation is ordained by God, a particular religious argument not often found in editorials. Such religious argument would likely be made by letter writers in response to any threat to segregation, not just one coming from the Supreme Court.

Quantitative analysis of newspaper opinion demonstrates that discussion of race increased sharply after *Brown*, and that discussion was often carried on using constitutional argument.<sup>54</sup> The most interesting finding of this article, however, comes from textual analysis of editorials and letters to the editor. I find that the arguments made in response to *Brown* constitute an ongoing dialogue about the nature of the American constitutional system and demonstrate how the Supreme Court stimulated nonjudicial actors to engage in constitutional argument.

The best and most coherent example of judicialized argument, and in particular social/political doctrine, is the editorial campaign waged on the editorial pages of the *Richmond News-Leader* in late 1955 and early 1956. Within the conflict over integration that later played out in elections and street

---

46. See *infra* Table 7.

47. See *infra* Table 8.

48. See *infra* Table 9.

49. See *infra* Table 10.

50. See *infra* Table 11.

51. See *infra* Table 12 and Table 13.

52. See *infra* Table 13.

53. See *infra* Table 13.

54. See *infra* Table 1.

protests, white Southerners constructed an alternate constitutional vision.<sup>55</sup> Written by James J. Kilpatrick, these writings were an explicit attempt to give legal and constitutional form to the reactionary movement of the White South.<sup>56</sup> Powe identifies the editorials as key documents in the development of the Southern resistance. “The political and intellectual problem facing the South was how to explain to itself and the rest of the nation why defying the Supreme Court of the United States was okay.”<sup>57</sup>

The *News-Leader* editorials present a constitutional interpretation constructed around the concept of interposition, in which a state “interposes” itself between its citizens and an unjust federal government action.<sup>58</sup> Thus, resistance to the Supreme Court decision was not unlawful, but “the highest possible example of fidelity to the compact.”<sup>59</sup> According to Kilpatrick’s understanding, the moral and legal high ground is occupied by Southern Whites, with their “reverence for law, and our obedience to constituted authority.”<sup>60</sup> This states’ rights-centered theory was justified with reference not just to the nature of the ratification of the Constitution, but to other documents like Jefferson and Madison’s Kentucky and Virginia Resolutions, and the writings of Calhoun. The Southern federalist theory is argued against the Court’s nationalism; individual rights are confronted by sovereign power.

These editorials follow the form of what I call the production of social/political doctrine. Previously existing regional values are publicly presented as a coherent doctrine that is grounded in legal and historical authority. An interpretation of the Constitution is supplemented by the inclusion of supportive sacred texts into the constitutional canon. A revised founding narrative is offered as the foundation for opposition to the Court’s argument and directives. Thus the Court stimulates an intellectual process that replicates its own process, but using different inputs and ideas.

Not only do the arguments of the Richmond paper’s Kilpatrick editorials follow the form of social/political doctrine, they were published in a form clearly meant to be taken as constitutional doctrine. The *News Leader* published them in a pamphlet called *Interposition*, and included supporting materials like the Kentucky and Virginia Resolutions, and writings by states’ rights proponents like Calhoun, John Taylor of Caroline, and Littleton Waller Tazewell, governor of South Carolina in the 1830s.<sup>61</sup> These sacred texts were

---

55. Baer, *supra* note 34.

56. See JAMES J. KILPATRICK, INTERPOSITION: EDITORIALS AND EDITORIAL PAGE PRESENTATIONS, THE RICHMOND NEWS LEADER, 1955–1956 (1956).

57. POWE, *supra* note 6, at 58.

58. *Id.*

59. See KILPATRICK, *supra* note 56 (originally printed Nov. 23, 1955).

60. *Id.* (originally printed Nov. 22, 1955).

61. *Id.*

included along with resolutions and reports of the Virginia legislature in support of massive resistance to integration.<sup>62</sup> This pamphlet includes all the components of a social/political doctrine and was produced in opposition to *Brown* and to support the movement against the Court's position.<sup>63</sup>

In 1962, Kilpatrick wrote an extended book version of the argument presented in his 1955–56 editorials, called *The Southern Case for School Segregation*.<sup>64</sup> In the introduction, he framed his project as the production of constitutional doctrine.<sup>65</sup>

May it please the court:

When this book was conceived, it was intended to be titled “U.S. v. the South: A Brief for the Defense,” but it seemed a cumbersome title and the finished work is not, of course, a brief for the South in any lawyer's sense of the word. It is no more than an extended personal essay, presented in this form because the relationship that exists between the rest of the country and the South, in the area of race relations, often has the aspect of an adversary proceeding. We of the South see ourselves on the defensive, and we frequently find ourselves, as lawyers do, responding in terms of the law and the evidence.<sup>66</sup>

This project, however, was not exclusively pursued by one newspaper over a few months, but by different newspapers and hundreds of letter writers across the South. Analysis of the five-newspaper data set finds that discussion of race shifted to a constitutional focus in the mid-1950s, and this shift was a result of *Brown v. Board of Education*.<sup>67</sup>

Before moving to a discussion of post-*Brown* judicialized dialogue, it is important to examine dialogue before the Supreme Court decision. Race in general, and segregation in particular, were often discussed as public policy before the decision, and not in terms of constitutionality. An illustrative example is this passage, from the editorial “Crime and the Deep South, III” from the *Richmond News-Leader* on May 1, 1953, discussing the relationship between high murder rates and large black populations in Southern cities:

The level of morality and respect for law indicated by these figures constitutes one of the principal reasons advanced by the South in defense of its historic public policy of racial segregation, though for some reason it is difficult to get our critics to recognize the facts. But these demonstrably high crime rates constitute more than that. They represent an economic loss and a social evil of

---

62. *Id.*

63. *Id.*

64. JAMES J. KILPATRICK, *THE SOUTHERN CASE FOR SCHOOL SEGREGATION* 6–7 (1962).

65. *Id.*

66. *Id.*

67. *See infra* Table 11.

the first magnitude and they justify thoughtful study by leaders of both races to determine how the picture may be improved.<sup>68</sup>

Segregation is discussed as a desirable governmental policy and resulting in reduction of crime.<sup>69</sup> Argument about race does not here involve a vision of the constitutional system.<sup>70</sup>

An editorial from the *Bryan (TX) Eagle*, titled “Public Housing,” published June 21, 1951, gives another example of discussion of race in terms of policy, not constitutionality:

In the opinion of citizens of Bryan who are generally familiar with conditions the need for such a project is greater than it was a decade or more ago. In that period there has been a heavy influx of Mexicans and many of these families are in deplorable condition from the point of housing. Many Negro families are in no better condition.<sup>71</sup>

This editorial, the only one in the data set discussing a minority group other than blacks, is concerned with segregation as public policy.<sup>72</sup> It advocates the expansion of public housing, and argues this expansion should occur within the framework of segregation.<sup>73</sup> A lengthy example of pre-*Brown* argument on race comes from an editorial published July 19, 1951 in the *Florence (SC) Morning News*, under the title “The North Could Profit by Studying Methods of the South in Handling of Race Riots.”<sup>74</sup>

The South has never had a race riot equivalent to the one staged in Cicero, a suburb of Chicago, not even during the bitter Reconstruction days.

It should stop the mouths of the Northern agitators who like to give the impression that the South is the only section of the nation where relations between the races is not what is ought to be. . . . [W]e [the South] recognize the problem for what it is and set up conditions in which the two races can live side by side peaceably and profitably.<sup>75</sup>

This defense of segregation is made on policy grounds, not grounds of constitutionality or in terms of the proper organization of the political system.<sup>76</sup>

Nonconstitutional, policy-focused arguments about race also were prevalent in letters to the editor before *Brown*. A letter signed “Meridian Home Owner” published December 19, 1950 in the *Meridian (MS) Star* calls for

---

68. *Crime in the Deep South, III*, RICHMOND NEWS-LEADER, May 1, 1953, at 10.

69. *Id.*

70. *Id.*

71. *Public Housing*, BRYAN DAILY EAGLE, June 21, 1951, at 2.

72. *Id.*

73. *Id.*

74. John M. O’Dowd, *The North Could Profit By Studying Methods Of The South In Handling Of Race Problem*, FLORENCE MORNING NEWS, July 19, 1951, at 4.

75. *Id.*

76. *Id.*

more available housing for black citizens, arguing in terms of segregationist policy, not constitutionality:

Southern Negroes are not clamoring for anti-segregation. They want homes where they can have peace, quiet, sanitary surroundings, where they can rear their children properly and enjoy the friendship and companionship of their own kind. They want to become first-class, taxpaying, home-owning citizens. They are part and parcel of the community.<sup>77</sup>

Such support for segregationist public policy was also evident in a letter from Henry L. Jones of Birmingham, Alabama, published in the *Birmingham News* under the title of “Another Negro Park, or Improve Present One,” on August 31, 1952: “There is no reason why the city cannot at least have a properly equipped park. There are a lot of places smaller than Birmingham which try to show that they are interested in their Negro population also.”<sup>78</sup> This focus on policy, not constitutionality, was characteristic of discussion of race in the pre-*Brown* period.

The shock to the Southern social and political system that came from the high court in May of 1954 shifted the focus of Southern race debate to one of constitutionality.<sup>79</sup> Segregation was still defended as desirable and effective public policy, but now the constitutional frame was most evident. Some of this constitutional argument concerned the practical questions raised by the *Brown* decision. *The Birmingham News* discussed issues of implementation in an editorial published on December 13, 1954, titled “Alabama Communities Vary Widely as to School Segregation Problem.”

Alabama in some respects has the gravest problem of all the states in regard to carrying out the decision of the U.S. Supreme Court that segregation should be abolished in public schools. No other state has a wider range in the proportions of the races which live in various counties. . . . [T]he school problems growing out of the court’s de-segregation decision can best be regarded as local with methods and timing in dealing with the situation having regard for the make-up of population. The situation surely is one that the Supreme Court recognizes and will consider in making its order of last May 17 effective.<sup>80</sup>

Many other editorials and letters engaged in discussion of the direct effect of the Court’s ruling.

Others, particularly the *Richmond News-Leader*, presented highly theoretical and historically grounded arguments for action that would preserve a “states’ rights” version of the constitutional system, a system which many

---

77. Letter to the Editor, *Meridian Home Owner*, MERIDIAN STAR, Dec. 19, 1950, at 4.

78. Henry L. Jones, Letter to the Editor, *Another Negro Park or Improve Present One*, BIRMINGHAM NEWS, Aug. 31, 1952, at C2.

79. See *infra* Table 13.

80. Editorial, *Alabama Communities Vary Widely as to School Segregation Problem*, BIRMINGHAM NEWS, Dec. 13, 1954, at C2.



white Southerners believed was ordained by the Founding and the Constitution.<sup>81</sup> The doctrine of interposition was also supported by other Southern newspapers. The *Florence Morning News* argued on January 8, 1956:

There is a serious question in the minds of the Southern states as to whether or not the Supreme Court exceeded the rights and authority given it in the Constitution. Since the purity of the Constitution is at the heart of the test, Interposition would be an act to strengthen the Constitution. It would not challenge the Constitution.

Recognizing the right of the States to challenge a questionable act places the burden of proof properly on the shoulders of the Federal Government. It must win support for its position by making the Court's decree an acceptable amendment to the Constitution. The result, then, will bind all or none. As John Milton asked in a famous discussion of freedom, "What can be juster in a state than this?"<sup>82</sup>

The prevalence of constitutional argument extended to facets of the debate over race outside of court-ordered integration. The *Meridian (MS) Star* editorialized on December 15, 1955 that "[u]nder the Constitution, the States are reserved the rights of operating their educational systems. As far as we can see, there is nothing in the Constitution to give the federal government any authority to operate schools in any state in the nation."<sup>83</sup> President Dwight Eisenhower's school funding program was opposed on constitutional grounds.<sup>84</sup> The Mississippi newspaper argued that such federal aid to schools was an impermissible alteration of the constitutional system, violative of the Constitution as higher law.<sup>85</sup>

Letter writers also opposed integration on constitutional grounds during the period of judicialized debate that followed *Brown*. L.N. Formby of Picayune, Mississippi, writing in the *Meridian (MS) Star* June 12, 1956, argued that to win Southern votes, the Democratic Party should embrace a platform that supports

the fight for States' rights, including the right of every State to control and segregate its schools . . . [and] the right to maintain a Constitution and laws against sedition, treason and subversive acts to overthrow the State Government, and to maintain Constitutional provisions and laws for suitable police power within the state.<sup>86</sup>

---

81. BARTLEY, *supra* note 19, at 67.

82. Editorial, FLORENCE MORNING NEWS, Jan 8, 1956, at 4.

83. Editorial, *Federal School Aid*, MERIDIAN STAR, Dec. 15, 1955, at 4.

84. *Id.*

85. *Id.*

86. L.N. Formby Sr., Editorial, *Star Reader Editorial*, MERIDIAN STAR, June 12, 1956, at 4.

Mrs. R.R. Johnson of Blackstone, Virginia argued on June 10, 1955 that the Supreme Court exceeded its rightful power under the constitution, and that judges should lose their life tenure:

When the Supreme Court handed down its opinion that segregation in public schools was unconstitutional it exercised the limit of authority granted it by the supreme law of the land, the Constitution of the United States. . . . If the Constitution is no more stable than are the minds of the present members of the Supreme Court, then God help us! That document should be re-written and make its members, as are the President and members of Congress, subject to election by the people.<sup>87</sup>

Mrs. Johnson's constitutional critique, while not terribly sophisticated, is part of a broader phenomenon brought about by Supreme Court action. Constitutional argumentation, coming from both mass and elite actors, followed from the Court's desegregation decisions of 1954 and 1955.

Taken together, these instances of constitutional argumentation constitute the production and presentation of Southern white social/political doctrine. That doctrine was not created by the Supreme Court; it was at times evident in editorials before May of 1954, and certainly had roots in the Founding and Civil War. But the Court's challenge to Southern social institutions and customs motivated the defenders of segregation to argue publicly in defense of their social system, and to make that argument in constitutional terms. Southern editorialists and writers of letters became advocates of a particular theory of constitutionality, and they advocated their position in the public forum of newspaper editorial pages.

This greater focus on constitutionality and the increased frequency of discussion of race are, at minimum, strongly associated and correlated with *Brown*. I argue that the timing and substantive orientation of this quantitative and qualitative shift in the Southern discussion of race support the claim that *Brown* caused the transformation. The decision had an effect outside of the judicial system, and that affect took the form of judicialization, with the Court remaking political conflict in a manner consistent with its institutional identity as a Court.

---

87. R. R. Johnson, Editorial, *High Court Judges Should Be Elected*, RICHMOND NEWS-LEADER, June 10, 1955, at 18.

Table 1: Editorials and Letters to the Editor by Newspaper

	Number of Race Editorials, 1950-56	Number of Race Letters, 1950-56
<i>Richmond News-Leader</i>	188	572
<i>Birmingham News</i>	105	210
<i>Florence(SC) Morning News</i>	250	n/a
<i>Meridian (MS) Star</i>	72	8
<i>Bryan (TX) Eagle</i>	33	n/a
Total	648	791

Table 2: Frequency of editorials, before and after *Brown*

	Total Editorials	Editorials per month
# per month Before <i>Brown</i> (49 Months)	218	4.5
# per month After <i>Brown</i> (31 Months)	430	13.9

Table 3: Frequency of editorials, before and after *Brown*, without *Richmond News-Leader*

	Total Editorials	Editorials Per Month
# per month Before <i>Brown</i> (49 Months)	165	3.4
# per month After <i>Brown</i> (31 Months)	295	9.5

Table 4: Frequency of letters to the editor, before and after *Brown*

	Total Letters	Letters Per Month
# per month Before <i>Brown</i> (49 Months)	107	2.2
# per month After <i>Brown</i> (31 Months)	683	22.0

Table 5: Frequency of letters to the editor, before and after *Brown*, without *Richmond News-Leader*

	Total Letters	Letters per month
# per month Before <i>Brown</i> (49 Months)	34	.69
# per month After <i>Brown</i> (31 Months)	184	5.9

Table 6: Race Editorials Using Constitutional Frame by Year

Year	Const.	Total	% Const.
June 1950 – April 1951	26	69	38%
May 1951 – April 1952	12	57	22%
May 1952 – April 1953	2	38	5%
May 1953 – April 1954	10	52	19%
May 1954 – April 1955	47	105	45%
May 1955 – April 1956	93	189	49%
May 1956 – Nov 1956	63	136	46%
Total	253	648	39%

Table 7: Percent of Editorials that use Constitutional Frame, before and after *Brown*

	Constitutional Editorials	Total Editorials	Percent Constitutional
Before <i>Brown</i>	50	218	23%
After <i>Brown</i>	203	430	47%

Table 8: Percent of Editorials that use Constitutional Frame, before and after *Brown*, without *Richmond News-Leader*

	Constitutional Editorials	Total Editorials	Percent Constitutional
Before <i>Brown</i>	17	165	10%
After <i>Brown</i>	96	295	33%

Table 9: Race Letters to the Editor Using Constitutional Frame by Year

Year	Const.	Total	% Const.
June 1950 – April 1951	1	21	5%
May 1951 – April 1952	4	24	2%
May 1952 – April 1953	5	17	29%
May 1953 – April 1954	13	32	41%
May 1954 – April 1955	100	173	58%
May 1955 – April 1956	215	381	56%
May 1956 – Nov 1956	63	129	49%
Total	401	790	51%

Note: The first year contains only 11 months, and the last year only seven months

Table 10: Percent of Letters that use Constitutional Frame, before and after *Brown*

	Constitutional Editorials	Total Editorials	Percent Constitutional
Before <i>Brown</i>	23	107	21%
After <i>Brown</i>	378	683	55%

Table 11: Percent of Letters that use Constitutional Frame, before and after *Brown*, without *Richmond News-Leader*

	Constitutional Letters	Total Letters	Percent Constitutional
Before <i>Brown</i>	1	34	3%
After <i>Brown</i>	76	184	41%

Table 12: Number of Editorials that use Constitutional Frames, Compared to Other Frames

	Constitutional	Economic	Religious	Cold War
Before <i>Brown</i>	50	12	4	5
After <i>Brown</i>	203	14	7	8

Table 13: Number of Letters to the Editor that use Constitutional Frames, Compared to Other Frames

	Constitutional	Economic	Religious	Cold War
Before <i>Brown</i>	23	9	14	4
After <i>Brown</i>	378	10	127	38

