

**Article: “What Brown Teaches Us about the Rehnquist Court's Federalism Revival”**

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**Issue: Apr. 2004**

**Journal: *PS: Political Science & Politics***



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# What *Brown* Teaches Us About the Rehnquist Court's Federalism Revival

Linking the Warren Court's school desegregation decisions to more recent Rehnquist Court actions limiting congressional power helps us see clearly how social and political forces shape Supreme Court behavior. This article argues, contrary to common impression, that interest group litigation strategy was relatively unimportant to both the Warren Court's decision in *Brown v. Board of Education of Topeka, Kansas* (1954) and to the Rehnquist Court's decision to revitalize federalism in *United States v. Lopez* (1995). Social and political forces are crucial factors in both *Brown* and in the initiation of a federalism revival. Moreover, majoritarian pressures also influenced the Warren Court's avoidance of school desegregation after *Brown* and the Rehnquist Court's continued enhancement of state power at federal expense.

## I. The Warren Court

The *Brown* decision's declaration that "separate cannot be equal" in public education is widely attributed to the NAACP's "step-by-step assault on segregation in education, which began in the mid-1930s with a series of cases against all-white professional schools" (Greenberg 1994, 5).<sup>1</sup> Before 1950, the NAACP did not ask the courts to end racial segregation in public education. Instead, it argued that states could remedy inequality in public education by either desegregating schools (so that minority and non-minority students would attend the same schools) or by spending money on "unequal" all-black schools. In 1950, however, the Supreme Court concluded (in a case involving the University of Texas law school) that intangible factors affect education, including the "reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions, and prestige" (Sweatt 1950, 634). Following this decision, the NAACP decided that all future education cases would "be aimed at obtaining education on a nonsegregated basis and that no relief other than that will be acceptable" (Kluger 1975, 293). *Brown* was one of the cases that the NAACP filed in pursuit of its revised litigation strategy.

No doubt, the NAACP's litigation strategy was masterful. By first pursuing winnable cases involving all-white professional schools, the NAACP scored important victories that

sensitized the Court to the pervasiveness of segregation in education. Also, the NAACP sought to improve its chances of undoing Jim Crow in public education by waiting for the Court to signal its interest in the intangible factors affecting education. Nevertheless, the NAACP's victory in *Brown* is much more an accident of good timing than of a carefully wrought and well executed litigation strategy.

The principal virtue of the NAACP's litigation strategy was that majoritarian attitudes towards racial segregation went through a sea change in the two decades before *Brown* (the same two decades that the NAACP was pursuing its litigation strategy).<sup>(2)</sup> Consider, for example, public opinion: two-thirds of white adults supported segregated education in 1942; at the time of *Brown*, just over half of white adults opposed segregated education (Erskine 1962). More telling, by a 54% to 41% margin, Americans approved of the Court's ruling in *Brown* (Erskine 1962).

Racial equality, moreover, became a politically salient issue in the 1940s. Recognizing the ever-growing political power of Northern blacks in 1948, President Harry Truman began to institutionalize fair employment practices in the federal civil service, and initiated desegregation of the military through executive orders 9980 and 9981 (Klinker 1999, 217–21; Skrentny 1996, 113–14). Furthermore, "[c]oncern about the effect of U.S. race discrimination on Cold War foreign relations led the Truman administration to adopt a pro-civil rights posture as part of its international agenda to promote democracy and contain communism" (Dudziak 2000, 27). Indeed, the Truman administration's brief in *Brown* highlights the debilitating impact of race segregation to American foreign policy.

Commenting on the impact of these dramatic changes in race relations, Justice Felix Frankfurter remarked that had the segregation cases been brought in the mid-1940s he would have sustained segregation's constitutionality because "public opinion had not then crystallized against it" (Memorandum of William O. Douglas 1960). Indeed, Justice William O. Douglas wrote in his autobiography that the Court, led by Chief Justice Fred Vinson, would have voted 5-4 to uphold segregation in 1952 (Douglas 1988, 113). The following September, however, Vinson died. His replacement was Governor Earl Warren.

Warren, a skilled politician, patiently led a badly divided Court to unanimity in *Brown* (Hutchinson 1979, 30–44; Patterson 2001, Ch. 3). In an effort to temper southern hostility, the Court did not issue a remedy in *Brown I*. After another year, in which the

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public had time to contemplate a desegregated country, the Court issued *Brown II* (1955), declaring that desegregation must proceed with “all deliberate speed.” The Court’s bifurcation of its merits and remedies holdings, as well as the absence of judgmental rhetoric in its segregation decision, reveals that the justices sought to improve the acceptability of their decisions in *Brown* by speaking in a single moderate voice. *Brown*, therefore, is a testament not just to the reaches but also to the limits of judicial action.

By taking into account potential resistance to its decision, *Brown* also exemplifies the Court engaging in the type of interest balancing that has set political parameters on judicial intervention in equal educational opportunity. Recognizing that “some achievable remedial effectiveness may be sacrificed because of other social interests” and that “a limited remedy [may be chosen] when a more effective one is too costly to other interests” (Gewirtz 1983, 589), the Court concluded that victims’ rights must be balanced against a broad spectrum of competing policy concerns. Specifically, aside from victims’ rights, the *Brown* Court valued local control of public school systems and judicial restraint.

*Brown II*, in particular, calls attention to the limited reach of the *Brown* rulings. Rather than require southern systems to take concrete steps to dismantle dual school systems, the Court contended that “varied local school problems” were best solved by “[s]chool authorities,” that district court judges were best suited to examine “local conditions,” and that delays associated with “problems related to administration” were to be expected (Brown 1955, 299–300). The Court’s emphasis on local conditions invited tokenism and delay, and southern school officials and judges acted in kind. The Supreme Court, then, did not seek to provide the type of leadership against which one can measure changes in black-white student contact.

In the decade following *Brown*, the Court’s only foray into school desegregation is best understood as the Warren Court’s defense of its institutional self-interest. Pressed—by Arkansas governor Orval Faubus’s efforts to block school desegregation in the Little Rock case—the Court aggressively defended its turf, proclaiming itself “supreme in the exposition of the law of the Constitution” (Cooper v. Aaron 1958, 18). In 1968 it finally demanded that school boards “come forward with a plan that promises realistically to work, and promises realistically to work now” (Green v. County School Board of New Kent 1968, 439).

The Warren Court’s intransigence on school desegregation spanned most of its 16-year life. Remarkably, one decade after *Brown*, only 2% of black children attended biracial schools in the 11 southern states. In the 1965–1966 school year, however, the percentage of black children in biracial schools rose to 6%. The key factor was not enhanced judicial enforcement but legislative and executive action.

Most significant, the implementation of the Elementary and Secondary Education Act of 1965, coupled with the issuance and enforcement of guidelines for Title VI of the Civil Rights Act of 1964, marked a significant expansion in federal power over state education systems. With Title VI’s demand that federal grant recipients be nondiscriminatory, Congress became willing to supply billions of dollars of aid for the compensatory education of educationally deprived children. This aid was sufficient incentive for many school systems to comply with the Office for Civil Rights’ nondiscrimination standards. Furthermore, by authorizing Department of Justice participation in school desegregation litigation through its 1964 Civil Rights Act, Congress encouraged judicial intervention.

Against this backdrop of increasing federal involvement in school desegregation, the Warren Court stepped up its own

involvement. This parallelism should come as no surprise. With Congress and the White House both making equal educational opportunity a national priority and envisioning an increasing judicial role, concerns of local control and judicial restraint no longer impeded judicial action. Court intervention was consistent with judicial respect for the priorities set by coequal branches of the federal government.

## II. The Rehnquist Court

Like the NAACP in the 1940s and 1950s, conservative advocates, most notably the Washington Legal Foundation, the Center for Individual Rights, and the Pacific Legal Foundation, used a carefully crafted litigation strategy to shape Rehnquist Court action on federalism, civil rights, and much more. These groups sometimes take credit for the Rehnquist Court’s recent revitalization of federalism. From 1995 to 2003, they litigated some of the 31 cases in which the Rehnquist Court invalidated all or parts of federal statutes.<sup>3</sup> These very same interest groups, however, failed to shape Court action on affirmative action and other social issues. As with the Warren Court school desegregation decisions, social and political forces, not litigation strategy, explains Rehnquist Court decision making. The Court’s willingness to pursue doctrinal reform on federalism matched majoritarian preferences. In sharp contrast, Congress’s strong support for civil and abortion rights stood as a roadblock to the Court’s pursuit of the conservative social agenda. Most notably, the Court’s swing Justices, Sandra Day O’Connor and Anthony Kennedy, may well have been influenced by signals sent to the Court from Capitol Hill.

Consider, for example, the Court’s decision to reaffirm abortion rights, *Planned Parenthood v. Casey* (1992) (hereafter *Casey*). Justice Kennedy and O’Connor’s refusal to overturn *Roe v. Wade* (1973) seems inextricably linked to Senate Judiciary Committee efforts to “make clear to nominees that a willingness to profess belief in some threshold constitutional values is a prerequisite to the job” (Wermiel 1993, 121–22). Specifically, the Senate Judiciary Committee limited its sights on abortion and other social issues; for example, it rejected Robert Bork’s nomination because Bork, if confirmed, almost certainly would have supplied the fifth vote needed to overturn *Roe*. Also, the Committee’s “severe hazing” of Clarence Thomas “served as a warning to the sitting Justices that if they persisted down the path of seeking to overturn *Roe* and securing other conservative objectives, they could expect equivalent retaliation of an unspecified nature” (Merrill 2003, 630–31). Against this backdrop, it seems certain that the Senate played an instrumental role in the defeat of the conservative social agenda. Not only did it keep Bork off the Court, it also sent a message to Justices O’Connor and Kennedy that the repudiation of Court decisionmaking on abortion, school prayer, and the like would be seen as an act of political defiance. Perhaps for this reason, the *Casey* plurality emphasized both the costs of “overrul[ing] under [political] fire” and explicitly linked the Court’s “legitimacy” to “people’s acceptance of the Judiciary” (*Casey* 1992, 867).

For quite similar reasons, recent Rehnquist Court decision-making invalidating federal statutes is also tied to social and political forces. This seems especially true of the Court’s pursuit of federalism-related innovation, although the forces contributing to this federalism revival help explain the Court’s willingness to strike down several other statutes (Devins 2001; Merrill 2003).

First, unlike social issues, lawmakers barely mentioned federalism in the confirmation hearing, committee reports, or floor debates concerning any member of the Rehnquist Court. For example, the Senate Judiciary Committee never pressed Sandra

Day O'Connor about states rights—even though O'Connor asserted that her “experience[s] as a State court judge and as a state legislator” gave her “a greater appreciation of the important roles that States play in our federal system” (Nomination of Judge Sandra Day O'Connor 1981). Correspondingly, there are

virtually no mentions of federalism in interest group testimony and written submissions. With no interest group constituency pressuring Congress on federalism issues, the Senate has not used its confirmation power to push the Court to embrace pro-Congress positions in federalism cases. (Devins 2002; Whittington 2001).

Second, Congress is widely held in disrepute, partly because of the well known inclination of candidates to run for Congress by running against it. As compared to respondents in 1964 (when 76% of those polled thought that the federal government could

be trusted “just about always” or “most of the time”), 27% of respondents in 2001 think the government trustworthy. By a 74% to 17% margin, a 1997 poll revealed that Americans think that members of Congress care more about making themselves look better than making the country better. In 1992, 82% of those polled thought that people elected to Congress “lose touch with the people pretty quickly” (Schroeder 2001).

Relatedly, Republicans took over Congress in 1994 by running on the “Contract with America.” Seeking to capitalize on widespread voter dissatisfaction, the Contract pledged a smaller federal government and a larger role for the states. The Contract promised: item veto legislation (because Congress could not be trusted to enact responsible spending bills); unfunded mandate reform (because Congress could not be trusted to respect state prerogatives); and a vote on a constitutional amendment to establish term limits (because members of Congress quickly lost touch with their constituents).

Third, Congress has signaled to the Court that it has little institutional stake in federalism issues and that the Court will pay little, if any, institutional price when invalidating legislation on federalism-related grounds.<sup>4</sup> In the wake of recent rulings limiting congressional power, there has been no talk of stripping the Court of jurisdiction, of amending the Constitution, or of enacting legislation at odds with these decisions. Indeed, there has been virtually no talk at all; the precedential effects of Court decisions limiting federal power are rarely mentioned in the *Congressional Record* or in political discourse more generally. Moreover, with the exception of Court rulings invalidating the Violence Against Women Act and the Religious Freedom Restoration Act, no more than four comments exist about the wisdom of any of the Court’s federalism-related decisions. Furthermore, these decisions played no role in the 2000 elections. Finally, Congress has

shown relatively little interest in rewriting the statutes; and when Congress has revisited its handiwork, lawmakers have paid close attention to the Supreme Court’s ruling, limiting their efforts to revisions the Court is likely to approve.

Rehnquist Court innovation in the federalism arena has also

been incremental. Only after the 1994 elections did the Court launch its counterrevolution, and even then it moved gingerly, striking down relatively few laws on somewhat ambiguous grounds (Devins 2001). Today, however, the Court seems more aggressive, and with good reason. Congress certainly accepts and may even approve of Court efforts to curtail federal power. Moreover, there is little reason to fear a populist backlash. The Court remains politically popular and somewhat middle of the road on divisive

social issues. Also, when the Court strikes down a law, it typically leaves Congress room to revisit the issue.



The U.S. Supreme Court has ruled on some of the 20th century’s most influential legal decisions. Photo: /istockphoto.com/Mark Hurlburt.

### III. Conclusion

When striking down federal and state legislation, the Supreme Court is often described as “countermajoritarian.” Such decision making, as Alexander Bickel put it, “thwarts the will of representatives of the actual people of the here and now; [the] Court exercises control, not in behalf of the prevailing majority, but against it” (Bickel 1962, 17). Warren Court school desegregation decision making and Rehnquist Court federalism rulings, purportedly classic examples of countermajoritarian behavior, are, on closer examination, very much tied to majoritarian social and political forces. Both *Brown* and the federalism revival match changes in public opinion and signals sent to the Court by Congress, the White House, and the American people. Likewise, social and political forces help explain both the Rehnquist Court’s willingness to extend its federalism revolution and the Warren Court’s decision to steer clear of school desegregation for the decade following *Brown*.

Parallels between the Warren and Rehnquist Courts are hardly surprising. When striking down legislation, the Supreme Court almost always takes its cues from elected officials, the public, or elites (academics, journalists, and other opinion leaders). Court behavior in the two eras move in different directions, to be sure. *Brown* advanced civil rights interests and Rehnquist Court federalism decisions have invalidated legislation protecting the interests of religious minorities, the elderly, the disabled, and victims of domestic violence. But both suggest a Court operating within boundaries established by social and political context.

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## Notes

1. For other accounts of the NAACP's attack on segregation, see Kluger 1975 and Tushnet 1987.
2. For more detailed treatment of this topic (which helped shape my thinking), see Klarman 1994 and Klarman 1996.
3. By revitalizing federalism limits on Congress, the Court invalidated statutes providing relief for victims of domestic violence, age discrimination, and disability discrimination. Statutes banning religious discrimination and gun possession near schools were also struck down on federalism grounds. In particular, the Court concluded that Congress

exceeded its powers under the Commerce Clause, Section 5 of the Fourteenth Amendment (allowing Congress to enforce the Fourteenth Amendment), or the Eleventh Amendment (protecting states from lawsuits by private parties). In addition to these federalism rulings, the Court also invalidated item veto legislation and several statutes implicating free speech protections. For general treatments of these Court decisions, see Brudney and Colker (2001); Merrill (2003); McGinnis (2002).

4. For a general treatment, see Devins 2001.

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