A STORM OVER THIS COURT

Law, Politics, and Supreme Court Decision Making in *Brown v. Board of Education*

JEFFREY D. HOCKETT

CONSTITUTIONALISM and DEMOCRACY

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For Aaron

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A STORM OVER THIS COURT

CONTENTS

Introduction

On May 17, 1954, the U.S. Supreme Court ruled unanimously in *Brown v. Board of Education of Topeka, Kansas*—the lead case in a group of four consolidated state cases—that racial segregation in public schools violated the equal protection clause of the Fourteenth Amendment to the U.S. Constitution.[1] The Court maintained that the separate-but-equal principle enunciated at the end of the nineteenth century in *Plessy v. Ferguson* was a contradiction in terms as applied to education.[2] Justice Hugo Black's admonition to his brethren during the Court's deliberations in *Brown*—that rash action regarding enforcement would bring a "storm over this Court"—indicates that the justices understood that their behavior would be carefully scrutinized.

In spite of the justices' awareness of the sensitive nature of the case at hand, the rationale that they adopted for their desegregation order generated enormous controversy. Speaking for all of his brethren, Chief Justice Earl Warren made no pretense that the Court's ruling rested on the intentions of the framers and ratifiers of the Fourteenth Amendment. The historical sources that were the focus of reargument of the case in 1953, he suggested, were, "at best, . . . inconclusive." The chief justice followed this comment with the observation that "the most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among 'all persons born or naturalized in the United States,'" while "their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect." "What others in Congress and the state legislatures had in mind," he said, "cannot be determined with any degree of certainty."[3] Given the powerful historical defense of segregation that the lawyers for the respondents (i.e., the school boards) had presented to the Court at the rehearing, however, Warren's claim regarding the indeterminacy of the framers' intentions appeared rather disingenuous.[4]

The Court based its holding in *Brown* on the empirical proposition that racial segregation in public schools "generates a feeling of inferiority [in black children] as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." For this reason, Warren stated, "separate educational facilities are inherently unequal." "Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson,*" he declared, "this finding is amply supported by modern authority." At this point in the opinion, the chief justice made reference to social science studies that Thurgood Marshall and the lawyers of the NAACP Legal Defense and Educational Fund (LDF) introduced on behalf of the petitioners in the case.[5] Given that this was the first time the Court had turned to modern social science evidence to invalidate governmental action—and given that counsel for the school boards had thoroughly critiqued the evidence on which the Court relied—the Court's rationale appeared dubious even to those sympathetic to desegregation.[6]

Bolling v. Sharpe, a companion case to *Brown* that involved the public schools of the District of Columbia, was no less controversial. Since the Fourteenth Amendment applies only against the states, the Court held in *Bolling* that racial segregation in the District's public schools violated the due process clause of the Fifth Amendment. Specifically, Warren contended in his opinion for the Court that the federal government failed to satisfy the requirement that a rational relationship exist between a legislative goal and the means chosen to effectuate that goal. The chief justice courted controversy by failing to explain his statement that "segregation in public education is not reasonably related to any proper governmental objective and thus . . . imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause."[7] Warren entirely ignored the primary argument that segregationists offered in support of the practice—that it provides for the welfare of blacks and whites alike by preserving racial harmony.

Because of the sensitive nature of the issue that the Court addressed in *Brown* and *Bolling,* and because of the difficulty that Warren had in articulating a compelling legal basis for the Court's holdings, the desegregation decisions were controversial in their day and for some time thereafter. Yet, in spite of the vulnerability of the arguments that Warren offered, *Brown* eventually became one of the Supreme Court's most celebrated rulings. As Michael J. Perry observes, *Brown* "is generally thought to represent the Court at its best." Scholars of all ideological

stripes agree that "*Brown* was a great and correct decision," "perhaps the most important judgment ever handed down by an American Supreme Court."[8] In an attempt to explain the widespread sentiment that "*Brown* may be the most important political, social, and legal event in America's twentieth-century history," J. Harvie Wilkinson III does not suggest that, with the passage of time, jurists and scholars developed an appreciation for Warren's logic. Indeed, he contends not only that the Court "spoke *without* eloquence" in *Brown;* he charges that it "never attempted to reason much at all." Wilkinson observes that *Brown*'s "greatness" lay not in the substance of the Court's argument, but "in the enormity of injustice it condemned, in the entrenched sentiment it challenged, in the immensity of law it both created and overthrew."[9] In other words, televised images of the brutality that segregationists directed at peaceful civil rights protestors in the 1960s deprived southerners of the rationalization that segregation was intended to benefit blacks as well as whites. As a consequence, and as Charles L. Black had predicted in 1960, "in the end the [desegregation] decisions [were] accepted by the profession" not because southern whites had inadvertently made black children feel inferior, but for a powerful reason about which Warren and his brethren said nothing: "that the segregation system [was] actually conceived and . . . actually function[ed] as a means of keeping the Negro in a status of inferiority."[10]

Although *Brown* became one of the Supreme Court's most respected decisions, the ruling ushered in one of the most contentious periods in the Court's history. Under Earl Warren, the Court generated enormous controversy across a range of areas of constitutional law, including the First Amendment's freedoms of speech, press, and religion, and the procedural protections contained in other provisions of the Bill of Rights. The Court's use of the due process clause of the Fourteenth Amendment to apply many of the provisions of the Bill of Rights against the states; its recognition of a general, unenumerated right of privacy; and its use of the equal protection clause of the Fourteenth Amendment to restructure the electoral systems of the states were no less controversial.[11] The Warren Court even sustained criticism in the area in which it achieved its greatest constitutional victory—equal protection and race. In a unanimous ruling handed down fourteen years after *Brown,* the justices set the stage for judicial involvement in the controversial issue of busing when they held that desegregation would be measured by actual results. The Court obliged southern states to eliminate (presumably through "benign" racial classifications) the racial imbalance in public schools that remained after the legal framework of segregation was dismantled.[12]

As a consequence of *Brown*'s eventual rise to iconic status in American political culture and the controversial rulings that followed in its wake, there is no shortage of histories of the LDF's direct attack on school segregation.[13] Scholars have also given considerable attention to the process by which the members of the Supreme Court reached the holding in *Brown*.[14] But, in view of the problematic nature of Chief Justice Warren's legal argumentation, the aspect of *Brown*'s origin to receive perhaps the most attention involves the justices' reasons for declaring public school segregation unconstitutional. Students of *Brown* have borrowed from important work on Supreme Court decision making that political scientists contributed in the half-century since the Court ruled against segregation. One group of scholars—those who believe that institutional considerations are central to any accurate account of *Brown*'s basis—can be subdivided into instrumentalists, who regard institutions merely as potential impediments to the justices' efforts to use law as an *instrument* to realize their personal policy preferences, and noninstrumentalists, who contend that institutions may constitute justices' decisions by providing information concerning normatively appropriate judicial behavior. The former subgroup includes scholars who have related the justices' desegregation votes to the policy preferences of either the leaders of the dominant national alliance of the mid-twentieth century or to elements of the New Deal political coalition.[15] For their part, noninstrumentalists have characterized the ruling as an executive-inspired Cold War imperative, a reflection of the policy preferences of the Eisenhower administration, a response to politicians' requests to remove the volatile issue of segregation from the political landscape, or an effort to complete Franklin Roosevelt's attempt to alter the nature of the Democratic party by undermining the segregationist element of the New Deal coalition for the more fundamental purpose of shifting the balance of power toward the national executive.[16]

But institutional accounts of *Brown* compete with the most commonly held view, which appeared immediately after the decision was announced—that the ruling represented an especially flagrant instance of instrumental decision making by judges. In other words, *Brown* was and is regarded as an *institutionally unrestrained* infusion of the justices' attitudes or personal policy preferences into the abstract language of the Fourteenth Amendment.[17] Senator Burnet Maybank of South Carolina spoke for many southerners in 1954 when he characterized *Brown* as "a shamefully political rather than a judicial decision." It is not surprising that southern politicians considered *Brown* a manifest instance of judi-

cial usurpation of the legislative function. In view of the daunting and seemingly insurmountable impediments that constitutional history and precedent presented to the LDF's direct attack on the separate-but-equal principle, even those sympathetic to the petitioners' cause characterized *Brown* as an instance of unrestrained judicial activism. Wesley Sturges, the dean of Yale Law School, for example, described the decision as "very humane"; "the court," he concluded, "had to make the law" in the case.[18]

This starkly instrumental, or attitudinal, interpretation of the *Brown* decision figures prominently in contemporary conservative criticism of the jurisprudence of the Warren Court. In the decades following *Brown,* these critiques functioned merely as laments against what seemed an unrelenting expansion of civil rights and liberties across a range of issue areas.[19] Since the 1980s, however, when conservative politicians and jurists began a concerted effort to roll back the supposed excesses of the Warren Court by altering the composition of the federal judiciary, these works have served as blueprints for change.[20] In perhaps the most publicized effort to promote such a jurisprudential shift, Robert H. Bork, echoing the substance of earlier conservative critiques of the Warren Court, contends that the *Brown* decision, while one of the Supreme Court's "great triumphs," had "a calamitous effect upon the law." He explains that the non-originalist basis of Chief Justice Warren's opinion for the Court, combined with "the obvious moral rightness of [*Brown*'s] result," led the Court to believe mistakenly that the achievement of justice in any situation depends on decision making that is divorced from the original intentions of the Constitution's framers. Bork argues that "the catalogue of the Warren Court's legislative alterations of the Constitution"—*Brown*'s unfortunate legacy—"is a thick one and is organized by the theme of egalitarianism." "It is no answer to say that we like the results, no matter how divorced from the intentions of the lawgivers," he declares; to embrace the "unprincipled activism" of the Warren Court is merely to substitute the values of liberal judges who disregarded the law for the policy preferences of political majorities that adhered to constitutionally prescribed methods of lawmaking.[21]

This book challenges the empirical basis of this normative assessment of the Warren Court's constitutional jurisprudence by demonstrating the problematic nature of an attitudinal account of the *Brown* decision. If, as conservative opinion suggests, *Brown* was the crucible in which the Court formulated the interpretive strategy that would inform its civil rights and civil liberties rulings for the next two decades, then critics of the

Warren Court's constitutional decision making must abandon the charge that the individual justices necessarily acted on a liberal preference for egalitarianism in this and subsequent cases. While all of the justices engaged in non-originalist decision making, and some of them based their votes on a policy preference for desegregation, it is necessary to consult the insights of institutional—primarily *noninstrumental*—approaches to Supreme Court decision making in order to explain the behavior of *most* of the justices in *Brown.* One cannot conclude on the basis of this case study that the Warren Court justices' votes in cases other than *Brown* and related racial equality controversies were noninstrumental in nature. But this analysis of *Brown* reveals that instrumental decision making—the self-interested pursuit of a favored policy preference—is not an inevitable consequence of a justice's conviction that the proper resolution of a controversy requires reference to something other than the intentions of the framers of the particular constitutional provision at issue. As important, this study demonstrates that the noninstrumental factors that informed the desegregation votes of certain members of the Court prompt important critical inquiries regarding the nature of American racial politics. These inquiries contrast sharply with the uncritical professions of faith in existing political arrangements that Bork and other critics of the Warren Court combine with their charges of judicial legislation.

In contrast to earlier works on the desegregation decision, this study demonstrates that the puzzle regarding *Brown*'s basis defies an elegant solution. While most general studies of Supreme Court decision making emphasize the degree to which a single (usually instrumental) factor affords predictive success for many decisions across numerous issue areas, such a focus is of limited value, especially if the task is to explain the votes of nine justices in one case. Scholars must recognize that all Supreme Court decisions are combinations of instrumental and noninstrumental factors, and should take to heart Rogers M. Smith's admonition that the most productive inquiries into the Court's decision-making process are those that "focus on the interplay of specified [instrumental and noninstrumental] structures and decisions."[22] While Smith could not realistically expect, at least in the short term, that his observation would do more than provoke thought and perhaps promote a degree of methodological tolerance among scholars whose interest is to develop and test decision-making theories, those who seek to explain the behavior of the nine individuals who voted in *Brown* should regard his point as indisputable.

A thorough, accurate account of *Brown* requires reference to pub-

lished studies that apply a particular model of Supreme Court decision making to the case and to approaches that have not been utilized for this purpose. Such an account demands a critical analysis of existing studies, since some elegant arguments that employ one model to explain the votes of most or all of the justices are overly broad in their application, while others are either unconvincing or require strengthening. And more than one model may be required to explain a particular vote, since individual justices might have had multiple goal orientations in the case.

This case study uses the various models of Supreme Court decision making as a framework for analysis. Each chapter, save for the first, views *Brown* through the lens of a particular decision-making model, and the chapter titles alert the reader to the explanatory factors to which each model points. The analysis of *Brown*'s basis begins with an assessment of the contribution of an attitudinal understanding of Supreme Court decision making—the strongly instrumental model that supports the conventional view that *Brown* was the product of the justices' liberal value preferences[23]—and then moves to consider the insights that institutional approaches to the Court afford. As noted, institutional decision-making models are of two types: instrumental and noninstrumental. Scholars refer to the former as the strategic or rational choice approach, while the latter type includes both the constitutive and "political regimes" approaches. The strategic approach shares the attitudinalist assumption that policy goals are the primary influence in Supreme Court decision making but avers that constraints, both internal and external to the Court, may impede judicial policy making.[24] The noninstrumental institutional approaches, by contrast, posit that institutions *provide the norms* upon which justices base their decisions. These noninstrumental approaches differ in that the constitutive model puts forth an abstract conception of institutions and places particular emphasis on the notion of a sense of mission or duty that is transmitted through the somewhat indistinct process of judicial socialization.[25] By contrast, the "political regimes" approach locates the Court within the political system or regime and identifies specific political actors (such as executive branch officials) whose own senses of the Court's mission or, more broadly, whose own constitutional views or concerns serve as a source of judicial norms.[26]

The unevenness of the documentary record ensures that a comprehensive analysis of the justices' votes in *Brown,* even one that guards against oversimplification, will yield varying levels of certainty. That said, the present study marshals ample evidence to demonstrate the relevance of noninstrumental approaches to a majority of the justices in *Brown,* and

thus reveals the problematic nature of the claim that the ruling set the stage for value-based decision making on the part of the Warren Court.

In order to appreciate the claim that *Brown* was merely a reflection of the values of the justices, it is necessary to come to terms with the significant barriers that the LDF and the petitioners faced when their cases came before the Court in 1952 and again the following year for reargument. These barriers were formidable, especially considering that seven of the nine justices who decided *Brown* had been active participants in the New Deal before joining the Court. As harsh critics of the anti–New Deal decisions that the Supreme Court rendered before Franklin Roosevelt was able to alter the composition of that body through presidential appointment, the New Deal justices were sensitive to the charge of judicial policy making.[27] To provide a sense of the Court's vulnerability to this charge, chapter 1 illuminates the respondents' powerful answers to the arguments that the LDF made on behalf of the petitioners in the case. The lawyers for the school boards emphasized the force of precedent, provided a thorough critique of the social science evidence that the petitioners offered as reason to overturn the line of cases that placed the Court's imprimatur on segregation, noted that courts typically deferred under the Fourteenth Amendment to state determinations of the need for the classifications employed, and offered considerable evidence that the framers of that amendment accepted school segregation. In view of the legal obstacles that the Court faced in *Brown,* supporters as well as opponents of desegregation characterized the ruling as the product of the justices' personal policy preferences.

The development in political science of an attitudinal model of Supreme Court decision making lent credence to the charges of judicial policy making that greeted the *Brown* decision in 1954. As chapter 2 notes, defenders of an attitudinal model contend that judicial independence enables the justices to take advantage of the indeterminacy inhering in legal language and to use law as an instrument for the pursuit of their personal policy preferences. In support of an attitudinal understanding of Supreme Court decision making, and of *Brown* in particular, Michael J. Klarman suggests that the Supreme Court almost inevitably reflects the broader social and political context of the times because the justices are embedded in majoritarian culture.[28] As perhaps the most famous example of this proposition, he argues, *Brown* was rendered at a time when important historical events, such as the fight against a genocidal regime during the Second World War, brought about significant changes in American racial attitudes.

Instructive as it may be to consider the context in which the Court rendered *Brown,* aggregate data cannot provide definitive conclusions about individual behavior. Klarman's strongly instrumental account of *Brown* is incomplete in that he only provides evidence of desegregation policy preferences for Felix Frankfurter, William Douglas, and Robert Jackson. An attitudinal account of *Brown* is also complicated by the fact that the methods scholars have developed for measuring the values of past justices indicate, if anything, that the members of the Court were deeply divided over the issue of elementary school segregation and that certain justices, in voting against segregation, acted contrary to their personal policy preferences. Finally, studies of ideological drift suggest that, relative to their respective first years on the Court, a majority of the justices had become significantly more conservative before they decided *Brown.* While this evidence does not prove that noninstrumental goals informed the desegregation votes of these men, it suggests we cannot assume the justices were part of the current of history that was beginning to liberalize American racial attitudes at midcentury.

A review of the documents regarding the justices' deliberations in the case, featured in chapter 3, further suggests an attitudinal account of *Brown* may be incomplete. Given that *Brown* was a unanimous ruling, attitudinalists would regard as mere hand-wringing the legal objections to desegregation that several members of the Court raised, and they would question whether other justices' legal arguments supporting desegregation were sufficiently strong to explain their votes. But the policy defenses of segregation that two of the southerners, Stanley Reed and Tom Clark, advanced suggest that these justices may have voted for desegregation for reasons other than the satisfaction of their personal policy preferences. And, even assuming that the members of the Court were simply following their policy preferences in *Brown,* nearly all of the justices expressed a willingness to postpone, if not deny, the satisfaction of those preferences by calling for the delay of desegregation in order to minimize the threat of social disorder or violence.

A strategic or rational choice model of Supreme Court decision making helps to compensate for some of the shortcomings of an attitudinal account of *Brown.* The willingness of the justices to delay the implementation of *Brown* fits comfortably within the framework of a strategic understanding of Supreme Court decision making, since the model acknowledges that justices might behave insincerely (i.e., in a manner that is not an accurate reflection of their preferences) in response to external threats to judicial prestige. By examining the constraints that are internal