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The Effectiveness of Judicial Activism: Desegregation and Racial Attitudes

by

Steven E. Hugie

The relationship between Supreme Court desegregation rulings and the racial tolerance of Americans is examined. Comprehensive summaries are given of the desegregation cases and public opinion survey data on the question of public school desegregation from 1954 to present. While some question the constitutionality of judicial activism, it is defended on the grounds that it is an effective means for achieving important social ends. Data show that when (from the 1954 Brown decision to the 1974 Milliken decision) the Court pressed for desegregation, the public responded more positively to opinion poll questions about the appropriateness of racially balanced schools. Milliken represented a turning point for the Court. Since the court began weakening its demands for integration, public opinion has been much less favorable on racial integration. The legitimation hypothesis is defended, placing the responsibility for deteriorating racial attitudes on a Court which could, but is unwilling to, change those attitudes. Alternative explanations, which would attribute the decline in racial attitudes to the failures of desegregation, are discredited as inconsistent with sociological expectations.

Introduction

The words of Martin Luther King, Jr. rang loud in the segregated South: "I have a dream that one day on the red hills of Georgia the sons of former slaves and the sons of former slaveowners will be able to sit down together at the table of brotherhood" (D’Amato 1987, 357). Desegregation of the public schools was one of the principal aims of the civil rights movement led by King. The National Association for the Advancement of Colored People (represented by Thurgood Marshall) took to the court dockets for redress of the wrongs that executives and legislators had ignored. Now, thirty-four years after their victory in Brown et al v. Board of Education of Topeka (1954), a police brutality incident in Los Angeles, a Hispanic uprising in our nation’s capital, and litigation from Mississippi claiming that "unconstitutional vestiges of desegregation remain and should be ordered eliminated" have brought race relations once again to the American consciousness (Applebome 1991, A16). Desegregation has fallen on hard times.

One avowed aim of desegregation was the elimination of racism, "both root and branch" (U.S. v. Mississippi, 1989). Measuring racial attitudes as a product of desegregation will reflect on the effectiveness of judicial activism as well as the social influence of education. Before discussing desegregation, however, we must place it within the context of a larger constitutional debate over what the Supreme Court’s role in such questions should be.
The Judicial Activism Debate

The debate over judicial activism has its roots in the origins of American government. The Constitution did not explicitly grant the authority of judicial review to the Supreme Court. Now the Constitution is being interpreted by a Court which makes a broad range of policy decisions that otherwise would be reserved to the more "democratic" executive and legislative branches. Wechsler and Berger warn that "court decisions should be explicitly based on neutral, general principles that transcend a particular result"; otherwise, they violate the separation of powers and threaten democratic government (Rebell and Block 1982, 6, 8).

The Civil Rights Act of 1964 echoes this anti-activist stand on desegregation, saying that it does not mean the assignment of students to public schools to overcome racial imbalance and that nothing therein empowers any official or court of the United States to issue any order requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve racial balance (Trenker 1989, 672-3).

The Court decided to desegregate at any cost. Scholars who defend the Court's policy making role argue that the rise of the welfare state has led to the activist intrusion of all three branches into our lives and that the Court is just keeping pace. While others question the Court's abilities in fact-finding and remedial action, defenders of activism argue that "courts protect the basic constitutional rights of minorities...when other institutions are unwilling to deal with important social issues" (Rebell and Block 1982, 10). They argue that the founders did not intend an absolute separation of powers but rather a blending of those powers as they were shared by three coordinate branches of government.

Methodology and Thesis

The justifiability of judicial activism depends, at least in part, on the measure of its effectiveness. The major public school desegregation cases spanning from the Brown decision in 1954 down to the present will be examined in conjunction with data from public opinion polls that measure public responses to this question: "Do you think white students and black students should go to the same schools or separate schools" (Gilbert 1987, 267)? It will be shown that while the Court pursued desegregation, racial tolerance increased; but during the period in which it has become less assertive, there has been a downturn in racial tolerance, suggesting that the Court can and does influence racial attitudes.

Literature Review and Theoretical Framework

Much work has been done examining the interaction of public opinion and Supreme Court decisions. When the Court takes a stand on visible and controversial issues, argue some theorists, the body of thought that they uphold is validated as "politically correct." The legitimation hypothesis emphasizes the degree of compliance and support that accompany Supreme Court rulings (Marshall 1989, 135). Public opinion, according to this theory, would be expected to shift favorably toward the position of the Court. Hence, the Court can and does have a profound influence on Americans' attitudes and the nation's policy agenda.

The work of sociologist Cardell C. Jacobson equips the legitimation hypothesis with approximate controls for all variables external to the ruling itself (social factors, implementation, and other policies such as affirmative action). He conducted a survey in the months before and after a Milwaukee desegregation ruling. Among those directly affected by the ruling, 8.1% fewer of them
said that they would object to their children attending racially balanced schools after the ruling than before (1978, 703):

There were no increased intergroup contacts, no changes in school feeder patterns, no increased neighborhood integration. There was only the ruling. Like several earlier investigators of law and attitudes we have found that the law can change public opinion (1978, 705).

Franklin and Kosaki fine-tuned the legitimation hypothesis and renamed it the positive response hypothesis, but argued that the effects of the ruling on long-held social values are mitigated as "social communication processes become the dominant influence" (1989, 766). These processes are defined as interactions within an individual's own racial or ethnic group. The reasoning behind this theory is not unlike that which justified the separate but equal doctrine of Plessy v. Ferguson (1896). Other researchers have come to the same conclusion. Muir and McGlamery found that while white students displayed more acceptance of blacks as classmates (from 56.4 percent in 1963 to 96.7 percent in 1982), "data reveal that this trend has not just slowed but actually reversed, with an increased portion of white undergraduates believing that blacks are relatively lazy, untrustworthy, immoral, and vengeful" (1984, 968).

Longshore asserts that desegregation may sow the seeds of its own destruction because of a phenomenon that he calls territorial instinct. He found that "even when students of one race are greatly outnumbered, their attitudes are more favorable than when the school is racially balanced, because control of the school is not in dispute" (1982, 675). He proposes the use of situation-specific remedies rather than universal judicial decrees.

Thus, most researchers assert that while desegregation might have seemed like a good idea at first, it has failed to achieve its desired results in the long run. The case often singled out for such analysis is Milliken v. Bradley (1974), which was accompanied by a two point positive poll shift from the pre- to postdecision period, while the long term poll shift was negative eight points (Marshall 1989 147, 155). It will be shown, however, that the negative opinion shifts in the wake of Milliken reflected the subtle "throttling back" of the Court on desegregation. The explanatory value of the legitimation hypothesis will be illustrated by examining desegregation cases and placing them on a public opinion continuum from 1954 to the present.

Findings

History of Public School Desegregation Cases

Plessy v. Ferguson (1896) established the doctrine of "separate but equal facilities" for members of different races, citing congressional segregation of Washington, D.C. public schools as justification. Brown v. Board (1954) reversed Plessy, calling separate facilities "inherently unequal," and stated that the opportunity of education, "where the state has undertaken to provide it, is a right which must be made available to all on equal terms" (483). The Court had started down the road to desegregation, a road that it would continue to take until 1974.

Brown (II) (1955), issued one year later, required compliance with the original decree "with all deliberate speed". The decisions met massive resistance, especially in the South, but the Court in Cooper v. Aaron (1958) unanimously reaffirmed Brown. When, in 1964, Prince Edward County, Virginia schools remained mostly segregated the Court declared that "the time for more deliberate speed had run out" (Griffin v. County School Board of Prince Edward County, 1964).
School boards defended themselves by saying that they allowed students the "freedom-of-choice" to go to any school they chose, but the Court held in *Green v. New Kent County School Board* that "[the open-enrollment] plan has operated simply to burden children and their parents with a responsibility which *Brown II* placed squarely on the School Board" (1964, 430). The Court went farther out on a limb, requiring not only that school districts allow students to choose which school they would like to go to, but that they also take steps (busing being one) to facilitate racial diversity in each school.

Opposition persisted. "[T]he Supreme Court rejected [Nixon] Administration-sponsored delay requests in *Alexander v. Holmes County Board of Education* (1969) and *Carter v. West Feliciana Parish School Board* (1970)" (Levy 1986, 559). By 1974, however, the Court's resolve had eroded. *Milliken v. Bradley* (1974) was the first case to strike down a judicial desegregation order, an order involving several school districts, not all of which discriminated. Thus, they rejected the only possibility of having integrated schools where "white flight" to the suburbs had left a high concentration of minorities in inner-city districts.

From 1974 on, the liberal-activist judges (notably Brennan and Marshall) were consistently on the dissenting side of desegregation opinions. More difficult standards for proving discrimination were set forth in a number of cases. "There was little judicial enthusiasm for continued reliance on a remedial process about which there was so much controversy as to its effectiveness..." (Levy 1986, 560). In 1975, the Court accepted partial desegregation in *Calhoun v. Cook* and did basically the same thing in *Milliken v. Bradley II* (1977). The Court held that resegregation after integration need not be corrected by the courts in *Pasadena Board of Education v. Spangler* (1976). Finally, the 1982 *Crawford v. Los Angeles Unified School District* case validated this California proposition: "State courts shall not order mandatory pupil assignment or transportation unless a federal court would do so to remedy a violation of the Equal Protection Clause" (527).

While the Court has remained mostly silent on public school desegregation cases since 1982, it has allowed lower court rulings to stand that have made it more difficult for parent organizations to obtain standing (*Morgan v. McDonough* 1984), has placed the burden of proof squarely on those who challenge a school district that has declared itself unitary, and has granted "relief against school board's 'bussing' plan to promote desegregation" (Trenker 1989, 674). Still other lower court decisions (such as *United States v. Mississippi* [1989] and *Whittenberg v. School District* [1985]) have relaxed desegregation rules and been decided in favor of the school districts whose policies are challenged. Although they do not abandon *Brown*, these lower court opinions (tacitly approved by the Supreme Court) have departed from the activist traditions of the 50s, 60s, and half of the 70s. The recent conservatism of the Court on racial issues can also be illustrated by race-related cases such as *Wygant v. Jackson Board of Education* (1986) and *Bazemore v. Friday* (1986) that have also found Brennan and other desegregation activists in the minority. An examination of the history of these cases shows a shift in the Court's posture on desegregation and racial issues. How does this shift relate to patterns in public racial attitudes? To this question we turn next.

**Evolution of Racial Attitudes**

*Brown* was a watershed of racial tolerance for Americans. In 1964 34.5 percent
of eighteen to twenty-four-year-olds polled said that they were in favor of desegregation. By 1972, nearly 51 percent agreed. Between 1972 and 1974 (exactly when *Milliken* brought the judicial pendulum swinging back to the right) there was a sharp downturn and by 1978 only 32.8 percent polled were in favor of desegregation—less than in 1964 (Converse et al. 1980, 64). This trend seems to have persisted. A June 1990 Gallup poll reports that only 33 percent of eighteen to twenty-nine-year-olds polled feel like they have become more tolerant of people of different colors and races (Newport 1990, 32).

Supreme Court Cases and Attitudes on Desegregation

Question: Do you think white students and negro students should go to the same or separate schools?

National Opinion Research Center

The declining proportion of positive racial responses of students corresponds with a similar pattern in their parents. A 1990 Gallup Poll found:

10% of whites saying they would object to sending their child to a school where half of the students were black. That proportion increased to 31% when asked if they would object to sending their child to a school where more than half of the children were black (Newport 1990, 25).

Polls show that there has been only a modest increase (from 30 percent in 1973 to 37 percent in 1988) in those who feel that more should be done to integrate our schools (Shriver 1988, 46). These data show that racism and separatism are not, as we might like to think, unfortunate relics of the past.

The most continuous, representative, and random data is provided in the figure which traces overall public opinion on integration from 1940 to 1985. When the cases we have examined are plotted along the x-axis, we can see an almost linear increase of the Brown to Carter period. After Milliken, the trend stops and has flattened significantly as the Court has become less active in school integration.

Analysis

Review of the Data

In the figure, all shown cases from Brown to Carter were decided in favor of integration and were relatively activist decisions. Milliken in 1974 and all subsequent cases did not reverse Brown but represent a departure from the Court’s activist position. The pre-Brown period saw the initiation of positive racial attitudes. This jump from 2 percent to 15 percent positive responses coincides with the first two cases in which the Supreme Court upheld the rights of black citizens, Smith v. Allwright (1944) and Shelley v. Kramer (1948) (Schaefer 1990, 219). The 1954 Brown decision creates an even sharper increase in positive responses, a trend that continued until the Milliken decision. As Figure 1 shows, since Milliken, the Court’s negative posture towards desegregation and race related cases has corresponded with steady or only minutely increasing positive public responses to the question of integration.

Theoretical Implications

This analysis, particularly in light of the dramatic shift in the early 1970s, supports the legitimation hypothesis. To the extent that this correlation is not mere coincidence, alternative hypotheses are discredited.

Proponents of the positive response/social communication hypothesis would attribute this renewed polarization to the influence of primary social institutions (friends and family) and/or a resurgence of ethnicity. However, most sociological models emphasize assimilation or pluralism rather than conflict. After 300 years of cohabitation and black attempts to assimilate into white society, we should be able to expect successful integration. Those sociologists who do predict a resurgence of ethnicity do not expect this to occur until the third generation after a strong push for assimilation (in this case the Brown decision) (Schaefer 1990, 142-3).

The territoriality theory is also discredited by the exact coincidence of Milliken and the decline in racial attitudes. Moreover, territorial conflicts could only be expected where there is a nearly perfect balance of black and white students. Blacks represent only 12 percent of the population and do not account for 50 percent of the student body in a majority of schools.
The social communication or territoriality hypotheses would attribute the deterioration of racial attitudes to the failures of desegregation (see Table 2). The data show, however, that so long as the Court was willing to take a stand in favor of desegregation, public racial attitudes improved. The opposite was true when the Court softened its activist stance on desegregation. The legitimation hypothesis is consistent with both trends.

Table I. Theories and implications.

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<tr>
<th>HYPOTHESIS</th>
<th>IMPLICATION</th>
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<tr>
<td>Legitimation</td>
<td>Court lost resolve</td>
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<tr>
<td>Positive Response</td>
<td>Desegregation failed</td>
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<tr>
<td>Territoriality</td>
<td>Desegregation failed</td>
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Limitations and Suggestions for Further Research

Analysis of this type carries with it the persistent subjectivity of the social sciences. People who agree generally to the principle of desegregation may nonetheless oppose specific remedies such as busing. Politically correct professions of racial tolerance might only mask the persistent hatred of a "timid bigot" (Schaefer 1990, 56). Another limitation encountered in this type of study is that it is easier to explain conclusively the shifts in public opinion before and after the first ruling on a controversial issue than it is to explain shifts in opinion in concert with subsequent rulings.

This study focuses on the aim of improving racial tolerance; other research has and will focus on the accessibility to quality education and student attainment. Future researchers might also look at the role of media, the executive and legislative actions of the same period, racial lobbying efforts, and other political factors. Racial violence is, unfortunately, an increasingly available variable that will be useful for future studies.

Conclusion

By examining the relationship between Supreme Court decisions and racial attitudes we have seen the effect that the Court can and does have on public opinion. The period of activist desegregation coincided with dramatic increases in racial tolerance. Since 1974, however, the Court has taken a much more conservative stance and public opinion has deteriorated.

The implications are profound. Racial tensions and conflict are on the rise. The conservative Court's current session will address desegregation for the first time in years. The outcome will be as impressive as Brown and therefore should be of great interest to all of us. Just how effective can an activist Court be in "correct[ing], by balancing of the individual and collective interest, the condition which offends the Constitution" (Trenker 1989, 672)? It can be very effective. Should the Court assert itself as it did before 1974? It should. Will Martin Luther King's dream ever become a reality? We can only hope that it will.

NOTES


WORKS CITED


Plessy v. Ferguson, 163 U.S. 537 (1896).


