THE LITTLE ROCK CRISIS: A CONSTITUTIONAL INTERPRETATION. By Tony Freyer.[1] Westport, Conn.: Greenwood Press. 1984. Pp. xii, 186. $27.95.

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Over the last few decades, social scientists have written numerous "impact" or "compliance" studies that seek to measure the actual effect on human conduct of changes in the law. Many of these studies are about the impact of Supreme Court decisions on school prayer, criminal procedure, and desegregation.[3] Another familiar genre seeks to calculate the effects of various changes in criminal sanctions, such as the introduction of mandatory incarceration for drunk driving or the abolition and reintroduction of the death penalty.[4] All of these efforts involve major methodological problems. Complex organizations (like police departments, schools, and political parties) respond to changes in their environment through a series of time staged adjustments that generate a relatively permanent and stable change in the behavior of the organizations only after a considerable intermediate period of confused experimentation. Suppose, for instance, that one wants to measure the impact of a "point" change in the law, like the passage of a new statute or the announcement of a new constitutional doctrine by the Supreme Court. Any study done shortly after the event is likely to catch the observed organizations at their stage of transitional confusion rather than at the stage of final adjustment which would be the most socially significant measure of the impact of the legal change. Ideally, then, scholars should wait for the dust to settle.

On the other hand, from the point of view of the social scientist as scientist, the point change in law constitutes the independent variable or cause whose effects he or she seeks to measure by observing changes in the dependent variables, that is, the behavior of the observed organizations. The gravest danger to such a scientific endeavor is the dreaded intervening (or "exogenous") variable. Besides the cause under consideration, other independent causes may intervene so that it is impossible to tell which cause created which effect. After the new drunk driving law is passed, a new head of the

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3. *E.g.*, T. BECKER & M. FEELEY, THE IMPACT OF SUPREME COURT DECISIONS (2d ed. 1973); S. WASBY, THE IMPACT OF THE UNITED STATES SUPREME COURT: SOME PERSPECTIVES (1970).

4. *See* COMPLIANCE AND THE LAW (S. Krislov, K. Boyum, J. Clark, R. Shaefer, & S. White ed. 1972).

highway patrol may be appointed. Which event caused more drunk drivers to end up in jail? To avoid this problem of extra independent variables, impact should be measured very soon after the cause under observation, before there has been time for other independent variables to intervene.

Thus hair trigger impact studies give us relative rigorous analyses of relatively trivial matters; and delayed studies give us less reliable inferences about more significant issues. Because of this paradox social scientific impact and compliance studies have not contributed greatly to the development of social theory, nor have they helped policy makers much, except in buttressing a truism hammered home by nearly all scholarly examination of the political and social world: nothing ever turns out exactly as anticipated.

Professor Tony Freyer has written an impact study titled *The Little Rock Crisis*. As a historian he need not, and does not, trouble himself with the social science paradox. He is not primarily concerned with building a general theory of how law changes society. For him all the awkward organizational transitions and the intervening variables are parts of the rich multicause, multieffect stew that a historian must digest in appreciating a particular historical event in all its uniqueness. While, almost to the point of perversity, he does not cite the large literature of Supreme Court impact studies, he is the beneficiary of much of that literature. As if he were a student carefully organizing his paper to illustrate points made by others before him, he shows that when, why, how, and by whom a Supreme Court decision is obeyed is determined by a broad array of factors ranging from demographics to the structure of federal, state, and local governments, the nature of the dominant political party or parties, the complex internal needs and interrelations of interest groups and, probably most important, the motives, knowledge, and ideologies of the individuals who hold key places in the decision-making structure that decides to obey or not to obey. That he does all this without an enormous scholarly paraphernalia of footnotes and commentary concerning earlier research will be a blessing to those who care more about what happened in Little Rock than what has happened in social science. Professor Freyer either wears his learning lightly or has taken in a great deal by osmosis without himself quite knowing where he got it. In any event, he offers a sophisticated, if sketchy, catalogue of the local political factors that contributed to the Little Rock crisis.

If Freyer is functioning as a historian, rather than a social scientist, just what sort of history is this book? As Professor Freyer tells us in his introduction, someone else is engaged in a massive

study of the Little Rock crisis. *The Little Rock Crisis* contains only 176 pages of text and notes. It tells only the bare minimum about what happened in Washington. It provides only an outline of even the Arkansas events and often provides only cursory support for its conclusions about them. Against the standard canons of historical scholarship, it must be counted a minor work.

So much for that favorite pastime of book reviewers, criticizing a book for what it is not. This book is not social science and it is not history, at least not major, scholarly history. It is, however, a very good basic sketch of what happened at Little Rock. As such, it serves two extremely important functions. First, at least for beginners, it provides an incredibly clear and useful illustration of the point that law is not obeyed simply because a legislature or a court authoritatively announces it, but instead depends for obedience on an extremely complex set of factors that are essentially political, many of which have little or no obvious connection with the substance of the law being announced. Secondly, this book provides a fair and realistic assessment of the actions of Governor Faubus who has become one of the demons of modern American folklore.[5] Professor Freyer shows that Faubus was one of that long string of populist Southern Democrats whose ambitions for social justice became tragically entangled with the racial conflicts endemic to the very poor whose lot in life they seek to improve. So, as a "trade" book rather than a scholarly one, *The Little Rock Crisis* has some outstanding merits and deserves to be read by those who do not specialize in the intersection of law and politics or the history of race relations.

Beyond providing these signal services to that wonderful creature, the literature lay reader, this book makes another contribution. Its subtitle is "A Constitutional Interpretation."

> [Everyone] approached racial justice . . . in terms of deference to constitutional symbolism . . . . The focus on legalism . . . had the effect of confusing means with ends. Obedience to law itself—not the substantive value of equal educational opportunity—became the basis for both compliance and resistance . . . . [M]any government leaders expected . . . Americans . . . to accept minority rights as a matter of compulsion rather than consent . . . . [D]ependence on [force] obscured the moral principle at issue.
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> . . . [F]ocus on the rule-of-law value led inevitably to controversy over the nature of judicial power in a representative democracy.
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> [J]udicial lawmaking could foster public acceptance of desegregation . . . . But the chief result of . . . [the] interaction [between legal process and political interest] was that questions of moral principle became absorbed in a confrontation

5. The most dramatic example of this folklore is Charles Mingus's *Fables of Faubus*, Atlantis Records.

> over the scope, character, and legitimacy of federal authority. This process in turn narrowed the reach of the constitutional principle established in *Brown* . . . . [T]he complex interplay of interests, democracy, law, and values produced a policy of principled but conservative moderation.
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> Individual and community conduct changed . . . because of judicial activism *and* democratic processes . . . . Changes were always in the direction of less and slower . . . desegregation . . . . The ultimate impact . . . was . . . the integration of a mere handful of black young people . . . .[6]

The conclusion that constitutional principles passed through the incremental decison-making processes characteristic of our polyarchic,[7] democratic process lead only to small changes in policy outputs and even smaller or problematic changes in fundamental social values and structures is in line with those of dozens of other Supreme Court impact studies. And the more general conclusion that the judicial function involves both law and politics has, of course, been the mainstay of the political jurisprudence literature for many years.[8] So at the level of positive description this book is hardly startling but is a useful addition to the evidence.

It is not quite clear whether Professor Freyer thinks that what he has described was inevitable, desirable, or both. Although Freyer is a historian, he has at least one trait in common with many academic lawyers: he would prefer a utopia in which moral change occurs solely as a result of discourse about moral principles.[9] He does not say how he wants constitutional change to occur in the real world.

What he does say, however, provides a jumping off place for two quite different normative theories of constitutional change. Freyer does pretty clearly label racial desegregation as a good moral principle and he frets at the tendency of the legal and political process to compromise this good principle in its search for acceptable incremental, polyarchical, consensual means. One normative solution is to reject the means. There is now some evidence to suggest that if we reject incremental and essentially consensual tactics and instead adopt relatively total, coercive tactics for achieving desegregation, our moral end will be less compromised and more fully

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6. T. FREYER, THE LITTLE ROCK CRISIS 172-75 (1984) (emphasis in original).

7. The term polyarchy refers to a system of government in which the power of decision rests not so much with the mass of individual voters or a close, single political elite as with a complex congeries of groups, interests, and individual participants. *See* R. DAHL, PLURALIST DEMOCRACY IN THE UNITED STATES (1967).

8. *See* Stumpf, Shapiro, Danelski, Sarat, & O'Brien, *Whither Political Jurisprudence: A Symposium*, 36 W. POL. Q. 533 (1983).

9. *See* Shapiro, *Fathers and Sons: The Court, the Commentators, and the Search for Values*, in THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T 218 (V. Blasi ed. 1983).

achieved.[10] Draconian court orders including busing and interdistrict remedies to cut off white flight, the club of contempt, judicial takeover of administration through masters, the threat to cut off federal funding from state and local governments not totally dependent on such funding, strictly enforced quotas and timetables—if the end is just why not adopt these means? Desegregation is a local issue, and so long as the central government exercises a properly Machiavellian timing, the locales can be knocked off a few at a time. No single locale has the power to really resist a full onslaught of the central government and each locale will be indifferent to the plight of others *both before its own crisis has come and after its crisis has passed*. A lot of "properly timed" coercion in the cause of racial equality is a damned good thing, as Ronald Dworkin and others have told us, and it may well work.

In short, when Professor Freyer says that the emphasis in the Little Rock crisis on law and thus on coercion had the unfortunate consequence of shifting attention away from moral concerns, he may be speaking a half or very distorted truth. The real truth may be that what had unfortunate moral consequences was not the choice of legal coercion but the continued treatment of that choice as problematic—the continued yearning to elicit consent. A wholehearted, absolute dedication to coercion in the cause of racial justice might have been the best path to moral progress.

Of course, to be absolutely confident of this normative theory of constitutional change, we must be confident that the end or value chosen is indeed both a good and what political theorists call a "priority good." For those who question either the goodness or the priority of the goal of racial equality, a second and quite different normative theory may emerge. As Freyer points out, J. Skelly Wright and company are quite confident that their moral principle is *the* moral principle either in the sense of being objectively correct or being the principle chosen by the Constitution or being the principle in which the American people really believe or being the principle in which the American people would believe if they got involved in a true moral discourse about principles, or preferably in all of these senses. But what if they are wrong? What if the goal of racial equality is not in any of these senses a true goal or is only one among many true and potentially conflicting goals? It may appear to some that the goal of racial equality, particularly when coupled with the demand for immediate attainment through high levels of judicial and bureaucratic coercion, constitutes not a universal, first

10. *See* J. HOCHSCHILD, THE NEW AMERICAN DILEMMA: LIBERAL DEMOCRACY AND SCHOOL DESEGREGATION (1984).

priority value but the ideology of a particular liberal, intellectual elite that at a particular moment in American history found itself in control of the judiciary, the federal bureaucracy, and the mass media. From this perspective, one moral of Professor Freyer's story may be that this elite foolishly squandered its opportunities. Instead of being sucked into the incremental, polyarchic swamp, it should have gone for broke, employed the maximum coercion at its disposal and achieved its goals.

An alternative moral, however, is that Freyer's characterization of the problem is dead wrong. If we believe that government by the consent of the governed is just as fundamental as racial equality, then Little Rock is not an instance in which a mistaken statement of the issues in terms of government authority rather than race led to a moral error. Nor is it one in which a resort to incremental democratic processes led to the erosion of moral principle. Instead it is one in which whatever compromise occurred was the result of the collision of two equally weighty and ultimate moral principles, racial equality and the consent of the governed. If we do not assume a moral universe in which moral principles are arranged in a neat hierarchy assuring that they can always be harmonized by consulting their relative importance, or if we do not assume that the choice by the liberal intellectual elite of racial equality as the absolutely trump value represents an ultimate truth rather than merely the choice of a particular group, then the significance of Little Rock is that it presents the moral dilemma long ago posed by Herbert Wechsler: that freedom of association is a constitutional value as weighty as racial equality.

The dilemma may be more vividly appreciated once we understand that, of all our governmental institutions, the public school (with compulsory attendance) is the most totalitarian and coercive. It rips children from the bosom of their families in order to inculcate in them whatever the state designates as truth in a setting in which the state dictates exactly who shall be with whom in exactly what social relationships. Where this massive and detailed coercion is employed not in the best interest of the child but in the best interest of some other child or in the interest of what the state has chosen to designate as social justice, the coercion is much more severe.

Perhaps Professor Freyer's story implied that if there had been a full public discourse on the moral principle of racial equality the people of Little Rock would have freely consented to school integration, thus resolving the dilemma and avoiding the compromise of any moral principle. What if, however, a substantial proportion of them decided, after a full moral discourse, that they would not con-

sent? Do we have a right to ignore consent of the governed as an (*an*, not *the*) ultimate value simply by labelling their decision as morally obtuse or selfish or wrong?

Perhaps Little Rock is an example of a terribly embarrassing but frequent event: that public discourse on moral issues does not produce the moral result that liberal intellectuals know to be right. The Supreme Court had initiated a public moral discourse in *Brown* and as the public became more and more engaged in that discourse in Little Rock and elsewhere, the public came to reject, not the principle, but the priority initially assigned to it by the Court. In short, Little Rock may be a perfect example of what the liberal proceduralist wing of constitutional interpretation says it wants, namely a public discourse initiated and guided by courts leading to a choice of policies consonant with public values.[11] The trouble is that this particular discourse led to a choice of values and policies that the liberals don't like. Thus it becomes necessary to characterize it as a discourse that went astray, that lost its focus on moral questions and so reached a poor moral result. Those who are not liberal may prefer to characterize Little Rock as a true moral discourse that brought to light conflict between the ultimate values of consent and racial equality and yielded precisely that moral compromise which is to be expected and even applauded when two ultimate moral values collide.

THE BURDEN OF BROWN. By Raymond Wolters.[1] Knoxville: The University of Tennessee Press. 1984. Pp. 346. $24.95.

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The Burden of Brown by Raymond Wolters is a long book with a very short message: integration is bad, but desegregation is not. The distinction between the two is crucial to Wolters's analysis. Desegregation is the prohibition of officially sanctioned separation of the races. Integration, on the other hand, is the compelled mixing of the races for the sake of mixing. The "burden" of *Brown v. Board of Education*,[3] according to Wolters, is that the Supreme

11. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979).

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3. 347 U.S. 483 (1954).