

CHAPTER ONE	2
AN INTRODUCTION TO JUDICIAL DECISION MAKING	2
I. WHAT THIS BOOK IS ABOUT	2
II. BROWN V. BOARD OF EDUCATION	4
II. BROWN AS LAW	12
A. THE MEANING OF THE TEXT	12
B. THE INTENTIONS OF THE FRAMING GENERATION	13
C. PRECEDENT	16
D. AND MORE	19
IV. BROWN AS IDEOLOGY	20
V. BROWN AND AGENDA SETTING	28
A. THE NAACP’S LITIGATION CAMPAIGN	28
B. AGENDA-SETTING, COURTS AND THE LAW	31
1. <i>The Agenda Setting Capacity of Courts</i>	31
a. Ducking Issues	31
b. Certiorari, and courts of discretionary review	32
c. Signaling to Litigants	33
d. Configuring Litigation	33
2. <i>The Power of Litigants</i>	34
3. <i>The Nature of a Legal Case</i>	34
4. <i>The Symbiotic Nature of Courts and Cases</i>	35
VI. INFORMATIONAL AND INSTITUTIONAL CONSTRAINTS IN <i>BROWN</i>	36
VII. DECISIONMAKING ON A COLLEGIAL COURT	42
A. BROWN I	43
B. BROWN II	45
VIII. JUDICIAL DECISIONMAKING IN A SYSTEM OF SEPARATION OF POWERS	47
A. THE JUDICIAL BRANCH.....	48
B. THE OTHER BRANCHES	50
C. THE COURT AND THE EXECUTIVE BRANCH.....	54
1. <i>Giving the Truman Administration the Cold Shoulder</i>	56
2. <i>About-Face: Wanting the Administration on Record</i>	56
3. <i>‘The Eisenhower Administration’s (Reluctant) Participation in Brown</i>	57
D. THE THREE-BRANCH SOLUTION	59
IX. PUBLIC OPINION AND JUDICIAL DECISIONMAKING	61
A. BROWN AND PUBLIC OPINION	63
B. FROM BROWN TO THE PRESENT	65
1. <i>Limits on the use of race: the 1970s</i>	67
2. <i>The 1990s: school desegregation and affirmative action in higher education diverge?</i>	69

CHAPTER ONE

AN INTRODUCTION TO JUDICIAL DECISION MAKING

I. What this Book is About

Judges are some of the most important decision makers in the American system of government. They aren't the only ones, of course. Governance in the United States is a complex affair, involving many officials, from all three branches of government, and at all levels of government, from the state and local to the national. Especially in law schools, there is a concern that too much attention has been paid to judges, at the expense of their colleagues in the legislature, or in executive and administrative agencies. Still, there is a reason for the attention to judges. Judges make much of the law in the United States. Even when judges are interpreting legislative statutes or executive regulations, it is those judicial decisions that determine ultimately how those statutes and regulations will apply.

Indeed, there is some irony about the current view in law schools that too much attention is played to judges, because in truth we know remarkably little about how judges reach their decisions, or about the factors that influence the content of judge-made law. We obviously are aware of the part of judging that is transparent, the briefs that get filed, the opinions that judges hand down. But a great deal of what judges do is opaque, and difficult to study.

When lawyers study law, they might be said to an "internal" view of the law, which is to say they study the opinions judges hand down, trying to understand how those decisions follow from prior decisions and influence later ones. Law tends to be viewed as a closed or autonomous system, about which one needed to know little except what was contained in the legal texts themselves. See Richard Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 Harv. L. Rev. 761, 762 (1987). If one is curious about, say, affirmative action in education, one could look at the main legal texts – such as the Supreme Court's 2003 decisions in the University of Michigan affirmative action cases, *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Gratz v. Bollinger*, 539 U.S. 244 (2003) – and analyze the extent to which *Grutter* and *Gratz* rested on prior precedents, how the two cases could be read together, and how they evolved into the set of rules that governed affirmative action in university admissions. (Taken together, *Grutter* and *Gratz* basically said it was okay to take race into account in university admissions to ensure a "diverse" student body, so long as it was just one of many factors, and each applicant was considered on a bundle of his or her own characteristics.) And if one wanted to understand whether those rules were altered at all by the 2012 decision in *Fisher v. University of Texas*, 132 S. Ct. 1536 (2012), one need only read that opinion.

Social scientists look at law and judging in a very different way. Many social scientists are skeptical that any legal precedent determines the outcome of a case or set of cases, and few believe that is a complete explanation of how law and legal institutions work. Instead, they focus on factors outside the law itself that seem to govern judicial decisions, what might be called an

“external” perspective. For example, a social scientist might say about the decisions in *Grutter* and *Gratz* that it was all about the preferences of the justices of the Supreme Court who decided those cases, and that if one focuses on the cases, it is apparent that Justice O’Connor was the “median” justice of the Court and therefore her preferences determined the result. Then, noting the somewhat different approach of the Supreme Court in *Fisher*, a social scientist might point to the change in membership of the Supreme Court in explaining the differing outcome. Of course, the identity of the judge is hardly the only external factor that might matter. For example, a social scientist might also point to changing public opinion about affirmative action as the explanation for the change.

These differing characterizations are overstated, of course. Any lawyer worth her salt understands full well that it is more than the legal sources that decides cases, and good social scientists try to study and understand the role law itself plays in judicial decisionmaking.

Still, it is the case that for many, many years there has been a divide between the legal and social science students of judging and the law. Good lawyers may be perfectly well aware that factors beside the texts themselves decide cases, but they aren’t too sure what to do with this knowledge. Take a trite but telling example: a lawyer would hardly feel comfortable standing before a trial court in an affirmative action case and saying something like, “everyone knows that the *Grutter* and *Gratz* cases were decided the way they were because of the moderate views of Justice O’Connor, but she is gone now, so this case should come out differently.” By the same token, social scientists often want to ignore the internal workings of law, either dubious that they matter or finding them uninteresting.

The good news is that the divide between social scientists and lawyers is closing. Many leading law schools have hired social scientists on their faculties, realizing that to understand all the institutions of American law – not just courts – it helps to have an external perspective as well. The methodologies of social science – empirical testing, and formal modeling – have gained a great deal of acceptance in law. Indeed, more and more law professors are using these tools of external analysis themselves. By the same token, social scientists have come to realize that if they want to understand how judging and legal institutions work, they need to know something of law itself.

The premise of this book is that the internal and external views of judicial decisionmaking not only can be united, but that they must. Unless one is prepared to say that either view is valueless, then the question is what a shared approach can offer – both to the social scientist trying to understand judicial behavior, and to the lawyer trying to understand the law. While many seem skeptical that it is possible to integrate the internal and external perspectives on law and judging, it is the promise of this book to prove otherwise.

Two general insights animate this book.

First, it is simply impossible for social scientists to study judicial behavior and decisionmaking in an adequate way without also trying to understand and account for how law and legal institutions work. Law, in particular, is infinitely richer and more complex than many social science accounts grasp, and to get a handle on courts, judicial process, and judicial decisions, it is essential to take account of the texture of the law.

Second – and perhaps more important – some aspects of what social scientists have learned about judicial behavior have a real bearing on the law and legal institutions. To state the obvious, lawyers adopting strategies to win a case or set of cases, and thereby succeed for a client – and perhaps change the law in the course of doing so – necessarily profit from understanding what social scientists can teach about how and why judges actually decide cases. But something even more fundamental is true. It turns out that the sorts of things social science teach us about judicial behavior have an enormous influence *on the law itself* – whether legal rules are broad or narrow, whether they grant discretion to lower court judges and other actors, and whether the rules are likely to be implemented or find adherence.

In short, marrying the internal and external perspectives will give us a much richer, fuller, and more nuanced understanding of what courts and judges do, why they do it, and how to be successful studying them, or litigating cases in front of them. Here are some examples, just so that you have a sense of what we mean, what are the kinds of things we will cover here:

*Suppose Jane Doe sues the government arguing it is violating her rights in some way. And suppose the judge or judges hearing the case believe she is absolutely right. Yet, suppose further there is a real reason to doubt whether government officials will follow their decision. What do judges do in these cases? Do they avoid issuing a ruling that will be ignored? And what should they do?

*When should the law employ a bright line rule that is clear and everyone can follow, but may be unjust in some circumstances, or when should it adopt a mushier standard that is harder to follow but if done properly allows for justice in every case? For example, should the law say “drive at whatever speed is safe?” Or should it set a specific speed limit, even if that means giving tickets to perfectly safe drivers who have a good reason to rush (like rushing someone to the hospital)? Is it an acceptable answer that judges do this because their caseload gets too high to handle each case on its own facts? How about because the judge doesn’t trust the lower court judges (or other governmental actors, like the police) to do the right thing, and so believes a clear rule – even if not exactly right – will be easier to monitor?

*Is the law affected by the order in which cases come to judges? Is it possible that if they’d come in a different order the law would be different? And if there is evidence this occurs, how should we feel about it, and what might we do about it?

*Sometimes judges have controversial cases, like a person accused of a heinous crime, whose guilt is uncertain but the community is clamoring for “justice” (i.e., convict him as quickly as possible). Or, a case asking whether abortion should be legal. What does the evidence suggest about whether judges listen to public opinion in these cases? When should they? If they listen in cases in which they should not, is there a way to further insulate them so they can decide on the law and facts alone? If they don’t listen when they should (should they ever?) how can they be made to be more responsive?

II. Brown v. Board of Education

There’s a reason a picture is said to be worth 1,000 words. Sometimes the best way to understand something is by way of example. One of the things we hope you will like about this

book is that it is full of examples. Not just judicial decisions, which are common in law school course materials, but also excerpts from social science studies, charts, graphs, congressional testimony and much else, even pictures.

This chapter will introduce you to the various themes that we will explore throughout the remainder of the book. It will give you a sense of the many ways in which internal and external perspectives on law interact, often in ways that change the law itself, and people's rights under that law. The chapter is built around one example – the Supreme Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954). As almost everyone surely knows, *Brown v. Board of Education* held that it violated the Constitution for governments to have a mandatory system of racially-segregated schools.

Why Brown?

Brown v. Board of Education has the odd distinction of being an iconic statement of law that draws virtually no dissent, and is some of the most contested turf in American law and politics. At the same time, no less.

Consider the confirmation of nominees to the Supreme Court of the United States. It is inconceivable that anyone could be confirmed to the country's high bench without expressing fealty to *Brown*. And when we test that hypothesis by looking to recent confirmation hearings, that is precisely what we find. One expects that the more "liberal" nominees (there's a term we will explore in some depth) will be simpatico to *Brown*, such as in this exchange between Stephen Breyer and Senator Herbert Kohl:

Senator KOHL: ...Judge Breyer, I would like to ask you this: In your opinion, what do you think are the three most important Supreme Court cases of the 20th century? And why?

Judge BREYER: Well, the first is easy. I mean, the first is *Brown v. Board*. And why that is so easy is because, to me, it was clear. I mean, you know, here is the promise in this document, and the promise is the country will be fair. And they wrote it sometime in the middle, last part of the 18th—you know, in the 19th century, and then it was not done. How shocking. How shocking to write a promise like that into the Constitution and it is not done. And it seems to me that *Brown* was a decision of courage, in a sense, but the courage was do what the law says. Read it. That is what it says. We are going to do it.¹

But deeply "conservative" justices, such as Justice Samuel A. Alito, Jr, have shown even more profound devotion to *Brown*:

¹ *The Nomination of Stephen Breyer to be an Associate Justice of the Supreme Court of the United States: Hearing Before the Sen. Comm. on the Judiciary*, 103rd Cong. 64 (1994) (question of Sen. Herbert Kohl to Judge Stephen Breyer).

Senator Durbin: I would ask you at this point—you obviously support *Brown v. Board of Education*, do you, and the finding of the Court in that?

Judge ALITO. Certainly, Senator.

Senator DURBIN. Do you believe that the Constitution protects the right of children in America to be educated in schools that are not segregated?

Judge ALITO. Absolutely, Senator. That was one of the greatest, if not the single greatest thing that the Supreme Court of the United States has ever done.²

Yet, consider also the war over *Brown* that took place when the Supreme Court was asked, in the 2007 case of *Parents Involved in Community Schools v. Seattle School District 1*, 551 U.S. 701 (2007), whether school districts could rely on race in assigning students to certain schools or in allowing them to transfer among schools. The question in that case was whether primary and secondary school districts could use race as a basis of pupil assignment in order to avoid existing racial imbalance in the schools that may or may not be the government’s fault – for example if neighborhoods are racially segregated due to the conduct of private actors and that influences the composition of student bodies. The case produced five opinions: a plurality opinion by Chief Justice Roberts and joined (in its central aspects) by Justices Scalia, Thomas, and Alito; a concurring opinion written by Justice Kennedy; a dissenting opinion written by Justice Stevens; and a dissenting opinion by Justice Breyer, joined by Justices Stevens, Souter and Ginsburg. Justices in the majority voted to invalidate the district’s assignment plan, while those in dissent concluded that it was constitutional.

Each opinion claimed *Brown* supported its position, but each presented very different visions of what *Brown* was. Note that justices who expressed fealty to *Brown* in their confirmation hearings sat on both sides of *Parents Involved*. As the Chief Justice put it: “The parties and their amici debate which side is more faithful to the heritage of *Brown*.” 551 U.S. 701, 747. Those justices opposed to race-based school assignment insisted the legacy of *Brown* was a “color-blind Constitution,” 551 U.S. at 772 (Thomas, J., concurring), meaning the one thing government could never do was make decisions based on race, absent some extraordinarily compelling reason, even if it seemed the government was trying to do good and not hurt anyone. As the Chief Justice’s opinion for a plurality of the justices (including Justice Alito) said:

“Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin. The school districts in these cases have not carried the heavy burden of demonstrating that we should allow this once again—even for very different reasons.”

551 U.S. at 747. Justice Thomas was even more strident and direct:

² *The Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Hearing Before the Sen. Comm. on the Judiciary*, 109th Cong. 452 (2010) (question of Sen. Richard Durbin to then-Judge Samuel A. Alito, Jr.).

“Disfavoring a color blind interpretation of the Constitution, the dissent would give school boards a free hand to make decisions on the basis of race—an approach reminiscent of that advocated by the segregationists in [*Brown*]. This approach is just as wrong today as it was a half-century ago. The Constitution and our cases require us to be much more demanding before permitting local school boards to make decisions based on race.”

551 U.S. at 748 (Thomas, J., concurring). But those in favor of the school district’s plan responded that *Brown* was about the use of race to *subjugate* racial minorities, and did not apply when the government was trying to help them – the same issue as in the affirmative action cases. Justice Breyer’s dissent stressed the point that it was not easy to tell whether a school district was remedying segregation that was “de jure” (i.e. intentional as a matter of law) or “de facto” (i.e. the product of social forces). But he also challenged the majority justices’ image of *Brown* itself:

The plurality cites in support those who argued in *Brown* against segregation, and Justice Thomas likens the approach that I have taken to that of segregation’s defenders. See *ante*, at 39–41 (plurality opinion) (comparing Jim Crow segregation to Seattle and Louisville’s integration policies); *ante*, at 28–32 (Thomas, J., concurring). But segregation policies did not simply tell schoolchildren “where they could and could not go to school based on the color of their skin,” *ante*, at 40 (plurality opinion); they perpetuated a caste system rooted in the institutions of slavery and 80 years of legalized subordination. The lesson of history, see *ante*, at 39 (plurality opinion), is not that efforts to continue racial segregation are constitutionally indistinguishable from efforts to achieve racial integration. Indeed, it is a cruel distortion of history to compare Topeka, Kansas, in the 1950’s to Louisville and Seattle in the modern day—to equate the plight of Linda Brown (who was ordered to attend a Jim Crow school) to the circumstances of Joshua McDonald (whose request to transfer to a school closer to home was initially declined). 551 U.S. at ____.

To similar effect was Justice Stevens’ short solo dissent:

“The Chief Justice fails to note that it was only black schoolchildren who were so ordered; indeed, the history books do not tell stories of white children struggling to attend black schools. In this and other ways, The Chief Justice rewrites the history of one of this Court’s most important decisions.” 551 U.S. at 799

The disagreement was both intense and unfriendly. In his dissent, Justice Stevens took the unusual step of announcing that “no Member of the Court that I joined in 1975 would have agreed with today’s decision.” 551 U.S. at 803.

And so the question: What was *Brown v. Board of Education*? What did it hold? That turns out to be a surprisingly complex question, albeit one of huge practical importance and strong emotional valence. Nothing we are about to say will answer the question definitively. To the contrary, it will demonstrate how a variety of factors not usually the target of legal analysis

give us very different ways to understand what Brown was about, what people thought it resolved, and why. These materials will introduce you to the themes we'll cover right throughout this course.

What makes the Brown decision particularly apt to demonstrate the themes of the course is that we know a great deal about how the Brown case was decided; we have access to many archival sources, including the papers of the Supreme Court justices themselves, revealing their internal deliberations. This would not be true of a more recent case, and perhaps not of a less iconic one. By looking at these sources, we can see the various internal and external influences on the justices that had a hand in shaping the outcome of the case – and also how people's rights were or were not protected by that rule.

You might object right off the bat that Brown is a poor exemplar precisely because it was such an iconic case. Yes, external factors might have influenced the justices in Brown, but can we generalize about how these factors operate in more common and less iconic cases? Doesn't Brown's very specialness detract from its usefulness as a learning device?

Bravo for you if this question crossed your mind. One of the key lessons of this book, which is that we must be careful about the sort of inferences and conclusions we can draw from data. Throughout the book we will use cases like Brown as exemplars, but we'll also deal with this problem the way social scientists do, by using large data sets (or studies that relied on large data sets) and inferring from that data as best as we are able, what was going on. Still, it is useful and instructive to begin with a very tangible example, where we *can* know – as well as one can know anything, because it is very difficult to know much for certain – that the sorts of factors we study in this book really do matter to real judges and really do influence the development of the law.

Brown v. Board of Education *347 U.S. 483 (1954)*

CHIEF JUSTICE Warren

These cases come to us from the States of Kansas, South Carolina, Virginia, and Delaware. They are premised on different facts and different local conditions, but a common legal question justifies their consideration together in this consolidated opinion.

In each of the cases, minors of the Negro race, through their legal representatives, seek the aid of the courts in obtaining admission to the public schools of their community on a nonsegregated basis. In each instance, they have been denied admission to schools attended by white children under laws requiring or permitting segregation according to race. This segregation was alleged to deprive the plaintiffs of the equal protection of the laws under the Fourteenth Amendment. In each of the cases other than the Delaware case, a three-judge federal district court denied relief to the plaintiffs on the so-called "separate but equal" doctrine announced by this Court in *Plessy v. Ferguson*, 163 U.S. 537. Under that doctrine, equality of treatment is accorded when the races are provided substantially equal facilities, even though these facilities be separate. In the Delaware case, the Supreme Court of Delaware adhered to that doctrine, but

ordered that the plaintiffs be admitted to the white schools because of their superiority to the Negro schools.

The plaintiffs contend that segregated public schools are not “equal” and cannot be made “equal,” and that hence they are deprived of the equal protection of the laws. . . . Argument was heard in the 1952 Term, and reargument was heard this Term on certain questions propounded by the Court.

Reargument was largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868. It covered exhaustively consideration of the Amendment in Congress, ratification by the states, then existing practices in racial segregation, and the views of proponents and opponents of the Amendment. This discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive. 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.” 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 cannot be determined with any degree of certainty.

An additional reason for the inconclusive nature of the Amendment’s history, with respect to segregated schools, is the status of public education at that time. In the South, the movement toward free common schools, supported by general taxation, had not yet taken hold. Education of white children was largely in the hands of private groups. Education of Negroes was almost nonexistent, and practically all of the race were illiterate. In fact, any education of Negroes was forbidden by law in some states. Today, in contrast, many Negroes have achieved outstanding success in the arts and sciences as well as in the business and professional world. It is true that public school education at the time of the Amendment had advanced further in the North, but the effect of the Amendment on Northern States was generally ignored in the congressional debates. Even in the North, the conditions of public education did not approximate those existing today. The curriculum was usually rudimentary; ungraded schools were common in rural areas; the school term was but three months a year in many states; and compulsory school attendance was virtually unknown. As a consequence, it is not surprising that there should be so little in the history of the Fourteenth Amendment relating to its intended effect on public education.

In the first cases in this Court construing the Fourteenth Amendment, decided shortly after its adoption, the Court interpreted it as proscribing all state-imposed discriminations against the Negro race. The doctrine of “separate but equal” did not make its appearance in this court until 1896 in the case of *Plessy v. Ferguson*, supra, involving not education but transportation. American courts have since labored with the doctrine for over half a century. In this Court, there have been six cases involving the “separate but equal” doctrine in the field of public education. In *Cumming v. Board of Education of Richmond County*, 175 U.S. 528, and *Gong Lum v. Rice*, 275 U.S. 78, the validity of the doctrine itself was not challenged. In more recent cases, all on the graduate school level, inequality was found in that specific benefits enjoyed by white students were denied to Negro students of the same educational qualifications. *State of Missouri ex rel. Gaines v. Canada*, 305 U.S. 337; *Sipuel v. Board of Regents of University of Oklahoma*, 332

U.S. 631; *Sweatt v. Painter*, 339 U.S. 629; *McLaurin v. Oklahoma State Regents*, 339 U.S. 637. In none of these cases was it necessary to re-examine the doctrine to grant relief to the Negro plaintiff. And in *Sweatt v. Painter*, supra, the Court expressly reserved decision on the question whether *Plessy v. Ferguson* should be held inapplicable to public education.

In the instant cases, that question is directly presented. Here, unlike *Sweatt v. Painter*, there are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other “tangible” factors. Our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved in each of the cases. We must look instead to the effect of segregation itself on public education.

In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other “tangible” factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.

In *Sweatt v. Painter*, supra, in finding that a segregated law school for Negroes could not provide them equal educational opportunities, this Court relied in large part on “those qualities which are incapable of objective measurement but which make for greatness in a law school.” In *McLaurin v. Oklahoma State Regents*, supra, the Court, in requiring that a Negro admitted to a white graduate school be treated like all other students, again resorted to intangible considerations: “. . . his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession.” Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs:

Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to (retard) the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial(ly) integrated school system.

Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority.³ Any language in *Plessy v. Ferguson* contrary to this finding is rejected.

We conclude that in the field of public education the doctrine of “separate but equal” has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. . . .

* * *

We have edited the *Brown* decision very lightly. Except for a bunch of footnotes, and some material about the specific disposition of the cases – which we are saving for later discussion – you have most of the Chief Justice’s reasoning. Throughout the book we will follow the common practice of editing cases heavily, so that you need only focus on what is most germane. But we thought it would be useful this once to see a Supreme Court decision in almost all its glory. Besides, in this case the Chief Justice made it easy for us. He purposely wrote the opinion to a length he felt could be published on a page of most newspapers – and it was in fact widely disseminated in that way.⁴ And it was indeed carried in full in many newspapers.

Beginning with the text of the opinion, and moving out from there, let’s try to understand what *Brown* held, and what it means for us today.

³ FN11. K. B. Clark, *Effect of Prejudice and Discrimination on Personality Development* (Midcentury White House Conference on Children and Youth, 1950); Witmer and Kotinsky, *Personality in the Making* (1952), c. VI; Deutscher and Chein, *The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion*, 26 *J. Psychol.* 259 (1948); Chein, *What are the Psychological Effects of Segregation Under Conditions of Equal Facilities?*, 3 *Int. J. Opinion and Attitude Res.* 229 (1949); Brameld, *Educational Costs, in Discrimination and National Welfare* (MacIver, ed., 1949), 44-48; Frazier, *The Negro in the United States* (1949), 674-681. And see generally Myrdal, *An American Dilemma* (1944).

⁴ See RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY AND JUSTICE* 714 (2004); see also EARL WARREN, *THE MEMOIRS OF CHIEF JUSTICE EARL WARREN* 3 (1977) (noting “[i]t was not a long opinion, for I had written it so it could be published in the daily press throughout the nation without taking too much space”).

III. Brown as Law

The most obvious way to begin to understand Brown is from the internal perspective, as law. The question we ask in this section is, was Brown decided “according to law”? You might think that a lunatic question. We’ve already told you that respectable lawyers agree Brown was rightly decided.

What’s true today wasn’t true in 1954, however. Brown engendered violent opposition. Much of that, of course, was over the outcome, without much attention to the legal reasoning. And people who don’t like the outcome of a legal case are likely to argue that it was wrongly decided as a matter of law. Still, it might be instructive to see what some of Brown’s most high-profile opponents had to say. It may seem heretical to suggest this today, but viewed in the context of their time, those opponents made some valid points. To be clear, we (the authors) are unequivocal that Brown was the right decision at the right time. But explaining why is a more difficult endeavor.

In 1956 the vast majority of Southern members of Congress signed on to what became known as “The Southern Manifesto.” 102 Cong. Rec. H3948, 4004 (Mar. 12, 1956). The Manifesto was published at the beginning of the period of “massive resistance,” during which many Southern leaders did what they could to obstruct the orders of courts to desegregate. The Manifesto began angrily:

The unwarranted decision of the Supreme Court in the public school cases is now bearing the fruit always produced when men substitute naked power for established law . . .

We regard the decision of the Supreme Court in the school cases as clear abuse of judicial power. It climaxes a trend in the Federal judiciary undertaking to legislate, in derogation of the authority of Congress, and to encroach upon the reserved rights of the states and the people.⁵

But though they were angry, and although there were many bigots among them, the signers of the Southern Manifesto also included among them some highly regarded constitutional scholars. Their argument was framed along rather traditional means of constitutional interpretation. And it is that interpretation we will examine, asking whether Brown was necessarily rightly decided in these strictly legal terms.

A. The Meaning of the Text

The plaintiffs’ claims in Brown (and the accompanying cases) was governed by the Fourteenth Amendment to the United States Constitution, which provides in relevant part: “. . . nor shall any state . . . deny to any person . . . the equal protection of the laws.”

⁵ 102 Cong. Rec. H3948, 4004 (Mar. 12, 1956).

Here is what the Manifesto authors had to say:

The original Constitution does not mention education. Neither does the Fourteenth Amendment nor any other amendment.⁶

Does the argument that the Amendment doesn't mention education *specifically*, standing alone, resolve the question the Brown Court took up in any way? Justice Robert H. Jackson didn't think so. In an opinion he drafted to be published alongside the majority opinion in Brown – what we call a “concurring” opinion because he agreed with the outcome but has somewhat different reasons – Justice Jackson said of the language of the Fourteenth Amendment: “they are sweeping and majestic generalities which standing alone can be read to require a full and equal racial partnership.” Bernard Schwartz, *Chief Justice Rehnquist, Justice Jackson, and the Brown Case*, 1988 Sup. Ct. Rev. 245, 257 (1988). (Justice Jackson never published the concurrence he drafted, for reasons we will explain shortly.)

B. The Intentions of the Framing Generation

When it comes to interpreting most texts, not only those written in “sweeping and majestic generalities” like the Fourteenth Amendment, we often have to move beyond what the words themselves say. For example, does it deny the “equal protection of the laws” to require people to be 16 years of age to get drivers' licenses, or to be 18 to vote? What about 15 year olds who are good drivers (let alone 40 year olds who are not), or 17 year olds who are especially wise in civic affairs (as opposed to many older people who are not)? Justice Jackson is right: “Equal protection of the laws” is stated with sufficient generality that we need some way to know what it means in the context of real cases.

One of the classic ways to know determine constitutional is to seek guidance from the thoughts and writings of those who wrote it, or the generation that ratified it. For some people, the text and original meaning is all we should consult when interpreting the Constitution; these people call themselves “originalists.” There are many varieties of originalism, but the most commonly accepted today is a form of originalism that asks: “what was the broadly accepted public meaning of this part of the Constitution, as applied to the problem before us now, at the time the Constitution was adopted.” Oftentimes, answering that question as it applies to modern problems is not easy. But sometimes the originalist approach is extremely revealing.

Here is what the authors of the Southern Manifesto had to say about the original meaning of the Fourteenth Amendment:

The debates preceding the submission of the Fourteenth Amendment clearly show that there was no intent that it should affect the systems of education maintained by the states.

⁶ 102 Cong. Rec. H3948, 4004 (Mar. 12, 1956).

The very Congress which proposed the amendment subsequently provided for segregated schools in the District of Columbia.

Then the amendment was adopted in 1868, there were thirty-seven states of the Union. Every one of the twenty-six states that had any substantial racial differences among its people either approved the operation of segregated schools already in existence or subsequently established such schools by action of the same law-making body which considered the Fourteenth Amendment.⁷

When combined with their textual argument, this line of reasoning begins to seem pretty damning of any interpretation that the Amendment requires school desegregation, does it not? Remember what Justice Jackson said about the text? He followed it by saying: “‘If we turn from words to deeds as evidence of purpose, there was ‘nothing to show that the Congress which submitted these Amendments understood or intended to prohibit the practice here in question.’” Bernard Schwartz, *Chief Justice Rehnquist, Justice Jackson, and the Brown Case*, 1988 Sup. Ct. Rev. 245, 257 (1988) (quoting Memorandum by Mr. Justice Jackson (Mar. 15, 1954) (*Brown* file, Robert H. Jackson Papers, Library of Congress)).

And, in truth, most constitutional interpreters agree that the ratifying generation was pretty clear – by actions if not by words – that segregated education was not condemned by adoption of the Fourteenth Amendment. There’s one notable exception. Professor Michael McConnell is a highly-respected conservative scholar (and a former federal judge). He developed an elaborate argument that the common wisdom on the framing era intentions regarding segregated education is wrong. Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 *Va. L.Rev.* 947 (1995). He reaches that conclusion by examining in minute detail the congressional debates over the Civil Rights Act of 1875, which prohibits discrimination on the basis of race in “the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement.” Ch. 114, §1, 18 Stat. 335, 336 (1875). You will note instantly that public education is not on that list – seemingly a real problem for Professor McConnell. But his argument is more nuanced than this. The legislation that became the Civil Rights Act of 1875 was debated over a long period of time, and many votes were taken, including on the question of segregated schools. Professor McConnell analyzes those votes, and the debates, and concludes that, had the *Brown* Court “turn[ed] the clock back” to 1875, it might have discovered strong support for its holding” that school segregation is inconsistent the Fourteenth Amendment. McConnell, *supra*, at 1140. He points out those votes were cast by many people who were involved in drafting the Fourteenth Amendment, so they should know. And he shows that many of the arguments in favor of desegregating schools sounded explicitly in Fourteenth Amendment terms. According to Professor McConnell, the historical record demonstrates that a “substantial majority of political leaders who supported the Amendment” believed that it did, in fact, outlaw school desegregation. McConnell, *supra*, at 953.

⁷ 102 Cong. Rec. H3948, 4004 (Mar. 12, 1956).

This is a clever argument. We will let you decide if you buy it. In doing that, here's an excerpt from a response by Professor Michael Klarman, a law professor and historian who has spent his career studying the history of race in America, and who does not buy it:

McConnell's effort to justify *Brown* on originalist grounds fails for four independent reasons. First and foremost, McConnell neglects sufficiently to consider the political and social context in which the Fourteenth Amendment was drafted and ratified. It is inconceivable that most—indeed very many—Americans in 1866-68 would have endorsed a constitutional amendment to forbid public school segregation. McConnell focuses excessively on what the Fourteenth Amendment *must have meant*, given the conceptual legal apparatus with which the Republicans approached issues of racial equality, and insufficiently on the practical reality that racial mores in most of the country in the mid-1860s were hostile to school desegregation. Second, McConnell never adequately defends his particular brand of originalism—that the meaning of the Fourteenth Amendment reposes in the intentions of its congressional drafters, rather than in those of its state legislative ratifiers (or of either's constituents, manifesting their preferences at the polls). Thus he fails to show why opposition to school segregation as manifested in congressional debates on the 1875 CRA should count more heavily in the originalist calculus than does popular hostility toward school desegregation as manifested in the overwhelming repudiation of the Republican Party in the 1874 congressional elections. Third, McConnell's argument relies entirely upon congressional debates occurring between 1872 and 1874. He pays insufficient attention to the possibility that civil rights sentiment changed dramatically between 1866 and 1872-74 and thus that the congressional debates on the 1875 CRA might constitute unreliable evidence of what congressmen intended when they drafted the Fourteenth Amendment. Fourth and finally, McConnell exaggerates the extent to which congressmen who supported the schools provision of the civil rights bill in 1874 understood its "full and equal enjoyment" language to require desegregation, as opposed to simply prohibiting *exclusion* of blacks altogether from public education.⁸

Do you find one or the other approach more persuasive?

In any event, many people – including some originalists, and the Supreme Court in *Brown* – have concluded that the very generality of the equal protection clause is sufficient to encompass and support a challenge to segregated education. The framers may not have planned for nor specifically contemplated desegregated schools, but neither did they prohibit them. They left it, so the argument goes, to future generations to decide. Of course, this argument is tricky too. Had a future generation actually decided that state-segregated schools were unconstitutional? Now, certainly. In 1954? Not so clear.

⁸ Michael J. Klarman, *Brown, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 Va. L. Rev. 1881, 1884 (1995).

C. Precedent

You don't have to be an originalist and let matters rest there. (In fairness, though, you do then have to develop an interpretive methodology of your own then that remains true to the idea of a written Constitution and constrains constitutional interpreters –including, but not limited to, judges – from claiming the Constitution means whatever you want it to mean, today.)

The next thing constitutional interpreters often look to is precedents. Many years passed between the adoption of the Fourteenth Amendment in 1868, and 1954, when *Brown* was decided. And as you might imagine, in the interim people had something to say about what the Fourteenth Amendment meant regarding education and segregation. Precedents can take many forms, including actions by Congress, the President, or the state governments. Obviously, one of the forms of precedent judges tend to take most seriously are judicial precedents.

Here is what the Manifesto had to say about precedent:

As admitted by the Supreme Court in the public school case (*Brown v. Board of Education*), the doctrine of separate but equal schools “apparently originated in *Roberts v. City of Boston* (1849), upholding school segregation against attack as being violative of a state constitutional guarantee of equality.” This constitutional doctrine began in the North-not in the South-and it was followed not only in Massachusetts but in Connecticut, New York, Illinois, Indiana, Michigan, Minnesota, New Jersey, Ohio, Pennsylvania and other northern states until they, exercising their rights as states through the constitutional processes of local self-government, changed their school systems.

In the case of *Plessy v. Ferguson* in 1896 the Supreme Court expressly declared that under the Fourteenth Amendment no person was denied any of his rights if the states provided separate but equal public facilities. This decision has been followed in many other cases. It is notable that the Supreme Court, speaking through Chief Justice Taft, a former President of the United States, unanimously declared in 1927 in *Lum v. Rice* that the “separate but equal” principle is” * * * within the discretion of the state in regulating its public schools and does not conflict with the Fourteenth Amendment.”

This interpretation, restated time and again, became a part of the life of the people of many of the states and confirmed their habits, customs, traditions and way of life. It is founded on elemental humanity and common sense, for parents should not be deprived by Government of the right to direct the lives and education of their own children.

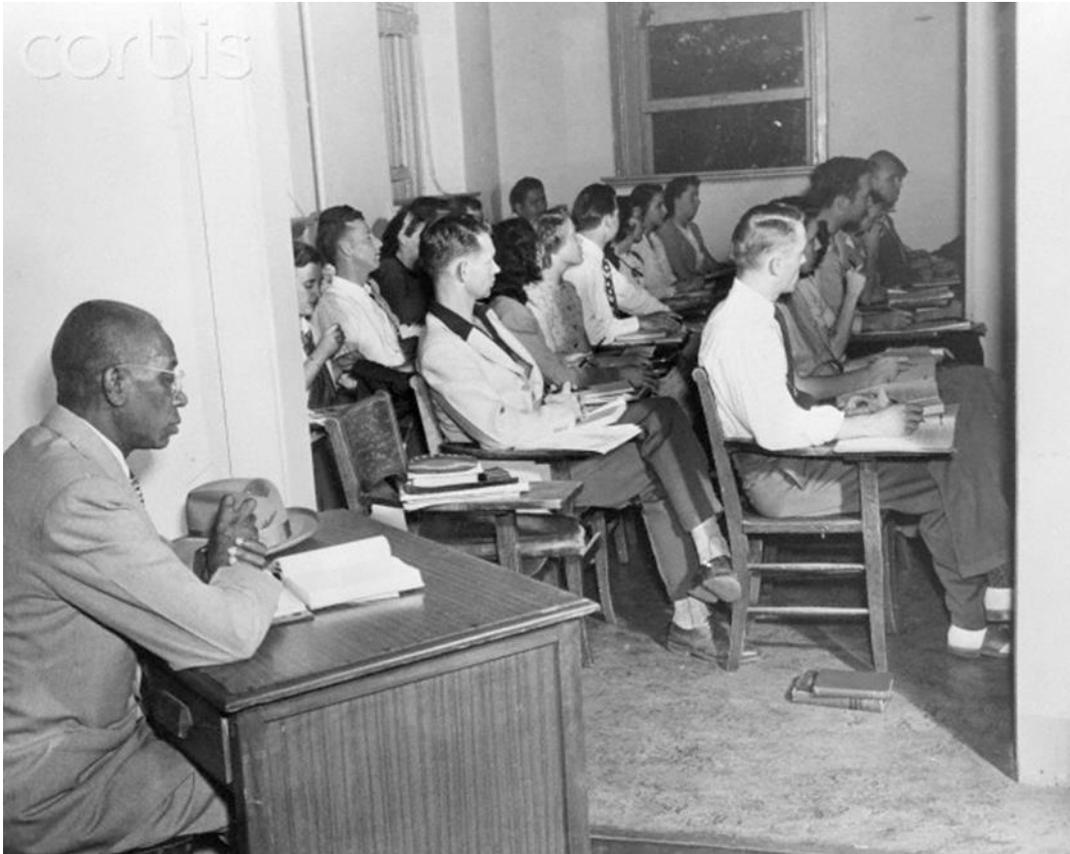
Though there has been no constitutional amendment or act of Congress changing this established legal principle almost a century old, the Supreme Court of the United States, with no legal basis for such action, undertook to

exercise their naked judicial power and substituted their personal political and social ideas for the established law of the land.⁹

Now, this is starting to look pretty bad for Brown, isn't it? As the Southerners tell it, there is a long line of precedents that seem to support them. Their claim is that they structured their lives – certainly their entire system of public schools, but much more as well – around the holding of *Plessy v. Ferguson* that separate was equal was the constitutional rule.

In truth, it's not quite that clear. Law, even constitutional law, evolves and changes over time. From the late 1930s to the early 1950s, the Supreme Court struck down segregation in education in a series of important cases. For example, in *Sweatt v. Painter*, 339 U.S. 629 (1950), the plaintiff sued challenging the lack of a law school for African-Americans in Texas. Texas made accommodation to have existing law faculty teach the African-American students, and when that proved a farce, Texas actually set up a new law school for African-American students alone. But the Supreme Court easily concluded that the new hastily-organized law school could not possibly afford the same education and prestige as Texas's flagship school, the University of Texas at Austin. It compared the facilities and found them wanting, then went further and said: "What is more important, the University of Texas School of Law possesses to a far greater degree those qualities which are incapable of measurement but which make for greatness in a law school." 339 U.S. 629, 634 (1950). Even more useful was *McLaurin v. Oklahoma State Regents for Higher Education*, 339 U.S. 637 (1950). Oklahoma barred African-Americans from existing graduate schools. But when *McLaurin* sued – he was seeking a doctorate in education – Oklahoma amended its law to provide for such education so long as the education was segregated. Pictures taken at the time show George *McLaurin* sitting in a chair in a section of the classroom marked off by white lines from the rest of the room.

⁹ 102 Cong. Rec. H3948, 4004 (Mar. 12, 1956).



Copyright: Bettman/Corbis, Photograph Date 16 October 1948.¹⁰

He also had to eat in a special place in the cafeteria, sit in a special seat in the library, etc. The Court held that this violated the Equal Protection Clause, saying *McLaurin* “is handicapped in his pursuit of effective graduate education. Such restrictions impair and inhibit his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession.” 339 U.S. 637, 641 (1950).

Although the handwriting may have been on the wall, it still was not clear as a matter of precedent that segregated primary school education was unlawful. These earlier cases involved graduate students, and one might argue graduate students had a greater need for the sort of contact with professionals to get adequate training. Besides, in each case the claim was that the graduate education the state offered was not equal. Certainly it helped the *Brown* plaintiffs that in *Sweatt* and *McLaurin* the Court was increasingly relying on intangible differences to hold separate was not equal. Yet, even the *Brown* Court acknowledged that “[i]n none of these cases was it necessary to re-examine the doctrine [of ‘separate but equal’] to grant relief to the Negro plaintiff.” 347 U.S. 483, 492 (1954).

To make matters more difficult, some Southern states were devoting substantial resources to equalizing their school systems. In 1951, for example, South Carolina embarked on a major

¹⁰ <http://www.corbisimages.com/stock-photo/rights-managed/BE029082/african-american-student-sits-outside-of-classroom>

initiative to equalize educational facilities and opportunities for black and white students. South Carolina's Governor (and former Supreme Court justice) James F. Byrnes obtained the state's General Assembly's support for a three-cent sales tax increase and a \$75 million bond issue for the purpose. This school equalization program was aimed, of course, at bolstering the state's case that it met the Plessy standard in the context of public schools.¹¹ Even on the facts, then, the situation was not perfectly clear that the facilities could not, in the near future, be adequate to meet the Plessy standard.¹² Thus, as Justice Jackson observed, it was not going to be easy to make the case that segregated public schools were unlawful: "the thoughtful layman, as well as the trained lawyer, must wonder how it is that a supposedly stable organic law of our nation [i.e., the Constitution] this morning forbids what for three quarters of a century it allowed." Richard Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality* 692 (2004).

D. And More . . .

There's more to interpreting a Constitution than text, original understandings, and precedent. Can you think of other factors that a good interpreter might take into account? In *How to Talk about a Constitution*, Barry Friedman and Sara Solow suggest:

In some ways, the debate about interpreting the Constitution has been going nowhere for years, and should be put aside in favor of looking at the full range of sources that courts actually examine in constitutional litigation, this form of ordinary interpretation is, in fact, what lawyers and judges actually do in the process of constitutional interpretation; looking at not just the text and original meaning, but also pre- and post-ratification practice, precedent, evolved understanding, normative justification, and consequentialist limitations on the right in question.¹³

The difficulty, however, is that the further one goes beyond text, intent and precedent, the more controversial the interpretive method becomes. Factors like anticipated consequences, or

¹¹ By the time of the second trial in the South Carolina case in 1952 (*Briggs v. Elliot*), which followed an initial decree by the district court requiring equalization of school facilities in 1951, the district court had found, as a matter of fact, that the state had engaged in good faith compliance with the court order and made substantial progress toward equalization. See *Briggs v. Elliot*, 103 F. Supp. 920, 922 (D.C.S.C. 1952) ("There can be no doubt that as a result of the program in which defendants are engaged the educational facilities and opportunities afforded Negroes within the district will, by the beginning of the next school year in September 18952, be made equal to those afforded white persons."); see also *Brown v. Board of Education of Topeka, Kansas*, 98 F. Supp. 797, 798 (D.C.Kan. 1951) ("We have found as a fact that the physical facilities, the curricula, courses of study, qualification or and quality of teachers, as well as other educational facilities in the two sets of schools are comparable."). Not all school districts involved in *Brown*, however, were found to have approached or achieved equal status. See *Belton v. Gebhart*, 87 A.2d 862, 869 (Del.Ch. 1952) (concluding that "with respect to teacher training, pupil-teacher ratio, extra curricular activities, physical plants and aesthetic considerations," the black school is inferior to the white school).

¹² [Insert quotes from federal cases holding that equality did not mean identical facilities for students of the different races.]

¹³ See further, Solow, Sara and Friedman, Barry, 'How to Talk About the Constitution' (2013) 25 *Yale Journal of Law & the Humanities* 69, 76.

what is morally correct, engender disagreement very quickly, raising anew the question why judges rather than democratic bodies should be making these decisions. Consider in that regard the views of one of America's greatest legal philosophers, Ronald Dworkin, about why *Brown* was right, even when it ran counter to the original intentions of the Framers and was not immediately apparent from the text:

America's growing sense that racial segregation was wrong in principle, because it was incompatible with decency to treat one race as inherently inferior to another, can be supported either on grounds of banned sources, that some preferences must be disregarded in any acceptable calculation of what makes the community better off on the whole, or on grounds of banned categories, that some properties, including race, must never be made the basis of legal distinction.¹⁴

Granting Dworkin his argument, do you believe it would have persuaded the authors of the Southern Manifesto?

FOR DISCUSSION

1. In light of what you've read, how would you assess the question of whether the *Brown* decision was consistent with what the Constitution required? Stated differently, putting aside your view of the merits – a question we all concede seems easy now – were the Southerners justified in feeling that the law had changed on them rather dramatically? Or stated yet one more way, do you think the result in *Brown* was compelled by the Constitution? Not compelled but permitted? Neither compelled nor permitted, as the Constitution stood in 1954? Defend your answer.

2. For what it is worth, the Supreme Court is entitled to overrule its precedents. Indeed, this is believed essential because once the Supreme Court says the Constitution requires something, the other branches are believed not able to change this. It is the Court, or no one. *Does* the *Brown* Court overrule *Plessy v. Ferguson*?

3. Can you pinpoint the key move on which the Court's decision rests? (This is a point to which we will return.)

IV. *Brown* as Ideology

The discussion of the applicable legal sources in *Brown* indicates that the choice to find segregated elementary education a *per se* constitutional violation was governed—at best—by ambiguous legal authority, especially regarding the proper interpretation of the Fourteenth Amendment in light of its framers' intent. At worst, those same justices encountered a longstanding legal framework created in the wake of *Plessy v. Ferguson* that supported the continuation of separate but equal educational facilities for school children in the South.

¹⁴ Dworkin, Ronald, *Law's Empire* (1986), 388.

If legal sources, precedents, and constitutional history did not clearly drive the outcome in *Brown*, then what alternative explanation exists for the Court’s firm conclusion that the separate education of black children constituted a *per se* violation of the Fourteenth Amendment? What caused the justices to decide that, even in the context of elementary schools, state efforts to equalize educational opportunities for school children would no longer be sufficient to satisfy the equal protection standard? And what persuaded the justices to render such a landmark decision *unanimously*?

As we will learn in Chapter 3, some scholars look to the backgrounds and political predispositions of judges to explain case dispositions, and when the doctrine shifts they often look at the shifting membership of a court over time. Typically found in political science departments, these scholars advance the explanation that the decisions of Supreme Court justices—like those of other political actors—are shaped by the justices’ policy preferences. Clearly then, this perspective builds from the premise that *judges make policy*, a straightforward notion but one that conflicts with what they see as the “unsophisticated view that judges are objective, dispassionate, and impartial in their decision making.”¹⁵ It is certainly true that many of the cases selected by the Supreme Court for review involve complex, difficult, or ambiguous legal issues, and so the justices often enjoy considerable discretion in shaping case outcomes. According to the political science theory of judicial decision making, known as “the attitudinal model,” the justices exercise their discretion by deciding disputes “in light of the facts of the case vis-à-vis the ideological attitudes and values of the justices.”¹⁶

Can the attitudinal model help to explain *Brown*? Doing so requires us to identify “the ideological attitudes and values of the justices” who were sitting on the Court at the time *Brown* was decided. Even within the single case of *Brown*, however, the Court’s membership was not static. *Brown v. Board of Education* and its companion cases were initially consolidated and placed on the Court’s docket in the 1952 Term.¹⁷ At that time, the Court was led by Chief Justice Fred Vinson. As discussed in more detail below, the Court did not to decide the case in the 1952 Term, choosing instead to hold reargument in the 1953 Term. Before the case could be reargued on the scheduled date in October 1953, however, Chief Justice Vinson died on September 8.

¹⁵ Segal, Jeffrey, and Harold Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge: Cambridge University Press, 2002), at 4.

¹⁶ *Id.* at 86. Social scientific models of human behavior represent simplified representations of reality; they ignore specific details in order to construct an explanation of individuals’ decisions and actions that focuses on the core or central factors that shape the behavior of interest. In contrast to the attitudinal model, for example, one might argue in favor of a “legal model” of judicial decision making, which suggests that the justices’ choices are governed and determined by controlling legal principles. See *infra* Chapter ##; Segal & Spaeth, *supra* note ##, at Chapter 2.

¹⁶ *Id.* at 86.

¹⁷ The named plaintiffs in *Brown v. Board of Education*, including Oliver Brown as guardian to his elementary school-aged daughter Linda, represented a class of black school children in Topeka, Kansas. Three other lawsuits were consolidated with *Brown* after the entry of judgments in federal district court or, in one case, the Delaware Court of Chancery: *Belton v. Gebhart*, 87 A.2d 862 (Del.Ch. 1952); *Davis v. County School Bd. of Prince Edward County, VA*, 103 F. Supp. 337 (E.D. Va. 1952); and *Briggs v. Elliott*, 103 F. Supp. 920 (E.D.S.C. 1952). An additional case decided by the Supreme Court in the same term, *Bolling v. Sharpe*, arose from the District of Columbia, where the federal district court dismissed the plaintiffs’ complaint challenging segregated education there; the Court granted the writ of certiorari in the case before the Court of Appeals had the opportunity to review the dismissal. See 347 U.S. 497, 498 (1954).

President Eisenhower acted quickly to select California Governor Earl Warren for a recess appointment beginning on October 1, 1953.¹⁸

How can we know whether the values and attitudes of these justices provide a useful explanation for the Court's actions in *Brown*? First, we need to devise a way to measure the justices' ideologies. One way to do this is by relying on a proxy: information about the Presidents who appointed the justices. Certainly in recent history, to the extent they were able to discern nominees' values, Presidents have appointed justices who share their views on legal and social policies. Thus, it is widely taken as true that appointees of Republican Presidents on the current Court are more conservative in their voting behavior than appointees of Democratic Presidents.¹⁹ What about the justices serving during the 1952-1954 Terms in which *Brown I* and *Brown II* were decided? Table XX provides information about their appointing Presidents, presented in chronological order of appointment. Because desegregation was largely a regional issue, the table also presents information about the justices' childhood locations.

Table XX

Justice	Appointment Date	Appointing President (Party)	Home State*
Hugo Black	8/17/1937	Roosevelt (D)	Alabama
Stanley Reed	1/25/1938	Roosevelt (D)	Kentucky
Felix Frankfurter	1/30/1939	Roosevelt (D)	New York
William O. Douglas	4/4/1939	Roosevelt (D)	Washington
Robert H. Jackson	7/7/1941	Roosevelt (D)	New York
Harold Burton	9/19/1945	Truman (D)	Massachusetts
Sherman Minton	10/4/1945	Truman (D)	Indiana
Fred Vinson	6/20/1946	Truman (D)	Kentucky
Tom C. Clark	8/18/1949	Truman (D)	Texas
Earl Warren	10/1/1953 (recess)	Eisenhower (R)	California

¹⁸ Chief Justice Warren was confirmed by the Senate on March 1, 1954. Several justices have been appointed to the Supreme Court while the Senate was in recess, including President Washington's appointment of John Rutledge to the position of Chief Justice in 1795, and Eisenhower's additional recess appointments of Justice William J. Brennan in 1956 and Justice Potter Stewart in 1959.

¹⁹ See, e.g., Liptak, Adam, "Court Under Roberts is Most Conservative in Decades," *New York Times* (July 25, 2010), at A1.

*Home state is defined as the justices' "Childhood Location" as identified in the *U.S. Supreme Court Compendium*, Table 4-2.

The table reveals several interesting facts. First, with the exception of Earl Warren, every justice serving on the Court from 1952 to 1954 was appointed by a Democratic President. This might lead a facile observer to conclude that *Brown* is easily explained by the justices' liberal attitudes. After all, nearly all appointed by Democrats and we all know that Democrats, especially after the New Deal, were and are more liberal than Republicans. Moreover, our experience tells us that liberals support the expansion of civil rights.²⁰ Why should we be surprised that the Court rendered an unanimous judgment in *Brown* that expanded the civil rights of school children to attend schools without regard to their race?

But this conclusion would be premature for several reasons. First, as is apparent from the chart, one key player in the *Brown* saga and a consistent supporter of expanded civil rights and civil liberties, Chief Justice Earl Warren, was appointed by a Republican President. Second, several of the justices on the Vinson Court prior to the 1952 term were bitterly divided by feuds and ideological divisions, regardless of the fact that they were all appointed by Democratic Presidents. Strained relations were present between Jackson and Black, Black and Frankfurter, and Douglas and Frankfurter, in particular.²¹ These tensions were highlighted in the media. In one particularly notable incident in 1946, for example, Justice Jackson (then serving as Chief Prosecutor at the Nuremberg Trials) cabled the Congressional judiciary committees that charged Justice Black with participating in cases in which he had a conflict of interest.²² The public cable produced a cause celebre in Washington—referred to by Jackson himself as “the disgraceful brawl.”²³

Moreover, the justices on the Vinson Court—although all appointed by Democrats—came to the high court with widely varying backgrounds that likely shaped their views on civil liberties, sometimes in unexpected ways. Justice Black was a former member of the Alabama Ku Klux Klan who had relied on the Klan's support to win his Alabama Senate seat in 1926. Several weeks after his victory in the Democratic primary, he addressed three thousand hooded Klansmen in Birmingham, where he thanked the Klan for its political support and pledged allegiance to Klan principles. (Black later repudiated his connection to the Klan in a national radio address given when his past became public shortly after Roosevelt nominated him to the Court.) Justices Reed and Vinson were raised in from the border state of Kentucky, and Clark hailed from the deeply segregated state of Texas. Justice Jackson, on the other hand, was raised in New York and confessed that he had no personal experience or conscious knowledge of the

²⁰ Black voters supported the Republican “Party of Lincoln” until 1936, when they deserted the Republican Party in a major party realignment and supported Franklin Roosevelt.

²¹ Antagonisms between Justices Frankfurter and Black, as well as between Douglas and Frankfurter, are also well documented. See, e.g., Simon, James A., *The Antagonists: Hugo Black, Felix Frankfurter, and Civil Liberties in Modern America* (Simon and Schuster, 1989); Yalof, David A., *Pursuit of Justices: Presidential Politics and the Selection of Supreme Court Nominees* (Chicago: University of Chicago Press, 1999)(describing “turbulent and bitter factionalism dividing the Court” at the time of Vinson’s selection as Chief Justice in 1946); Kluger, Richard, *Simple Justice: Brown v. Board of Education and Black America’s Struggle for Justice* (1976), at 584 (the 1952 Vinson Court “was perhaps the most severely fractured Court in history”).

²² Hutchinson, Dennis J. “The Black-Jackson Feud,” 1988 *The Supreme Court Review* 203 (1988).

²³ *Id.* at 222.

segregation issue until he came to the Court.²⁴ Former Indiana Senator Sherman Minton, although an “almost pathological Democrat,”²⁵ was the lone dissenter in the case of *Terry v. Adams* (1953), in which the Court rendered its final decision in a series of cases invalidating Texas’s all white primary system. His voting record in civil rights cases thus did not suggest that he would necessarily support *Plessy*’s invalidation. Indeed, Truman’s appointees in particular were not selected because they shared Truman’s progressive position on civil rights issues, but because of personal and professional friendships and relationships with the President.²⁶ Justice Burton, although appointed by a Democratic President, was himself a Republican Senator from Kentucky at the time of his nomination.

Political and historical circumstances also shaped the individual justices’ views on the proper role of the Supreme Court in national governance—views which had the potential to determine their predispositions toward judicial review of state enactments mandating segregation. Justices Frankfurter, Reed and Jackson, appointed by Roosevelt in the wake of the famous struggle between the Court and the President over the constitutionality of New Deal policies, were more likely to advocate judicial restraint and deference to legislative judgments. Justices Black and Douglas, on the other hand, had emerged on the Court as champions of judicial activism, joining forces in many cases to advocate an expansive reading of the Constitution in furtherance of social justice.²⁷ These differences of opinion about the proper role of the Court became fodder for articles in the public press, and easily could have shaped the justices’ views on overturning *Plessy*.²⁸

Thus, despite the fact that all the justices on the Court prior to the arrival of Chief Justice Warren were appointed by Republicans, there were sharp differences among them. Whether such differences emerged as a result of varying background characteristics, ideologies, or views of the proper judicial role, they plainly are evident in the record of their voting behavior. First, consider the graph presented in Figure XX, which provides information about the dissent rates on the Court for the 1925 to 1964 Terms.²⁹ As is immediately apparent, the late 40s and early 50s were characterized by an astonishingly high dissent rate relative to prior decades, peaking in the 1952 Term in which the Court produced unanimous outcomes in only 20% of its decisions! This is the

²⁴ See Conference Notes of Justice Clark, Dec. 13, 1952 (Tom C. Clark Papers, Tarlton Law Library, Univ. of Texas Law School, Box A27, Folder 5, Doc. 4)(“Jackson: . . . Not conscious of the problem until I came here – we had segregation in Jamestown”).

²⁵ According to Felix Frankfurter, that is. Kluger, *supra* note #, at 612.

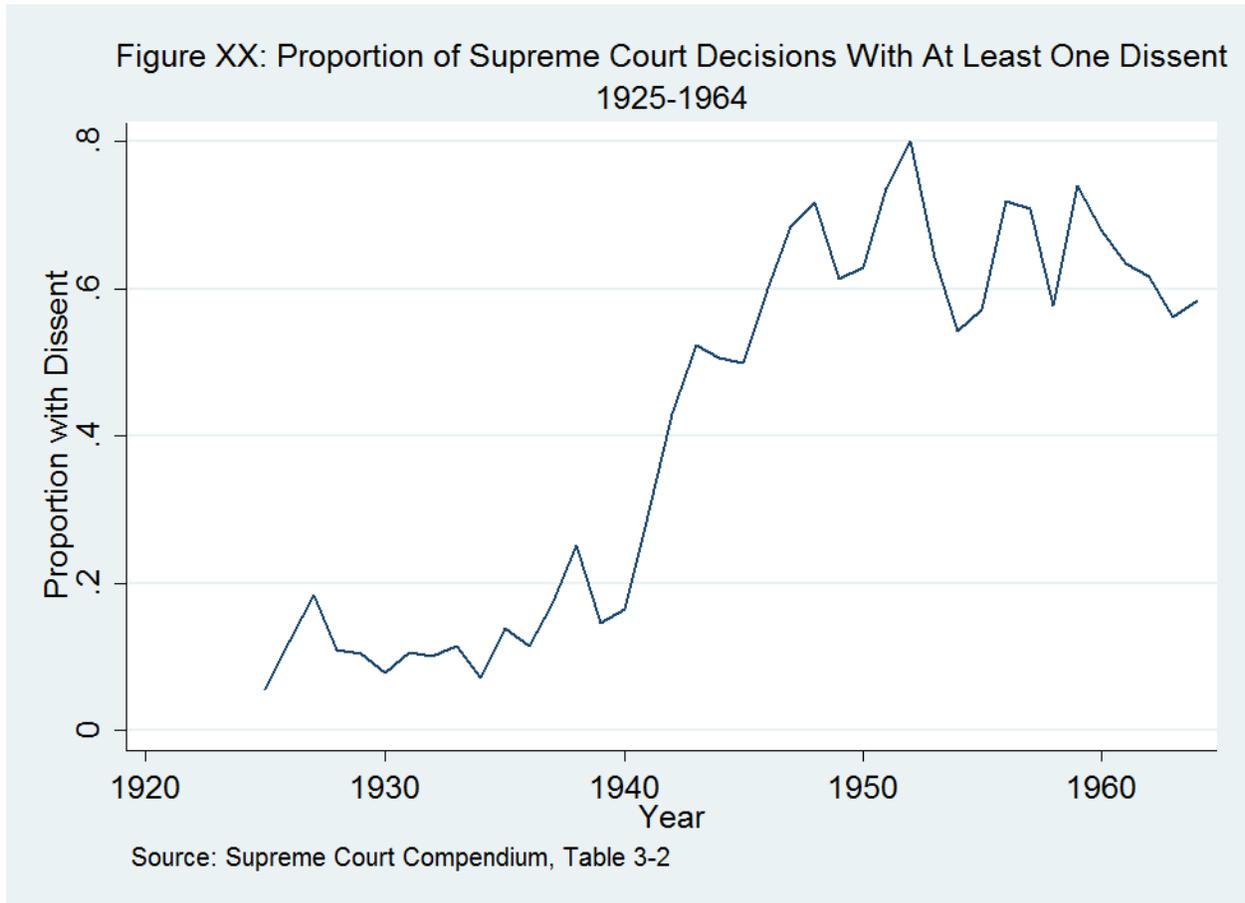
²⁶ Yalof, *supra* note #, at Ch. 2. Galloway, Russell W., Jr. “The Vinson Court: Polarization (1946-1949) and Conservative Dominance (1949-1953),” 22 *Santa Clara L.Rev.* 375, 378 (1982)(“[a] frequently noted paradox of Supreme Court history is that the relatively liberal President Harry S. Truman moved the court far to the right by appointing four conservative justices”).

²⁷ [RA: cites—perhaps note Black’s recalcitrance on incorporation as exception?]

²⁸ For a discussion, see Friedman, Barry, “The Birth of an Academic Obsession: The History of the Counter-majoritarian Difficulty, Part Five,” 112 *Yale L.J.* 153, 181-182 (2002); for an example, see Arthur M. Schlesinger, Jr., *The Supreme Court: 1947*, Fortune, Jan. 1947, at 73, 74-7 (“[T]he clash of judicial personalities had transformed them from mere marginal divergences into a fundamental conflict over the proper function of the judiciary in a democracy.”)[check quote—from Schlesinger?].

²⁹ Table 3-2 is organized by **Term**, change label on X axis in table.

lowest proportion of unanimous decisions per Term seen on the Court since its inception, and it has never been replicated even to this day.³⁰



Even more germane may be the level of agreement in cases most relevant to *Brown*—those involving civil rights and liberties. According to the Supreme Court Database, which provides data on the voting behavior of the justices during the period prior to *Brown*, the justices achieved unanimity in only 40% of their decisions involving civil rights and liberties in the Terms 1949 to 1952.³¹ In these cases, then, we see a somewhat higher level of consensus but one that still reflects a fairly divided Court. And what of cases involving *race* specifically? Table XX provides information about the Court’s inter-agreement in cases involving race.

Table XX: Voting Behavior in Race Cases, Vinson Court 1946-1953

Case	Issue	Date	Vote
Morgan v. Virginia	Transportation Segregation, ICC	1946	7-1

³⁰ Since 1952, the proportion of unanimous decisions each term has hovered around .6. See *The Supreme Court Compendium*, Table 3-2.

³¹ Code: tab unan if naturalCourt == 1302 & issueArea == 2 & (decisionType == 1 | decisionType == 6 | decisionType == 7). Describe issues included in issueArea 2.

Patton v. Mississippi	Blacks on juries	1947	9-0
Hurd v. Lodge	Restrictive Covenants	1948	9-0
Moore v. New York	Jury Discrimination	1948	5-4
Bob-Lo Excursion Co. v. Michigan	Preemption of State Civil Rights Statute	1948	7-2
Spuiel v. Board of Regents	Race discrimination in law school education	1948	9-0
Shelly v. Kraemer	Race discrimination in real estate covenants	1948	6-0
Oyama v. California	Discrimination against Japanese in Escheat Law	1948	6-3
Fisher v. Hurst	Mandamus Action to enforce Sipuel	1948	8-1
Takahashi v. Fish and Game Comm.	Discrimination against Japanese in state gaming law	1948	7-2
Graham v. Brotherhood of Firemen	Railway Labor Act	1949	7-0
Carter v. Illinois	Due Process in Criminal Proceeding	1949	5-4
Terminiello v. Chicago	Fighting words: anti-Jewish speech	1949	5-4
Henderson v. New York	Transportation Segregation, ICC	1950	8-0
Cassell v. Texas	Race discrimination in grand jury	1950	8-1
McLaurin v. Regents	Educational segregation, graduate school	1950	9-0
Sweatt v. Painter	Educational segregation, law school	1950	9-0
Hughes v. Superior Court	Free speech: picket against court order to integrate	1950	8-0
South v. Peters	One-man one-vote: racial dilution	1950	7-2
Shepherd v. Florida	Blacks on juries	1951	9-0
Feiner v. New York	Fighting words, incite blacks to rebellion	1951	6-3
Kunz v. New York	Hate speech: religion	1951	8-1
Sweeney v. Woodall	Cruel Treatment of Black Prisoners	1952	9-0
Briggs v. Elliott	Separate but Equal Education	1952	7-2
Railroad Trainman v. Howard	White-only Union	1952	6-3

Beauhanarais v. Illinois	Hate Speech: Race	1952	5-4
Gray v. Board of Trustees	Educational segregation, mootness	1952	9-0
Barrows v. Jackson	Racially Restrictive Housing Covenant	1953	6-1
District of Columbia v. Thompson	Discrimination in Accommodations	1953	8-0
Avery v. Georgia	Blacks on juries	1953	8-0
Terry v. Adams	White-only primary	1953	8-1
Brown v. Allen	Blacks on juries	1953	6-3
Orvis v. Brownwell	Seizure of Japanese Property	1953	6-2
Kwong Hai Chew v. Colding	Due process (5th) in deportation proceedings	1953	8-1

Although there were many unanimous cases, some of these cases in which race was an issue were decided by a sharply divided Court.

Our search for an ideological explanation for the unanimous decision in *Brown* based on the party of the appointing President, therefore, has resulted in null results. That is, while it might seem obvious to conclude that, since most of the *Brown* justices were appointed by Democrats, unanimity in favor of a pro-civil rights outcome was easy to achieve, a closer look calls this into question. Data on the justices' actual voting behavior indicates that even justices appointed by the same President often disagreed in civil rights matters before the Court. Although some notable cases involving race discrimination decided prior to *Brown* were decided unanimously, others were not. Finally, very basic information about the justices' backgrounds alone would suggest they might have very different views about race cases. It is impossible for us to conclude, therefore, that the unanimity in *Brown* was attributable exclusively to the justices' attitudes or ideological predispositions.

FOR DISCUSSION

1. The voting behavior of Vinson Court justices described above suggests that sometimes Presidents appoint justices who are not like-minded on certain issues. Assume you are a President who has appointed four justices—as did Nixon, Truman, Roosevelt, and Taft (the latter two each appointed five!). What would you think if your four justices consistently split their votes 2-2 in a large number of cases? Would you be disappointed in your appointees?

2. As we will see in Chapter XX, the attitudinal model of judicial decisionmaking suggests that justices decide cases based upon their ideological predispositions. In the case of race discrimination, how might the justices' form their attitudes about the application of the

Fourteenth Amendment--if not from the law? Would judicial attitudes be any different, do you think, than attitudes about policy formed by legislators?

3. We might expect that the justices' background experiences might have shaped their views about whether segregated schools violate the norms embodied in the Fourteenth Amendment. If you agree, what does this conclusion suggest about diversity on the Court? Does it matter whether justices with varying backgrounds are appointed? Does the current Court reflect a diversity of backgrounds and experiences? *See* Barton, Benjamin H., "An Empirical Study of Supreme Court Justice Pre-Appointment Experience, 64 *Fla. L.Rev.* 1137 (2012) (Roberts Court justices have spent more time in Washington D.C., in legal academia, and on appellate courts than any previous Court).

V. Brown and Agenda Setting

Suppose that in May of 1954, the justices of the Supreme Court decided, all on their own, and with no one urging them to do so, that segregated schools violated the Constitution and that they wanted to do something about it. Could they? The answer is obviously no; they had to wait for a case to bring the issue to them. This highlights an important point about courts, which is that – unlike other branches of government – judges do not set their own agenda.

This general statement about courts and agenda setting obscures a great deal of nuance. For example, as we will see, both here and in Chapter 4, there are ways that judges can try to set their agendas, although it proves easier for them to avoid issues than to grab hold of them. Still, the fact that courts are different than other branches of government when it comes to agenda setting has important implications for how judges decide cases, and what the content of the law is at any given time.

One of the most important implications is that when it comes to the judicial agenda, litigants have a certain degree of power. (Some types of litigants, we will see, have more power than others, and this too affects the content of the law.) It seems altogether fitting, then, that the focus of our story shifts from the justices of the Supreme Court to the National Association for the Advancement of Colored People, the NAACP, the organization that brought the cases that became *Brown v. Board of Education* to the courts.

A. The NAACP's Litigation Campaign

The NAACP was created in 1909.³² Although the initial impetus was racial violence, the organization's focus quickly expanded, encompassing issues such as voting rights, and racially

³² For a detailed discussion of the NAACP's litigation strategy over this time period see MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND RACIAL EQUALITY* (2004), RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY AND JUSTICE* (1975), and MARK TUSHNET, *THE NAACP LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950* (1987).

discrimination in a variety of contexts including housing and employment. And school segregation, of course.

Litigation became a focus of the NAACP, in part because seeking redress from other government actors seemed an act of futility.³³ The use of the filibuster in the Senate allowed Southerners to block most race legislation coming from Congress.³⁴ The insidiousness of its use was highlighted by the fact that even anti-lynching legislation could not get adopted.³⁵ For reasons of personal conviction and politics – African-Americans could prove an important voting bloc where their ability to vote was not impeded – Presidents took a number of measure to help, but still the Executive Branch could only accomplish so much on its own.³⁶ Although they were few, there had been a number of important court decisions protecting African-Americans from injustice, making the judiciary a promising situs for progress.³⁷

The NAACP's litigation campaign began in earnest in the 1930s. *See* Thurgood Marshall, *An Evaluation of Recent Efforts to Achieve Racial Integration in Education Through Resort to the Courts*, 21 J. NEGRO EDUC. 216, 218-19 (1952).³⁸ It was aided by a \$100,000 grant from the Garland Fund, which enabled – among other things – the production of the Margold Report, setting out a comprehensive litigation strategy (albeit one that over time was often honored most in the breach).³⁹ In 1939 the NAACP created a separate Legal Defense Fund, so that it could raise donations specifically for litigation.⁴⁰

One of the chief areas for litigation was school desegregation, and here the NAACP faced a dilemma: to seek equalization of opportunity or an end to racial segregation. *Plessy v. Ferguson* obviously suggested that separation was lawful only so long as equal resources were afforded to both races. Thus, segregated education could be challenged on the ground that it did not afford African-Americans equal opportunities. Challenging segregation itself, on the other hand, would require a head-on attack on *Plessy*.

Lawyers at the NAACP settled on a strategy that began with publicly-funded graduate education, and looked to expand eventually to primary and secondary education. *See* Marshall, *supra*, at 318-19.⁴¹ There were a number of reasons for this. First, intriguingly, desegregating

³³ RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 167 (2004).

³⁴ *See* ROBERT CARO, *MASTER OF THE SENATE* 94 (1983) (describing the South's overwhelming influence in the Senate).

³⁵ KLUGER, *supra*, at 167; *see also* JACK GREENBERG, *CRUSADERS IN THE COURTS* 17 (1994).

³⁶ *See* KLARMAN, *supra*, at 107-108 (chronicling successive administrations' attitudes toward race); GREENBERG, *supra*, at 61 (noting the Truman Administration's report on race relations in 1947 called for significant reforms, but would take 21 years to be adopted by Congress).

³⁷ *See, e.g., Pearson v. Murray*, 182 A. 590 (Md. 1936) (successfully challenging the absence of a law school for African Americans in Maryland).

³⁸ Though as early as 1926 the NAACP's Annual Report declared that the federal courts were the best option for advancing civil rights. *See* TUSHNET (1987), *supra*, at 1.

³⁹ Robert L. Rabin, *Lawyers for Social Change: Perspectives on Public Interest Law*, 28 Stan. L. Rev. 207, 215 (1976) (quoting NAACP Ann. Rep. 22 (1934)).

⁴⁰ GILBERT JONAS, *FREEDOM'S SWORD: THE NAACP AND THE STRUGGLE AGAINST RACISM IN AMERICA, 1909-1969* 46 (2005).

⁴¹ *see also* Mark Tushnet, *Litigation Campaigns and the Search for Legal Rules*, 6 J. App. Pract. & Process 101, 101-103 (2004).

graduate or undergraduate education was seen as less threatening to the South than seeking to desegregate public primary and secondary schools. As Thurgood Marshall noted, “[t]hose racial supremacy boys somehow think that little kids of six or seven are going to get funny ideas about sex and marriage just from going to school together, but for some equally funny reason youngsters in law school aren’t supposed to feel that way.”⁴² Second, the broader strategy in demanding equality was to raise the cost of segregation so that it became prohibitive. *See* Marshall, *supra*, at 318.

The NAACP scored an early victory in the *State of Missouri ex rel. Gaines v. Canada* 305 U.S. 337, 352 (1938) case. After Lloyd Gaines was denied admission to the University of Missouri School of Law on racial grounds, the state offered – as Southern states commonly did – to finance Gaines’ education out of state. The NAACP sued arguing that an out of state legal education was not equal. The Supreme Court agreed, holding that the Constitution required in-state education. 305 U.S. 337, 352 (1938).

Toward the end of the 1940s, a variety of factors were leading the NAACP to the conclusion that it ought no longer to seek equalization, and should move instead for the elimination of segregation altogether⁴³. Equalization suits were expensive to litigate. And although sometimes disparities were evident, in other circumstances proving them could be more complicated – such as in the case of South Carolina, which (as we have seen) was racing to equalize its schools. Besides, a victory in an equalization suit might afford relief in the geographic area in which it was filed, without establishing any broader legal principles.

The next key graduate education case, *Sweatt v. Painter*, 339 U.S. 629 (1950), moved the NAACP to pursue single-mindedly the elimination of segregation. *Sweatt*, as we have seen, decided that Texas’s attempt to throw together a law school for African-Americans failed the test of equality. Critical to the NAACP’s strategic decisions was the language in *Sweatt* that “the University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige.” 339 U.S. 629, 634 (1950). Thurgood Marshall, the lead counsel for the NAACP, believed that line contained an important message for their litigation strategy.⁴⁴ If the “intangibles” of racial segregation could render an otherwise equal educational experience unequal, then perhaps segregated primary education was itself vulnerable.

The case that became *Brown v. Board of Education* was the product of 4 cases begun in the lower courts to test the boundaries of *Sweatt*. The cases were litigated as challenges to the lawfulness of segregation, but the plaintiffs’ case included information about unequal schooling opportunities.⁴⁵ Thus, a court willing to find for the plaintiffs could either decide the case based on firm precedents regarding “separate but equal,” or it could go further and hold that separate

⁴² Alfred Kelly, *The School Desegregation Case, in* QUARRELS THAT HAVE SHAPED THE CONSTITUTION 318 (John Garraty ed., 1987).

⁴³ *See* Mark Tushnet, *Litigation Campaigns and the Search for Legal Rules*, 6 J. APP. PRAC. & PROCESS 101, 101-103 (2004).

⁴⁴ TUSHNET (1987), *supra*, at 135.

⁴⁵ Insert fn about other cases.

but equal was unconstitutional altogether. Suits were brought in Delaware, Kansas, South Carolina and Virginia. The Delaware Court decided the schools were unequal and ordered equalization. The NAACP lost all the other suits, on the ground that the schools were equal or in the process of being equalized, and that the Constitution did not require integration.

The stage was thus set for a decision by the Supreme Court.

B. Agenda-Setting, Courts and the Law

This simple story of the NAACP's litigation campaign to desegregate schools contains within it some basic lessons regarding the question of agenda setting and courts, lessons we explore in full in Chapter 5. *Brown* is, of course, not merely an iconic case, but an idiosyncratic one as well. Few litigations in American history, even those begun with the purpose of effectuating legal change, are the product of a deliberate and sustained effort on the magnitude of *Brown*. But here, as in other places, exceptions can illuminate the rule.

Can the process of judicial agenda setting affect substantive law? The idea hardly seems a crazy one. If cases are not brought, law cannot be made. If cases are brought in one order versus another, the path of the law may affect where it comes out. If courts are forced to hear cases at inauspicious times, or decide issues presented by difficult facts, this too can affect the rule that gets handed down.

1. The Agenda Setting Capacity of Courts

The simple statement that courts cannot set their own agendas obscures some of the ways courts can try to affect the sorts of cases they hear.

a. Ducking Issues

In reality, it is far easier for courts to duck deciding legal issues than to reach out to decide them. Although a court can hardly put an issue on its agenda, once the issue is there, judges can find ways to avoid deciding them. This is evident from two interesting episodes in the long legal struggle for racial equality.

In 1941, the Supreme Court heard a case called *Railroad Commission v. Pullman Company*, 312 U.S. 496. The case involved the constitutionality of a rule adopted by the Texas Railroad Commission, stating that Pullman sleeper cars had to be under the control of an employee holding at least the rank of a Pullman conductor. As everyone knew, Pullman conductors were white, and porters, who reported to conductors, were black. Thus, the idea was that sleeper cars would be under the control of white railroad employees. The Pullman porters sued the Railroad Commission, and the Pullman Company joined them in this endeavor. Given what you have read already, you can guess that the Supreme Court was not anxious to decide racial questions of this nature in 1941, and it didn't. Instead, in a decision that has become one of the chestnuts of the law of federal jurisdiction, the Supreme Court punted the case back to the Texas state courts. There apparently was some question whether the Railroad Commission was

entitled under state law to issue this rule in the first place. If not, then there was no need to decide the federal question. Thus, the Supreme Court decided that the parties must get resolution of the state law question from the state courts, only returning to federal court if there was still a federal constitutional question to be decided. In this way it avoided the awkward question it had been asked to decide.

Even after *Brown* was decided in 1954, the Court continued to duck some racial issues, the most significant of which was state anti-miscegenation laws, i.e., laws that prohibited racial intermarriage. This issue found its way to the Supreme Court in 1955 in the case of *Naim v. Naim*, 350 U.S. 891 (1955). The justices knew full well that the matter was an incendiary one among Southerners. The Supreme Court declined to decide it holding: “The inadequacy of the record as to the relationship of the parties to the Commonwealth of Virginia at the time of the marriage in North Carolina and upon their return to Virginia, and the failure of the parties to bring here all questions relevant to the disposition of the case, prevents the constitutional issue of the validity of the Virginia statute on miscegenation tendered here being considered ‘in clean-cut and concrete form, unclouded’ by such problems.” 350 U.S. 891, 891 (1955). This was an implausible way to resolve the case, and the justices knew it. At the conference in which the justices considered the case, Justice Felix Frankfurter stated: “Even if one regards the issue, as I do, of a seriousness that cannot be rejected as frivolous, I candidly face the fact that what I call moral considerations far outweigh the technical considerations of noting jurisdiction. The moral considerations are, of course, those raised by the bearing of adjudicating this question to the Court’s responsibility in not thwarting or seriously handicapping the enforcement of its decision in the segregation cases.”⁴⁶ (Frankfurter was one of the great manipulators ever to sit on the Supreme Court. He also wrote the *Pullman* decision, and shortly we will see his role behind the scenes in *Brown* itself.) The Supreme Court did not strike down state bans on racial intermarriage until 1967, in *Loving v. Virginia*, 338 U.S. 1.

There is not always a way for a court to duck a tough question, and courts will usually not be as nakedly transparent as the *Naim* court. Still, unlike the difficulty of finding a case and putting it on the docket, there are often many procedural “outs” available to a court that believes deciding a case is too difficult or will place the judiciary itself in institutional jeopardy. (The judiciary’s need to protect itself from retribution by the other branches, or hostile public opinion, are the subject of Chapters 9 and 10.)

b. Certiorari, and courts of discretionary review

Today, the Supreme Court would most likely not have had to go through the hoops it did in *Naim v. Naim*, because today most of the Supreme Court’s jurisdiction is discretionary. This is a critical difference between lower courts and high courts. It is common for some percentage of a high court’s jurisdiction to be discretionary, meaning that the judges are allowed to decide for themselves whether to resolve an issue presented by a case. Lower courts rarely have this luxury. This discretionary power of review goes by different names, but in the Supreme Court of the United States the Court decides to hear or not hear cases by granting or denying a writ of

⁴⁶ Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1955*, 68 GEO. L.J. 1, 96 (1979) (quoting Memorandum of Mr. Justice Felix Frankfurter read at conference (Nov. 4, 1955) (Felix Frankfurter Papers, Library of Congress)).

certiorari. There is a vast literature on the Supreme Court’s certiorari power, and the decision of whether to hear a case or not.

c. Signaling to Litigants

Even though the Supreme Court cannot simply place matters on their docket, they do have the means to attract some issues to them. One of the most intriguing ways is for the justices to send “signals” to litigants about cases they would consider deciding and how they might decide them. This isn’t usually explicit of course – though on rare occasion it can be – leaving room for considerable reading of the tea leaves.

Following the decisions in *Sweatt* and *McLaurin*, Thurgood Marshall believed he had been sent just a signal. As he wrote one of his expert witnesses, referring to the decisions and one other decided that term, “All three of the decisions are replete with road markings telling us where to go next.”⁴⁷ Marshall was hardly alone; New York Times correspondent Arthur Krock saw things similarly:

From now on a community must be able to prove beyond question that a segregated complainant receives educational services equivalent to those rendered the racial majority. And to do that will impose crushing financial burdens on the community.

Hence, while Mr. Perlman did not get the *Plessy* doctrine specifically overruled, he got the Supreme Court to put a price-tag on it which may have the same effect in numerous localities. . . .

The facts . . . were so minutely inspected that litigation inevitably will follow, based on conditions in segregated primary and secondary schools and colleges. The Court made it crystal clear today that it will sympathetically entertain any plea of inequality.⁴⁸

d. Configuring Litigation

As a final example, courts can configure the litigation before them in ways to bring issues to the fore or focus light on particular aspects of the case. Whichever way it was going to decide the issue of school segregation, it was clear by 1952 that the Supreme Court felt it had no choice but to seize the bull by the horns. In 1951, the NAACP had filed a request that the Supreme Court review the Kansas decision. In the late spring of 1952 the Court accepted that request, but delayed arguments to hear Virginia, South Carolina and Kansas at the same time. It also scooped up a case from the District of Columbia, tossing that in the mix, and hurried along a case from Delaware. This consolidation of the primary desegregation cases in the country let everyone know the Court was taking this issue seriously, and that something major was in the offing.

⁴⁷ MARK V. TUSHNET, *THE NAACP’S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950* 135 (1987).

⁴⁸ TUSHNET (1987), *supra*, at 133.

2. *The Power of Litigants*

The fact that judges require cases before they can proceed to decide legal issues puts a certain amount of power in the hands of litigants. They can bring cases or decline to do so, and push them to appellate courts or make them go away before appellate courts can get their hands on them. All this occurs in an attempt to manipulate the path of the law.

The NAACP litigation was part of a deliberate campaign to change the nation's law. As Charles Hamilton Houston – Dean of the Howard Law School and a prominent NAACP lawyer – explained in the October 1935 issue of *The Crisis*, “The National Association for the Advancement of Colored People is launching an active campaign against racial discrimination in public education. The campaign will reach all levels of public education from the nursery school to the university. . . .” TUSHNET (1987), *supra*, at 44. The NAACP had been pushed to do this as early as 1929 by the Garland Fund, which believed that “it would ‘waste time and money’” to fight isolated cases. TUSHNET (1987), *supra*, at 7. Thus, the Fund offered “to finance a large-scale, widespread, dramatic campaign to give the Southern Negro his constitutional rights, his civil and political equality, and therewith a self-consciousness and self-respect, which would inevitably tend to effect a revolution in the economic life of this country.” TUSHNET (1987), *supra*, at 7.

The advantage of such a campaign was that it would create the possibility of affirmatively affecting the law. Nathan Margold made this point in his report, urging the NAACP to eschew equalization cases, because to do so would “not be establishing any new principles, nor bringing any sort of pressure to bear which can reasonably be expected to retain the slightest force beyond that exerted by the specific judgment or order that we might obtain. And we should be leaving wholly untouched the very essence of the existing evils.” TUSHNET (1987), *supra*, at 27.

3. *The Nature of a Legal Case*

To change the law in a court, even a well-funded group must work within the confines of a legal case or cases, which presents its own challenges. As Mark Tushnet, perhaps the leading scholar of the NAACP's litigation campaign, commented: “The plans had rested on an image of ‘a lawsuit’ as a thing, something like a block of wood, but lawsuits are processes. As we will see, this was most obviously true with what proved to be the fantasy of conducting forty-five, or even seven, coordinated lawsuits. It was hard enough to organize litigation for one lawsuit at a time; simultaneous filings were practically impossible.” TUSHNET (1987), *supra*, at 43.

There were many choices the NAACP had to make along the way, some of which went as the organization hoped, and many that took on a life of their own.

One choice was whether to pursue cases in federal or state courts. Knowing a little of the history of the civil rights movement, and not much about the NAACP's campaign, one might assume federal courts were the easy choice. As is discussed in Chapter 4, how a judge is chosen or kept in office might affect the willingness of that judge to rule in various ways. Federal judges are chosen by the President with the consent of the Senate and serve for life; state judges for the

most part were in 1954 and are today elected. It is easy to see how the NAACP might not want to put its faith in judges elected from Southern communities to dismantle segregation. In truth, however, this was not how the NAACP saw it. Although there is some mention from as early as 1926 in preferring federal courts, in truth the NAACP litigated in both state and federal courts, and the choices were often made for reasons other than this obvious one. TUSHNET (1987), *supra*, at 1. Federal and state judges had the power to afford different sorts of relief; for example, if the NAACP wanted a “mandamus” to get a student admitted to a school, that was believed a question for a state judge. TUSHNET (1987), *supra*, at 49-50. Federal courts had the advantage of using a uniform set of procedures, making life easier the NAACP lawyers. But if the NAACP wanted to a federal court to strike down a state segregation law, that – at the time – required a three-judge trial court, which presented problems of its own.

A lawsuit requires plaintiffs, and this alone had its perils. Simultaneously with the school desegregation suits, the NAACP was litigating salary equalization suits for teachers. But any teacher who stepped up to be a plaintiff quickly could find his or herself without a job, eliminating their ability to lead a lawsuit, and deterring people from participating. Even when it came to school desegregation cases, African-American teachers were leery; the belief was that Southerners would never let them teach white children, especially white girls, and thus success in these suits also meant lost jobs. TUSHNET (1987), *supra*, at 43-45, 111-113.

Nothing may demonstrate the difficulty of managing a lawsuit better than the curious case of Lloyd Gaines. Having won his case ordering Missouri to either create a new in-state law school or desegregate the University of Missouri, the logical next step for the NAACP was to challenge the newly-created law school on equality grounds. When it came time to do so, however, Gaines had not only moved to Chicago, but completely disappeared from the face of the planet (never to be located again). As Houston wrote, “Since we cannot find Gaines, we cannot go on.” TUSHNET (1987), *supra*, at 74.

Then, there are the facts, which sometimes can be managed and sometimes not. The Sweatt case developed in a way that posed both difficulty and possibility for the NAACP. As the case was pending before a state appellate court, Texas abandoned its early pretense that an African American law school in Houston was remotely the equivalent of the education provided at the University of Texas at Austin, and established a new school sited near the Austin campus. TUSHNET (1987), *supra*, at 126; *see also* KLUGER, *supra*, at 260. Students here would be taught by UT-Austin faculty and use the state’s law library at the capitol. Facts like these made it difficult to prove inequality, forcing the NAACP to focus on the “intangibles” that moved the central constitutional question to the fore. TUSHNET (1987), *supra*, at 126-28.

4. *The Symbiotic Nature of Courts and Cases*

It should be evident that an interactive or symbiotic relationship exists between court decisions and the cases that are brought to courts. Cases are filed, shaped by pre-existing law, and then push the law in new directions, which in turn generates new cases. This was evident throughout the NAACP campaign. The existence of Plessy dictated a challenge to the equivalence of educational facilities for African-Americans. The decision in Gaines, which held that an out-of-state education would not suffice, placed the focus on whether in-state facilities

were in fact equal. And, of course, the focus on intangibles in Sweatt dictated Thurgood Marshall's and the NAACP's strategy moving into the cases that became Brown.

FOR DISCUSSION

1. Brown is sometimes referred to as the Nation's first great litigation campaign, but that is hardly the case. In the 1820s and 1830s there was a fight in the country over moving Native Americans off of their tribal lands to make way for westward expansion of the white population. In an effort to stave off what looked inevitable politically, the Cherokee and their friends began a campaign in the courts, headed by the former Attorney General William Wirt. JILL NORGREN, *THE CHEROKEE CASES: THE CONFRONTATION OF LAW AND POLITICS* 53 (1996). Similarly, after the Civil War, Southerners opposed to the Fourteenth Amendment conducted a litigation effort to get the Supreme Court to strike down military occupation of the South and Reconstruction before the Amendment could be ratified. See Charles Fairman, *The Oliver Wendell Holmes Devise History of the Supreme Court of the United States*, vol. 6, pt. I, *Reconstruction and Reunion*, 1864-88, ed. Paul A. Freund (1971), 366-67.

As each of these examples makes clear, litigation campaigns are serious efforts, which require a bankroll and stamina. The same might be said of any effort to change the law through litigation. Does this suggest to you any concern about bias in the law? What parties do you think are most likely to launch and succeed in litigation campaigns? Which are least likely?

Can you think of anything that might be done to level the litigation playing field?

2. Do you think, based on what you have read, that lawmaking resulting from litigation is path dependent? If so, can you see how anything might be at stake in the order in which cases are brought? If so, what might be done about this problem?

3. Why do you suppose the Supreme Court wanted to consolidate all the segregation cases for a joint hearing? Why might any court want to consolidate a group of related cases. Hint: on what do decisions in cases turn? In what way are courts limited in making law based on cases? Can you see a way in which having a number of cases solves the problem?

VI. Informational and Institutional Constraints in *Brown*

Not only do judges face difficulties in managing the agenda that comes before them; the nature of litigation imposes some constraints on their ability to decide the cases they must. Those sorts of constraints are the subject matter of Chapter 5; in this section we examine one particularly acute constraint: the problem of finding facts.

Even if the justices in *Brown* were motivated to overturn *Plessy*, they needed a basis for doing so. One basis was that some critical facts had changed since the time of *Plessy*. Can you see in the *Brown* opinion any reliance on such facts? Where did the justices get those facts, and how could they be certain those facts were correct?

To state the obvious, the Supreme Court is a court, not a legislature or administrative agency. The justices were not experts in educational policy, child psychology, or school system

logistics, and could not rely on an extensive staff to educate them on these matters. The adversarial process of justice limited the tools available to the Court to identify the relevant facts about segregated elementary schools. In important respects, courts are constrained by the information provided by the parties before the court. When you think of courts, you probably think of them as fact-finding experts, and in many ways the adversarial system is designed to find the truth. But still, it is limited by the facts the parties choose to present. Can you think of ways in which the “facts” at issue in *Brown* were very different from those in, say, a slip-and-fall torts suit?

Assessing the equality of educational opportunities on elementary school children was a difficult enterprise. In *Brown*, the Court was faced with individual plaintiffs in lawsuits in five jurisdictions, but the outcome in any of these suits had potential ramifications far beyond the named plaintiffs or their individual schools. The *Brown* complaint filed by the Charles Bledsoe on behalf of the NAACP brought suit on behalf of “all Negro citizens of the United States similarly situated who reside in cities in the State of Kansas in which separate public schools are maintained for white and Negro children of public school age, and who are so numerous as to make it impracticable to bring them all before the Court.”⁴⁹ As the Court thus noted in its opinion, the ruling in *Brown* would have “wide applicability,” in part because the lawsuits were styled as class actions.⁵⁰ In short, the Supreme Court was faced with a widespread challenge to segregated education that would involve more than comparison of the educational facilities within any one school district or in relation to any one student. The Court was engaged in an expansive *policy dispute* regarding the consequences for black children of segregated education, and the consequences for school systems of an order to desegregate them.

By their nature, these forms of policy disputes in constitutional litigation involve different decisional criteria than the traditional private law action involving facts about individuals’ circumstances within the confines of a discrete legal dispute.⁵¹ Policy disputes require courts to seek out what Kenneth Culp Davis has defined as “legislative facts”—facts which involve “generalizations about social, economic, political, scientific, medical, or psychological matters.”⁵² The Court’s role as finder of legislative facts in *Brown* was rendered even more difficult because the NAACP had chosen to challenge not just whether the black and white schools provided “equal” educational resources and facilities to students of each race, but whether segregated schools, by their very existence, caused harm to black children such that segregated education was inherently unequal under any circumstances. This inquiry would force the justices into territory more typically trod by legislators or bureaucrats in the process of

⁴⁹ Complaint at 3, *Brown v. Board of Education of Topeka*, 98 F. Supp 797 (D.Kans. 1951)(N. T-316)

⁵⁰ *Brown*, 347 U.S. at 495. As we will see, that *Brown* and its accompanying suits were class actions did not limit recalcitrant district and even circuit court judges from claiming that black students could be admitted to white schools only on an individual basis through “pupil assignment acts.” See, e.g., *Carson v. Warlick*, 238 F.2d 724, 729 (4th Cir. 1956)(in suit to force desegregation in North Carolina schools, finding that students are admitted “as individuals,” not as a class or group). The ingenious efforts of anti-integration forces rigged the system after *Brown* to make class actions infeasible: pupil placement laws vested discretion to assign pupils to various in the school boards and those decisions “varied from student to student.” Marcus, D., “Flawed but Noble: Desegregation Litigation and Its Implications for the Modern Class Action,” 63 *Fla. L.Rev.* 657, 685 (2011).

⁵¹ For an influential discussion of this phenomenon, see Chayes, “The Role of the Judge in Public Law Litigation,” 89 *Harv. L.Rev.* 1281 (1976).

⁵² Auerbach, “Legislative Facts in *Grutter v. Bollinger*,” 45 *San Diego L.Rev.* 33, 33 (2008).

evaluating the societal or economic consequences of various policy alternatives. Moreover, should the Court decide to issue an order outlawing segregated schools, it faced the question of implementation: how would it construct an order that provided relief to the plaintiff class when such an order might require the reconfiguration of entire school districts to eliminate segregated education? “Racial desegregation cannot be easily separated from issues like staffing, organization, funding, and educational philosophy.”⁵³ The justices on the Court recognized that the nature of the order would require additional information not typically encountered by courts. As Justice Frankfurter explained in a memorandum to his fellow justices:

As far as fashioning a decree is concerned, the problem before the Court is essentially a fact-finding problem, even if the ‘facts’ are not wholly simple. To give only one illustration of the complexities of our problem, the spread of differences in the ratios of white to colored population among the various counties in different States is very considerable. See, for instance, the 1950 Census figures for Arkansas and Virginia. Only on the basis of facts not now known will it be possible to judge how ill inherent in segregation of Negro children can be terminated without substantially diminishing the quality of education for all children. The Court does not know that a simply scrambling of the two school systems may not work. It surely cannot assume that scrambling is all there is to it.⁵⁴

Justice Frankfurter observed that, in *Brown*, a social policy “with entangling passions [were] at issue, [where] the facts ought to be dug out by an active, disinterested digger-out of facts.” But he noted that “[a] court is greatly handicapped in doing this; a court passes on materials that are dished up to it by the litigants. Here we cannot rely on materials that are dished up to it by the litigants.”⁵⁵ In contrast, legislators can hold hearings, subpoena expert and lay witnesses, and appoint commissions to explore factual issues and construct policy solutions.⁵⁶

In its opinion, the *Brown* Court relied in part on the harmful effect of segregated education on African American children.⁵⁷ At trial the plaintiffs presented expert testimony by

⁵³ Komesar, Neil K. “A Job for the Judges” *The Judiciary and the Constitution in a Massive and Complex Society*, 86 *mich. L.Rev.* 657, 708 (1988).

⁵⁴ Memo from Justice Frankfurter to the Court, January 15, 1954 (papers of Justice Tom Clark), at 2-3.

⁵⁵ *Id.* at 4.

⁵⁶ Observations about the inadequacy of the judicial process to vet social or policy facts as effectively as the legislative or executive branches have a long lineage. In 1933, for example, Morris Cohen observed that “[w]hen we come . . . to the appellate work of higher courts, in which new public policies are decided under the guise of their legality or constitutionality, we find courts making all sorts of factual generalizations without adequate information. The facilities of our courts for acquiring information as to actual conditions are very limited.” Cohen, Morris R., *Law and Social Order* 186 (1933). See also Bikle, Henry Wolf, “Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action,” 38 *Harv. L.Rev.* 6 (1924).; Horowitz, Donald, *The Courts and Social Policy* (Brookings, 1977); Rosenberg, Gerald, *The Hollow Hope: The Courts and Social Policy* (Chicago, 1991).

⁵⁷ See Maslow, Will, 1954 Address, “The Uses of Law in the Struggle for Equality” (Atlantic City, N.J.), quoted in Auerbach, C., Garrison, L.K., Hurst, W., and Mermin, S., *The Legal Process* 115 n.16 (1961)(“When the final decision was handed down in the public school desegregation cases, it rested not on conceptual legal principles or the legislative history of the Fourteenth Amendment or even on the sociological demonstration that in practice segregation results in inferior schools but on the psychological finding of thwarted intellectual development.”).

social psychologists on this issue. One of these was Kenneth Clark, a professor of psychology at City College in New York. Professor Clark conducted experiments to reveal the attitudes of black and white children about their race that focused on the children's reactions to dolls with either white or dark complexions. In the course of these experiments, Clark presented the dolls to children of both races and inquired which doll the children thought was the "nice" or the "bad" doll. The following testimony about these experiments was elicited by NAACP lawyer Robert Carter during the trial in Clarendon County, South Carolina:

THE WITNESS (*Kenneth Clark*): I made these tests on Thursday and Friday of this past week at your request, and I presented it to children in the Scott's Branch Elementary school, concentrating particularly on the elementary group. I used these methods which I told you about--the Negro and White dolls--which were identical in every respect save skin color. And, I presented them with a sheet of paper on which there were these drawings of dolls, and I asked them to show me the doll--May I read from these notes?

JUDGE WARING: You may refresh your recollection.

THE WITNESS: Thank you. I presented these dolls to them and I asked them the following questions in the following order: "Show me the doll that you like best or that you'd like to play with," "Show me the doll that is the 'nice' doll," "Show me the doll that looks 'bad'," and then the following questions also: "Give me the doll that looks like a white child," "Give me the doll that looks like a colored child," "Give me the doll that looks like a Negro child," and "Give me the doll that looks like you."

MR. CARTER: "Like you?"

THE WITNESS: "Like you." That was the final question, and you can see why. I wanted to get the child's free expression of his opinions and feelings before I had him identified with one of these two dolls. I found that of the children between the ages of six and nine whom I tested, which were a total of sixteen in number, that ten of those children chose the white doll as their preference; the doll which they liked best. Ten of them also considered the white doll a "Nice" doll. And, I think you have to keep in mind that these two dolls are absolutely identical in every respect except skin color. Eleven of these sixteen children chose the brown doll as the doll which looked "bad." This is consistent with previous results which we have obtained testing over three hundred children, and we interpret it to mean that the Negro child accepts as early as six, seven or eight the negative stereotypes about his own group. . .

MR. CARTER: Well, as a result of your tests, what conclusions have you reached, Mr. Clark, with respect to the infant plaintiffs involved in this case?

THE WITNESS: The conclusion which I was forced to reach was that these children in Clarendon County, like other human beings who are subjected to an obviously inferior status in the society in which they live, have been

definitely harmed in the development of their personalities; that the signs of instability in their personalities are clear, and I think that every psychologist would accept and interpret these signs as such.

MR. CARTER: Is that the type of injury which in your opinion would be enduring or lasting?

THE WITNESS: I think it is the kind of injury which would be as enduring or lasting as the situation endured, changing only in its form and in the way it manifests itself.

MR. CARTER: Thank you. Your witness.

Chief Justice Warren cited Clark's study, along with other "modern authority" consistent with Clark's findings, in a footnote in support of the notion that segregation causes a sense of inferiority and undermines African American children's motivation to learn.⁵⁸ This fact served to contradict the claim in *Plessy v. Ferguson* that Plessy's argument suffered from an "underlying fallacy. . . that the enforced separation of the two races stamps the colored race with a badge of inferiority."⁵⁹ According to the *Plessy* Court, any such assumption stems from not from the legal segregation regime, but rather "because the colored race chooses to put that construction upon it."⁶⁰

Soon after *Brown*, questions arose over the validity of Clark's studies. At the trial, opposing counsel's cross examination did not thoroughly explore the scientific basis for Clark's causal inferences between segregated schools and the children's attitudes, instead choosing to focus primarily on Clark's background, his experiences in the South, and his affiliation with Howard University.⁶¹ But later evaluation revealed serious flaws in the studies' methodology, leading one scholar to observe that, by 1978, "[v]irtually everyone who has examined the question now agrees that the Court erred" in citing the social science evidence because it "was methodologically unsound."⁶² Critics of the doll studies note, for example, that that the research did not provide a convincing rationale for its sampling strategy and thus the representative nature of the children involved.⁶³ Nor did it control for any variation in the students' backgrounds that might explain the results.⁶⁴ And perhaps most fundamentally, Clark's studies did not demonstrate that *segregated education*, rather than some other environmental or social forces, caused the school children's consciousness of race. In particular, Clark did not present evidence regarding

⁵⁸ *Brown*, citation to footnote.

⁵⁹ *Plessy*, 163 U.S. 537, 551 (1896).

⁶⁰ *Id.*

⁶¹ Kluger, R., *Simple Justice*, 496-500; see also Cahn, "A Dangerous Myth in the School Desegregation Cases," 30 *N.Y.U. L.Rev.* 150 (1955)(describing inept cross examination of Clark by defense counsel in trial court). The scientific validity of the results were not completely ignored on cross examination, however. See Garfinkel, "Social Science Evidence and the School Segregation Cases," 21 *Journal of Politics* 37, ## (1959).

⁶² Yudof, Mark G., "School Desegregation: Legal Realism, Reasoned Elaboration, and Social Science Research in the Supreme Court," 42(4) *Law and Contemporary Problems* 57, 70 (1978).

⁶³ Cahn, *supra* note ##, at ## ("We are not provided here with any proof of the numerical adequacy of the sampling or of its being a representative cross-section").

⁶⁴ *Id.*

how the study results differed between students in segregated schools in the South and integrated schools in the North. Other research by Clark, *not* presented in Court, suggested that students in the North were *more* pronounced in their preferences for the white doll than were Southern children, and furthermore, that African American children's preferences for the white doll *decreased* with age.⁶⁵ These findings undermine the conclusion that segregated education produced the pattern of preferences for the white doll described by Kenneth Clark.

But the Court is hardly to be blamed for deficiencies in the Clark study. The social scientific evidence presented at the trial court, even if flawed according to later critics, was supported by an appendix to the NAACP's brief entitled "The Effects of Segregation and the Consequences of Desegregation: A Social Science Statement." Signed by 32 social scientists, including Kenneth Clark and his wife Professor Mamie Clark, the statement reported on the results of existing studies showing that segregation creates feelings of inferiority in the minority group and reinforces negative attitudes toward the minority group by the majority. It also reported on a survey of social scientists, 90% of whom agreed that "enforced segregation is psychologically detrimental to the members of the segregated group."⁶⁶ The social scientists' appendix followed in the tradition of the famous "Brandeis Brief," in which Louis Brandeis in *Muller v. Oregon*, a 1908 case challenging the validity of a state law limiting the number of hours women could work in day.⁶⁷ Dominated by non-legal evidence and sources, Louis Brandeis's brief for the State of Oregon documented the medical and sociological evidence concerning the impact of long work hours on women's health and safety. According to some scholars, the Brandeis Brief marked the beginning of the rise in the Court's acceptance of social science evidence in the context of appellate litigation, although according to other observers, the brief was neither seminal nor effective.⁶⁸

Thus, as we can see, judicial decisions are reliant on facts, but the presentation of those facts is largely in control of litigants. This puts courts at the mercy of litigants and their lawyers for the ultimate correctness of judicial decisions. This need to rely on litigant presentations is but one of many constraints judges face in deciding cases.

FOR DISCUSSION

1. Can you think of any other constraints courts face in deciding cases?
2. In *Grutter v. Bollinger*, the Supreme Court considered the constitutionality of the University of Michigan Law School's program of affirmative action in admissions. 3M and 64 other business corporations filed briefs maintaining that student body diversity produced educational benefits that enhanced "skills needed in today's increasingly global marketplace" which could be "only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints."

⁶⁵ Garfinkel, *supra* note ##, at ##.

⁶⁶ Brief for Appellants (Appendix), *Brown v. Board of Education*, 347 U.S. 483 (1954), at 8 (citing Duetscher, M, and Chein, I., "The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion," 26 *J. Psych.* 259-287 (1948)).

⁶⁷ 208 U.S. 412 (1908).

⁶⁸ For a criticism of the traditional account of the Brandeis Brief, see Rustad, M. & T, Koenig, "The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs," 72 *N.C. L.Rev.* 91 (1993); Bernstein, David E., "Brandeis Brief Myths," 15 *Green Bag 2d* 9 (2011).

Another brief, filed by high-ranking military officials, in which the official concluded “based on decades of experience” that the military could not achieve its principal mission unless the military service academies and ROTC used limited affirmative action policies. How do these statements rely upon assumptions about the causal relationship between a diverse workforce and institutional effectiveness? What kind of evidence would you think necessary to prove such a causal association? Is a court competent to assess such evidence? Is this particularly problematic when such information is presented in an amicus (friend of the court) brief, rather than being the subject of adversarial testing at trial? According to one scholar, the social science evidence in *Grutter* was relied upon selectively by the justices to support their own separate conclusions. See Auerbach, Carl A., “Legislative Facts in *Grutter v. Bollinger*,” 45 *San Diego L.Rev.* 33, 50 (2008) (“Each justice was content with citing only the studies that supported his or her conclusions”). What does this observation tell us about the capacity of courts to address these types of social scientific questions? And what, if anything, can judges do about this problem?

3. Are courts unique in the constraints they face in constructing and implementing social policies? As J. Woodford Howard noted years ago: “The literature on decisionmaking in other organizations is replete with the same problems of defining issues and marshaling evidence, of planning and supervising subordinates, or spinning unanticipated consequences” Howard, J. Woodford, Book Review, *The Courts and Social Policy*, by Donald L. Horowitz, 1978 *Washington U. L.Rev.* 833, at 838. Conclusions about whether courts are competent decision makers in certain policy areas turn, perhaps, on a comparative analysis of policy making in legislatures or administrative agencies. Was Donald Horowitz right when he concluded that courts were deficient policy makers?

VII. Decisionmaking on a Collegial Court

Trial judges are left to their conscience in deciding cases as the law and facts require; appellate judges have a more difficult task. Not only must each judge on an appellate court reach an individual decision as to the correct decision in a case, that judge also must work with her colleagues to come to an agreement as a whole. Although some scholars see this process as deliberative, in which a meeting of the minds (or at least a majority of those minds) reaches the best and most principled outcome, other scholars see decisionmaking on a collegial court as in part strategic, with judges jockeying to assemble a majority opinion.

In *Brown v. Board of Education*, the judges did more than work together – both deliberatively and strategically – to come to a majority outcome: they decided any decision they reached should be unanimous.⁶⁹ To the justices, unanimity had been a constant prerogative in the decisions involving segregation in graduate education, and when it came to desegregating entire Southern school systems, the necessity of doing so with one voice seemed all the more pressing.⁷⁰ The unanimity of the Court in *Brown* has been much noted and generally admired.

⁶⁹ Michael J. Klarman, *Why Brown v. Board of Education Was a Hard Case*, 43 *Judges J.* 6, 12-13 (2004) (detailing why the Justices chose to vote unanimously in *Brown I*).

Dennis J. Hutchinson, *Unanimity and Desegregation: Decision-Making in the Supreme Court, 1948-1958*, 68 *Geo. L. J.* 1, 55 (1979-80) (describing the push for unanimity in *Brown II*)

⁷⁰ Klarman, *supra* note 1, at 12.

But unanimity has its consequences. Almost of necessity, opinions that achieve unanimity must say less to draw in more votes. This had certainly been true in the graduate education cases. In *Sipuel*, for example, the absence of a state law school seemed easily to require granting relief for the plaintiff, and was decided in an opinion of only five paragraphs. But the unanimous decision had to be written narrowly to avoid treading on the views of those who (on the one hand) felt that *Plessy v. Ferguson* should be overruled, and those who (on the other) believed a prior graduate school precedent was wrongly decided.⁷¹

In his memoir, *Five Chiefs*, Justice John Paul Stevens takes the Brown Court to task for choosing unanimity over greater clarity in the eventual decree. “I have never been convinced,” Stevens wrote, “that the benefits of its unanimity outweighed” what were in his view flaws in delaying the remedy of immediate desegregation in *Brown*. “Even when a dissenting opinion makes convincing arguments on the losing party's behalf, responses by the majority may not only clarify and strengthen the Court's reasoning, but also demonstrate to the public that the dissenter's views were carefully considered before they were rejected.”⁷²

The deliberations over the outcome in *Brown v. Board of Education* inform us of the difficulties of decisionmaking on a collegial court, a topic we take up in full in Chapter 8.

A. Brown I

Even with the benefit of the paper record left behind by the justices in their private papers regarding the deliberations in the *Brown* case, we still cannot achieve certainty as to what happened. Historian, careful historians, read the same documents and come to differing conclusions. The justices themselves were imperfect vessels for recording what was happening, in part because – as we will see when we discuss opinion writing – words can only take us so far in expressing complicated and shifting views. Justices may not even fully know their own mind, or be able to express their views without dissembling.

Still, the consensus was that when cases that formed the *Brown* litigation first were considered by the justices in 1952, the Court was unlikely to have ruled to strike down segregation in primary education. At the first conference to discuss the cases, on December 13, 1952, the justices did an unusual thing: they followed their typical practice of going around the room expressing their views, but given the stakes, they did not take a formal vote as to disposition.⁷³ That conversation revealed what might be regarded as three camps: those who would overrule *Plessy* and order desegregation now; those who felt the opposite, and those who for one reason or another were wavering. Views differ as to this head count, but one might roughly see the camps in this way (with justices who were perhaps persuadable if leadership were asserted indicated in red):

⁷¹ Hutchinson, *supra* note 1, at 7.

⁷² JOHN PAUL STEVENS, *FIVE CHIEFS*, 100 (2011)

⁷³ RICHARD KLUGER, *SIMPLE JUSTICE*, 585 (1975).

Name of Justice	Vinson	Reed	Clark	Frankfurter ⁷⁴	Jackson	Burton	Minton	Douglas	Black
Uphold <i>Plessy</i> ?	Yes	Yes	Yes	Yes	Yes	No	No	No	No

In part the problem was the Chief Justice, Roger Vinson. The most optimistic account holds that had strong leadership been asserted, all (or most) of the justices may have come around to a decision to rule for the *Brown* plaintiffs. But Vinson was not a strong leader. To the contrary, he was widely disdained by the other justices on this account.⁷⁵ And Vinson himself was inclined to uphold segregation, absent a strong showing from the other justices toward the opposite result.

Given the focus in this chapter and book on the interplay between law and politics, it is useful to note that among the wavering justices, it was the tension between the two that posed the most difficulty. There can be little doubt but that Justice Felix Frankfurter personally was deeply opposed to segregation, and although things are a little more ambiguous with Justice Robert Jackson, he apparently would have gone along with a decision to desegregate if it were acknowledged the Court was making a “political” rather than legal judgment.⁷⁶ But both saw *Plessy* and existing understandings of the Fourteenth Amendment’s framing history as serious obstacles to ruling for the plaintiffs. And both justices, who had been part of the historical fights waged by Franklin Roosevelt against the Supreme Court, believed the Court’s role should be a cautious one, rather than one of activism. Jackson’s assertion that desegregation could only be achieved through a “political” decision was particularly disturbing to Frankfurter’s mindset.⁷⁷

Felix Frankfurter cut through the indecision on the Court with a tactic to buy time. He suggested that the parties be instructed to brief the framing history of the Fourteenth Amendment to determine whether that history indicated an intention to allow for segregated schools. Reargument was scheduled for the fall of 1953.⁷⁸

Then, fate intervened. Chief Justice Vinson died in September of 1953. Felix Frankfurter responded by calling it “the first indication I have ever had that there is a God.”⁷⁹ President Eisenhower chose California governor Earl Warren to replace Vinson.

With Chief Justice Warren in the center chair, the Court hear reargument on Frankfurter’s historical questions in December of 1953. The *Brown* Court ultimately would deem that history

⁷⁴ Frankfurter would almost certainly have overruled segregation in the District of Columbia, but on grounds that did not apply to segregation instituted by the states. Mark Tushnet & Katya Lezin, *What Really Happened in Brown v. Board of Ed.*, 91 Colum. L. Rev. 1867, 1905-06.

⁷⁵ KLUGER, *supra* note 5, at 585.

⁷⁶ Tushnet, *supra* note 6, at 1894.

⁷⁷ Tushnet, *supra* note , at 1894.

⁷⁸ KLUGER, *supra* note 5, at 614.

⁷⁹ KLUGER, *supra* note 5, at 656.

“inconclusive.” Yet, it is possible Justices Frankfurter saw it as opening an area of constitutional discretion to decide for the *Brown* plaintiffs as a matter of law rather than politics.⁸⁰

There is little disagreement but that once Warren took the helm, the Court was able to move quickly to a unanimous decision in the *Brown* case. Some, such as Richard Kluger, seek to attribute this to Warren’s leadership. Others, including Warren himself, portray it as a gradual process of working their way to the result.⁸¹

One of the more intriguing and persuasive arguments as to how the Court reached unanimity is that once Warren expressed his views at the Court’s conference as to the outcome, there were five clear votes to strike segregated schools, allowing the others to coalesce around this result. Warren began the conference following the oral argument by stating that segregation could only be sustained on the basis of racial inferiority, but the Court should move cautiously to avoid “inflam[ing] the South more than necessary.”⁸² Michael Klarman explains that “[a]nyone counting heads – and all of the justices were – immediately would have recognized that the outcome in *Brown* was no longer in doubt.” At that point, concerns about the Southern reaction to *Brown* “felt pressure to suppress their personal convictions for the good of the institution.” In addition, with the responsibility for the outcome off their shoulders, Frankfurter and Jackson may have found it easier to vote their moral convictions over their hesitation on the legal issues.⁸³

B. Brown II

Earl Warren’s best idea, however, may have been to move discussion away from the merits and toward the question of the appropriate remedy. In a somewhat enigmatic entry in his personal diary, Justice Harold Burton noted that on December 17, 1953 “the Chief Justice told me of his plan to try [to] direct discussion of segregation cases toward the decree.”⁸⁴ With everyone focused on the remedy, the outcome on the merits slowly became a foregone conclusion. As we have seen, the result in *Brown I* was announced in May of 1954, at which point the justices set the case for reargument yet again on the question of remedy.

There can be little doubt but that the justices had grave, grave concerns about how their decision in *Brown* would be taken in the South, and what that would mean in terms of seeing a decree enforced. Over the summer before the decree re-argument, the Chief Justice had the law clerks engage in extensive study of what a desegregation decree would actually mean in terms of

⁸⁰ Hutchinson, *supra* note 1, at 43. Frankfurter’s law clerk at the time, Alexander Bickel, wrote an extensive memorandum on the history, which formed the basis for a later law review article. Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955). That article argued that while the history was inconclusive, it left room for subsequent generations to find segregated public schools a violation of Equal Protection of the laws. “[The Court] was able to avoid the dilemma because the record of history, properly understood, left the way open to, in fact invited, a decision based on the moral and material state of the nation in 1954, not 1866.” *Id.* at 65. Bickel went on to become one of the most famous law professors in American history.

⁸¹ Hutchinson, *supra* note 1, at 34-35.

⁸² KLUGER, *supra* note 5, at 679.

⁸³ Klarman, *supra* note 1, at 12-13.

⁸⁴ Hutchinson, *supra* note 1, at 40.

such issues as redrawing school boundaries and arranging for transportation. Many justices were worried about evasion, if not outright violence. Justice Black had stressed that “the Court should not issue what it cannot enforce.”⁸⁵ Justice Minton similarly believed “big talk in [the] opinion and little words in [the] decree would be bad.”⁸⁶ Indeed, Justice Burton expressed the view that it was “better to get limited results which are ordered and let them serve as examples than to order something which will not be carried out.”⁸⁷ Frankfurter too stressed that the “most important problem is to fashion appropriate provisions against evasion.”⁸⁸ The justices agreed, yet again, that it was “[v]ital to be unanimous.”⁸⁹

Given their concerns about the reaction in the South, the center of gravity on the Court was for a decision that allowed for flexibility and gave the South time to comply. Not all were of this mind; Justice Black, for example, presciently noted that allowing time would only encourage defiance. He was skeptical that desegregation would happen at all, and wanted simply to afford immediate relief to the named plaintiffs only.⁹⁰ Most of the others, however, from the time they first began to consider the case in 1952, stressed the value of a gradual approach. Justice Clark urged “slow speed,” while Frankfurter hoped that segregation would move “by gradual infiltration” to the more reticent areas.⁹¹ Toward the end, Frankfurter believed the Court had to offer “criteria not too loose to invite evasion, yet with enough ‘give’ to leave room for variant local problems.”⁹²

Unfortunately, the justices found it extremely difficult to agree on what the decree should say and what a gradual approach would entail. There were at least two axes of disagreement. First, the justices were split as to whether any decree should be directed only to the named plaintiffs, or to all members of the class.⁹³ Second, there was debate about whether to simply remand to allow the trial courts to fashion decrees, or whether more guidance should be given. Warren’s view was that “some guidance” was essential: “Rather cruel to shift back and let them flounder.”⁹⁴

In the face of that disagreement, the best that could be said about the opinion in *Brown II* was that it spoke in two voices at once. Most famously, the opinion ordered that the schools be desegregated “with all deliberate speed,” a favorite phrase of Frankfurter’s. As he explained it in another context: “mere speed is not a test of justice. Deliberate speed is. Deliberate speed takes time. But it is time well spent.”⁹⁵ The opinion was shot through with inconsistency and equivocation. On the one hand, the Court said “it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.” On the other hand, the opinion took note of the “varied local school problems” that would

⁸⁵ KLUGER, *supra* note 5, at 740.

⁸⁶ Tushnet, *supra* note 7, at 1927.

⁸⁷ Tushnet, *supra* note 7, at 1927.

⁸⁸ Hutchinson, *supra* note 1, at 51.

⁸⁹ Hutchinson, *supra* note 1, at 55. The quote was Justice Harlan’s but many others said the same.

⁹⁰ Tushnet, *supra* note 6, at 1926-27.

⁹¹ Tushnet, *supra* note 7, at 1925.

⁹² Hutchinson, *supra* note 1, at 54.

⁹³ Tushnet, *supra* note 7, at 1928.

⁹⁴ Hutchinson, *supra* note 1, at 55, quoting Frankfurter’s notes.

⁹⁵ Hutchinson, *supra* note 1, at 58.

complicate compliance and said the lower courts could take account of “a variety of obstacles.” Equitable principles were to govern, including “a facility for adjusting and reconciling public and private needs.” All the Court demanded was “a prompt and reasonable start toward full compliance.”

Thus, although the justices felt unanimity was “vital,” its price was sending a mixed message as to the outcome the justices desired. Justice Stevens may have been expressing too much certainty about a counterfactual – i.e., in insisting that a more prompt and definitive ruling on the remedy would have altered subsequent events. It is also possible that even a majority could not have coalesced around such a remedy if there was clarity on what it was. Still, there is little doubt that the Court’s “all deliberate speed” formulation contributed to the chaos that occurred next.

FOR DISCUSSION

1. Think about the difference between a 5-4 decision and a 9-0 decision of the Supreme Court. Each is likely to be more forceful in a particular way. Can you see the difference?
2. In an idealized view of law, justices on a collegial court either (a) vote their consciences; or (b) deliberate together to reach the best outcome. Is that our view of how matters work in a multi-member legislative body? Can you see how some of the legislative tactics, such as log-rolling, might play in a multi-member court? Is this inappropriate?

VIII. Judicial Decisionmaking in a System of Separation of Powers

Soon enough, the Justices’ fears about the response to *Brown* proved warranted, as the South engaged in a strategy of “massive resistance.” Senator Harry F. Byrd of Virginia declared “If we can organize the Southern States for massive resistance to this order I think that in time the rest of the country will realize that racial integration is not going to be accepted in the South.” J. Harvie Wilkinson, Harry Byrd and the Changing Face of Virginia Politics, 1945-1966 113 (1968) (quoting Richmond Times-Dispatch, Feb. 25, 1956). Southern Governors flat out challenged the Court. South Carolina’s James F. (Jimmy) Byrnes, who actually had sat on the Supreme Court briefly, stated “South Carolina will not, now nor for some years to come, mix white and colored children in our schools.” Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* 246 (2009). Georgia’s fiery Herman Talmadge announced “As long as I am governor, Negroes will not be admitted to white schools.” *Id.* Southern states engaged in a variety of defiant and dilatory tactics to avoid integration, from closing schools that judges ordered desegregated, to setting up private education for white children.

The history of massive resistance offers up lessons about the role and capacity of courts in making law and effecting change. In an idealized sense, we expect that courts will issue orders and they will be followed. In reality, judges must rely on other actors, both within and without the judiciary, to get the job done. Sometimes, those other actors do not cooperate. The problems discussed here find elaboration in chapters 6 and 9. We have already seen how the justices tailored their personal views on legal questions to anticipate disagreement among the public at

large. To what extent might this occur with regard to the judges on lower courts, or officials in the coordinate branches? Is such tailoring of the law in response to an anticipated reaction appropriate?

A. The Judicial Branch

One of the most problematic sources of resistance to the mandate in *Brown* was one the justices seem not to have anticipated sufficiently: the lower courts. While elected state judges might have been expected to follow Southern public opinion and gum up the gears of desegregation, by this time most of the desegregation cases were being litigated in federal courts.⁹⁶ Federal judges hold their jobs for life, and ostensibly are independent of public opinion. But even if this were true, lower federal court judges have their own views on cases that come before them, and those views are not always congruent with those of their superiors in higher courts.

Under the principle of “stare decisis,” lower courts are supposed to follow the rules handed down by higher courts. End of discussion. In the world of law, the assumption is this will happen, that between lower and higher courts there will be cooperation. But political scientists expect political contest even among courts. They model this competitive behavior, to see how it will affect the nature of the rules that get handed down, and whether they will be followed.

As we have seen, in *Brown* the justices reached unanimity in part by agreeing on a verdict that would not rush matters in the South. To the extent they thought about the lower courts, their concern was about the burden the desegregation cases would pose, both logistically and in managing the expectations of the parties.⁹⁷ But some of those lower court judges didn’t like the *Brown* decision any more than their non-judicial neighbors, and they did what they could to thwart it.

Lower court resistance to *Brown* took many forms. It took place against a backdrop of broader defiance by state governments, which engaged in a variety of actions ranging from “pupil placement” or “school choice” plans to outright shutting down of the state’s schools in a last ditch effort to avoid integration.⁹⁸ For example, Virginia’s pupil placement plan created a state board to place pupils in schools, in lieu of school boards.⁹⁹ Students were presumed to stay in their existing schools until each change was approved by the board. The board was directed to consider a number of factors, such as the health and aptitude of each individual student. The obvious purpose of the law was to slow if not halt the process of integration.

⁹⁶ *E.g.*, *Harrison v. Day*, 200 Va. 439 (1959); *McKinney v. Blankenship*, 154 Tex. 632 (1955). At least by the opponents of segregation. Segregationists often took to state court to attempt to enforce statutes mandating the defunding of integrated schools. See *e.g.*, *E.g.*, *Cameron v. Bd. of Ed. of City of Bonner Springs*, 182 Kan. 39 (1957).

⁹⁷ Mark Tushnet & Katya Lezin, 91 *Colum. L. Rev.* 1867, 1894 (1991).

⁹⁸ BASS, *supra* note 1, at 118-119.

⁹⁹ *Green v. Cnty. Sch. Bd. of New Kent Cnty., Va.*, 391 U.S. 430, 433 (1968).

Some lower courts engaged in outright defiance of *Brown*, to a degree remarkable in the annals of judicial decisions. Dallas, Texas provided sharp example. In 1955 a desegregation suit was filed, which the court dismissed. That decision was reversed by the United States Court of Appeals for the Fifth Circuit. On return, Judge William H. Atwell, of the Northern District of Texas, expressed his agreement with the dissenter on the appellate court, and proceeded to dismiss the case again. He called into question the *Brown* decision stating that it was “based on no law but rather on what the Court regarded as . . . “modern psychological knowledge,” with which the judge apparently disagreed.¹⁰⁰ While we have “Civil rights,” the judge said, “there are also Civil wrongs.”¹⁰¹ Noting that “the white schools are hardly sufficient to hold the present number of white students,” he said “it would be unthinkable and unbearably wrong to require the white students to get out so that the colored students could come in.”¹⁰² Thus, he declined to enter an injunction ordering desegregation and simply dismissed the suit for a second time. By 1960, matters were no better. This time, Judge T. Whitfield Davidson determined to let the decision to enter an integration order turn on an election being held regarding integration of the Dallas School District. If the vote were in favor of integration, then “there is no reason why the Court may not put wholesale integration into effect.¹⁰³” However, if “the election discloses large opposition to integration,” then the court would not do so because “the will of the people affected” should be given “consideration and a plan [] worked out that will not be obnoxious to those who undertake to operate and live under it.” The judge stated that while the *Brown* Court had found African-American children are “given an inferiority complex by being denied the right to sit in a class by th side of white children,” “the white child by the same psychological processes of reasoning may be found subject to inferiority complex by reason of being required to sit in classes with the colored child.” “The rights of one are equal to the rights of others.”¹⁰⁴

But more often, as the Texas litigation also demonstrated, the lower courts simply engaged in bone-numbing endless delay. And when they did, those judges often defended their decisions based on *Brown* itself. One of the more famous examples occurred in Charleston, in the case of *Briggs v. Elliott*.¹⁰⁵ There, the judges accepted that “[w]hatever may have been the views of this court as to the law when the case was originally before us, it is now our duty to accept the law as declared by the Supreme Court.” Still, “it is important that we point out exactly what the Supreme Court has decided and what it has not decided in this case.” The *Briggs* Court quoted at length the Supreme Court’s statements in *Brown II* concerning deference to school boards. And in a much quoted paragraph it stated:

It has not decided that the states must mix persons of different races in the schools or must require them to attend schools or must deprive them of the right of choosing the schools they attend. What it has decided, and all that it has decided, is that a state may not deny to any person on account of race the right to attend any school that it maintains. This, under the decision of the Supreme Court, the state may not do directly or indirectly; but if the schools

¹⁰⁰ *Bell v. Rippy*, 146 F. Supp. 485, 486 (N.D. Tex. 1956).

¹⁰¹ *Bell* 146 F. Supp. at 487.

¹⁰² *Bell* 146 F. Supp. at 487.

¹⁰³ *Borders v. Rippy*, 188 F. Supp. 231, 232 (N.D. Tex. 1960).

¹⁰⁴ *Borders* 188 F. Supp. at 232.

¹⁰⁵ *Briggs v. Elliot*, 132 F. Supp. 776 (E.D.S.C. 1955).

which it maintains are open to children of all races, no violation of the Constitution is involved even though the children of different races voluntarily attend different schools, as they attend different churches. Nothing in the Constitution or in the decision of the Supreme Court takes away from the people freedom to choose the schools they attend. The Constitution, in other words, does not require integration. It merely forbids discrimination.¹⁰⁶

This Briggs dictum became the support for innumerable delays, in Charleston and elsewhere.¹⁰⁷

Remarkably, in a case from Baton-Rouge, the federal judge took the bizarre step of lauding the delay in a litigation that had gone on already from 1956 to 1960 and claimed it was to “the everlasting credit of the local Negro leaders of the community” that they had somehow approved the delays. In his opinion, the judge, Gordon West, stated that he “personally regard[ed] the 1954 holding of the United States Supreme Court in the now famous Brown case as one of the truly regrettable decisions of all time,”¹⁰⁸ and gave the school board yet four months more to present a desegregation plan. When his decision was appealed, the Court of Appeals for the Fifth Circuit had enough, and issued a direct order, or mandamus, to the trial court to do exactly what it said, now. Recognizing that mandamus is an extraordinary remedy, the Court of Appeals stated that “This is such a ‘really extraordinary case.’”¹⁰⁹ The positions taken by the lower court and the defendants “show[] a startling, if not shocking, lack of appreciation of the clear pronouncements of the Supreme Court and of this Court.” “The courts can ill-afford the judicial time required to consider the case of every municipal, county or parish board of education two or three times, through the whole gamut of litigation . . . This case has run its course.”¹¹⁰ The defendants were ordered to present a plan to desegregate the schools when they reopened in the fall of 1964. Even yet, that order was for the plan to “contain as a minimum a food faith start”

As you can see, a small number of remarkable federal judges struggled to see that the Supreme Court’s will was done. See Jack Bass’s wonderful book on the subject, *Unlikely Heroes*. Still, in the face of recalcitrance, even from federal judges, desegregation barely occurred in the face of Brown. This situation would persist for a full decade, until the other branches of the federal government stepped in.

B. The Other Branches

One of the ugliest examples of massive resistance occurred in Little Rock, where Arkansas’s segregationist governor Orval Faubus whipped up the state against integration. When a federal judge ordered a small number of black students admitted to Little Rock’s Central High School, Faubus called out the State Guard to bar their entrance to the school. In litigation over

¹⁰⁶ *Briggs* at 777.

¹⁰⁷ *E.g.*, *Avery v. Wichita Falls Indep. Sch. Dist.*, 241 F.2d 230, 233 (5th Cir. 1957).

¹⁰⁸ *Davis v. E. Baton Rouge Parish Sch. Bd.*, 214 F. Supp. 624, 625 (E.D. La. 1963).

¹⁰⁹ *Hall v. West*, 335 F.2d 481, 482 (5th Cir. 1964).

¹¹⁰ *Hall*, 335 F.2d at 484.

the event that subsequently reached the Supreme Court, captioned *Cooper v. Aaron*, 358 U.S. 1 (1958), the justices described events:

While the School Board was . . . going forward with its preparation for desegregating the Little Rock school system, other state authorities, in contrast, were actively pursuing a program designed to perpetuate in Arkansas the system of racial segregation which this Court had held violated the Fourteenth Amendment. First came, in November 1956, an amendment to the State Constitution flatly commanding the Arkansas General Assembly to oppose ‘in every Constitutional manner the Un-constitutional desegregation decisions of May 17, 1954 and May 31, 1955 of the United States Supreme Court,’ Ark.Const.Amend. 44, and, through the initiative, a pupil assignment law, Ark.Stats. §§ 80-1519 to 80-1524. Pursuant to this state constitutional command, a law relieving school children from compulsory attendance at racially mixed schools, Ark.Stats. § 80-1525, and a law establishing a State Sovereignty Commission, Ark.Stats. §§ 6-801 to 6-824, were enacted by the General Assembly in February 1957.

The School Board and the Superintendent of Schools nevertheless continued with preparations to carry out the first stage of the desegregation program. Nine Negro children were scheduled for admission in September 1957 to Central High School, which has more than two thousand students. Various administrative measures, designed to assure the smooth transition of this first stage of desegregation, were undertaken.

On September 2, 1957, the day before these Negro students were to enter Central High, the school authorities were met with drastic opposing action on the part of the Governor of Arkansas who dispatched units of the Arkansas National Guard to the Central High School grounds and placed the school ‘off limits’ to colored students. . . .

‘The effect of that action [of the Governor] was to harden the core of opposition to the Plan and cause many persons who theretofore had reluctantly accepted the Plan to believe there was some power in the State of Arkansas which, when exerted, could nullify the Federal law and permit disobedience of the decree of this [District] Court, and from that date hostility to the Plan was increased and criticism of the officials of the [School] District has become more bitter and unrestrained.’ The Governor’s action caused the School Board to request the Negro students on September 2 not to attend the high school ‘until the legal dilemma was solved.’ The next day, September 3, 1957, the Board petitioned the District Court for instructions, and the court, after a hearing, found that the Board’s request of the Negro students to stay away from the high school had been made because of the stationing of the military guards by the state authorities. The court determined that this was not a reason for departing from the approved plan, and ordered the School Board and Superintendent to proceed with it.

On the morning of the next day, September 4, 1957, the Negro children attempted to enter the high school but, as the District Court later found, units of the Arkansas National Guard ‘acting pursuant to the Governor’s order, stood shoulder to shoulder at the school grounds and thereby forcibly prevented the 9 Negro students * * * from entering,’ as they continued to do every school day during the following three weeks. 156 F.Supp. at page 225.

[At the end of that period, after a court-ordered investigation] the District Court found that the School Board’s plan had been obstructed by the Governor through the use of National Guard troops, and granted a preliminary injunction on September 20, 1957, enjoining the Governor and the officers of the Guard from preventing the attendance of Negro children at Central High School, and from otherwise obstructing or interfering with the orders of the court in connection with the plan. The National Guard was then withdrawn from the school.

The next school day was Monday, September 23, 1957. The Negro children entered the high school that morning under the protection of the Little Rock Police Department and members of the Arkansas State Police. But the officers caused the children to be removed from the school during the morning because they had difficulty controlling a large and demonstrating crowd which had gathered at the high school. 163 F.Supp. at page 16.

The Supreme Court’s description of a “large and demonstrating crowd” was somewhat of an understatement. Judge J. Harvie Wilkinson, III brings the tension to life through the experience of those who were there at the high school:

I tried to see a friendly face," recalled Elizabeth Eckford, one of the nine. "I looked into the face of an old woman and it seemed friendly, but when I looked at her again, she spat on me." "They've gone in," a white man shouted. "The niggers are in our school," six young girls wailed hysterically. A mother threatened to enter Central High School and bodily remove the blacks. With the mob demanding that white students in the high school leave and with parents withdrawing their children to the cheers of the multitude, the police announced shortly after noon that the Negroes had been withdrawn. Little Rock had experienced roughly three hours and fifteen minutes of racial integration.¹¹¹

In response to the chaos in Little Rock, the Supreme Court issued its strongest statement of judicial supremacy, perhaps in all its history. The decision in *Cooper v. Aaron*, 358 U.S. 1 (1958), was individually signed by each of the nine justices. In it they equated their decisions with the Constitution (see *id.* at 18):

¹¹¹ J. Harvie Wilkinson, III, *The Supreme Court and Southern School Desegregation, 1955-1970: A History and Analysis*, 64 Va. L. Rev. 485, 517 (1978) (internal citations omitted).

Article VI of the Constitution makes the Constitution the ‘supreme Law of the Land.’ In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as ‘the fundamental and paramount law of the nation,’ declared in the notable case of *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60, that ‘It is emphatically the province and duty of the judicial department to say what the law is.’ This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States ‘any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.’ Every state legislator and executive and judicial officer is solemnly committed by oath taken pursuant to Art. VI, ¶3 ‘to support this Constitution.’ Chief Justice Taney, speaking for a unanimous Court in 1859, said that this requirement reflected the framers’ ‘anxiety to preserve it [the Constitution] in full force, in all its powers, and to guard against resistance to or evasion of its authority, on the part of a State.’¹¹²

No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it . . .

If you stop and think about it, this aspect of the Supreme Court’s opinion in *Cooper v. Aaron* seems odd, does it not? Absent a way to bring the situation in Little Rock under control, wasn’t the Supreme Court opening itself up to ridicule by insisting that its decisions were “supreme” while all over the South officials were flaunting them?

What puts the Court’s decision into perspective is that by the time it rendered its ruling, the situation in Little Rock was under already control, because President Eisenhower had sent in federal troops to bring it under control. As the Court explained in its decision: “On September 25, however, the President of the United States dispatched federal troops to Central High School and admission of the Negro students to the school was thereby effected. Regular army troops continued at the high school until November 27, 1957. They were then replaced by federalized National Guardsmen who remained throughout the balance of the school year. Eight of the Negro students remained in attendance at the school throughout the school year.” 358 U.S. 1, 12 (1958).

These events highlight yet another central theme about judicial decisionmaking, which is that even if all the judges in the judicial hierarchy are singing the same tune, the judiciary as an institution has its limitations. Judges cannot wave a hand and see that their orders are enforced. They depend on the help of the other branches. As with the lower courts, sometimes those relationships are competitive and sometimes they are cooperative, but in either case, as Chapter 9

¹¹² *Ableman v. Booth*, 21 How. 506, 524, 16 L.Ed. 169.

makes clear, it is important to consider the way this reliance on the other branches affects the law and the decision of actual cases.

The move from a segregated to a desegregated South is very much a three-branch story. Initially, the justices were egged on by the Executive Branch as segregation cases came to the Court in the first half of the twentieth century. Second, as indicated above, the Court's credibility in the desegregation project rested ultimately in the willingness of the Executive Branch to enforce judicial decisions. Finally, desegregation did not make much progress until Congress also stepped in with the Civil Rights Act of 1964. It took all three branches in harmony to change the reality on the ground.

C. The Court and the Executive Branch

As we have seen, in the 1920's the NAACP made a decision to seek racial justice in the courts. Part of that decision was a function of the fact that given the Southerners' ability to filibuster any legislation in the Senate, there were not many alternative venues in which to seek recourse. Still, progress in the courts was slow.

African-Americans got a boost in their judicial campaign when President Harry Truman decided to join their efforts, signing off on the idea that the Department of Justice should file "amicus" or friend of the court briefs in the Supreme Court in key racial cases. See Lynda G. Dodd, *Presidential Leadership and Civil Rights Lawyering in the Era Before Brown*, 85 Ind. L. J. 1599, 1638 (2010). The key player in all this was the Office of the Solicitor General, or simply the "SG." The SG is the government's lawyer in the Supreme Court, and it is generally accepted that the SG has a special relationship with the justices, offering wise counsel and a careful balanced perspective while at the same time advancing the government's cause in the high court. Indeed, the SG is sometimes referred to as "the tenth justice" because of this special role. There is a burgeoning political science literature documenting what many Supreme Court advocates know, which is that the SG holds special sway with the Court.

Truman's decision to aid the cause of African-American equality was a function of three things. First, he was personally appalled by stories he was told of brutality visited upon blacks, and in particular the story of Isaac Woodard, a black military veteran who was blinded by Southern police after an arrest for taking too long at a rest stop. Dodd, *supra*, at 1619. Second, Truman knew the 1948 election was going to be a tight one, and he needed to bolster his support among the African-American electorate. See Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 Stan. L. Rev. 61, 79 (1988). (This backfired in part when Truman's pro-black positions angered Southerners, leading to the breakaway "Dixiecrat" party in that election.) Finally, Jim Crow had become an issue in American foreign policy, as communist nations in particular delighted in publicizing how mistreatment of African-Americans was inconsistent with the supposedly American credo of equality. See Dudziak, *supra*. The NAACP had filed a complaint with the United Nations, saying "[i]t is not Russia that threatens the United States so much as Mississippi; not Stalin and Molotov, but [Southern politicians]: internal injustice done to one's brothers is far more dangerous than the aggression of strangers from abroad." Dudziak, *supra*, at 95 (quoting W.E.B. du Bois, *Three Centuries of Discrimination*, 54 *The Crisis* 362, 380 (1947)).

Given the lockup in Congress, Truman took several steps on his own to further racial equality, the most relevant one for present purposes being the creation of the President's Commission on Civil Rights. The CCR was charged with determining how "current law-enforcement measures" at every level of government "may be strengthened and improved to safeguard the civil rights of the people." Dodd, *supra*, at 1622. The findings of the CCR paint a hugely depressing picture of the state of affairs in the United States at mid-twentieth century. Truman ultimately made much of the CCR's report and recommendations in his 1948 State of the Union message, stressing in particular the foreign policy implications:

if we wish to inspire the peoples of the world whose freedom is in jeopardy, if we wish to restore hope to those who have already lost their civil liberties, if we wish to fulfill the promise that is ours, we must correct the remaining imperfections in our practice of democracy. We know the way. We need only the will.¹¹³

One of the CCR's recommendations, on which Truman signed off, was that the Department of Justice be instructed to file amicus briefs in key cases. Witnesses testified how the SG frequently refused to file such briefs, and the Attorney General explained his position that DOJ "rarely" should participate in such cases because "[t]he ends sought by private litigants . . . are frequently not such as should be sought or sanctioned by the Government." Dodd, *supra*, at 1633. But the CCR disagreed, and its final report – To Secure These Rights – concluded otherwise.

Immediately thereafter, the DOJ decided to file a brief in *Shelley v. Kraemer*, a landmark case in which the Supreme Court decided unanimously that racially discriminatory covenants barring selling property to blacks were unenforceable in court. As Philip Elman, a key player in the Solicitor General's office with close backchannel ties to Felix Frankfurter was to say in an oral history: "It was not an ordinary brief. It was a statement of national policy." Philip Elman & Norman Silber, *The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946-1960: An Oral History*, 100 Harv. L. Rev. 817, 819 (1987). The brief weighed in at a bulky 150 pages. *Id.* One of its constant themes was the injury to American foreign policy caused by Jim Crow. The brief earned the Administration plaudits throughout the black community, leaving it looking for further opportunities to egg on the justices.

The SG's next brief came in a case in which it explicitly asked the Supreme Court for the first time to overrule *Plessy v. Ferguson*, the chief "separate but equal" precedent. The case was *Henderson v. United States*, 339 U.S. 816 (1950), involving a federal rule regarding segregation on trains moving in interstate commerce. In filing this brief, the SG took on another branch of the federal government. Philip Elman, who was a key player in the SG's office, explained in an oral history that "We took a flat, all-out position that segregation and equality were mutually inconsistent, that separate but equal was a contradiction in terms." Elman & Silber, *supra*, at 821.

¹¹³ Dodd, *supra*, at 1644 (quoting Harry Truman, Special Message to Congress on Civil Rights, 1948 Pub. Papers 121 (Feb. 2, 1948)).

In each of the racial equality cases from Henderson to Brown, the Truman Administration continued to file briefs urging the Court to take the action that it did.

It is impossible, of course, to answer the counterfactual question of whether the Court would have decided these cases as it did absent Executive Branch encouragement. Intriguingly, some of the justices seemed to resent Executive Branch involvement. Dennis Hutchinson documents how Justice Harold Burton's clerks urged on him the positions taken by the United States in its amicus brief in Henderson, but there is no evidence of similar enthusiasm in other chambers. Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958*, 68 Geo. L. J. 1, 19-20 (1979). To the contrary, Chief Justice Vinson jotted a note on the cover of the Solicitor General's amicus brief in the Sweatt case, saying "certainly has heart appeal – But this is for the *head*." Richard Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle For Equality and Justice* 252 (1975).

No matter what the justices' views about Executive Branch pressure in the early segregation cases, it is clear that by the end of the Brown case the justices were anxious to have the Administration's support. The reasons for this varied, but one was clear: they anticipated trouble in response to their decision and they understood they would need help. As events in Little Rock made clear, that calculation was correct.

1. Giving the Truman Administration the Cold Shoulder

Initially, the Court turned a cold shoulder to the Truman Administration's efforts to play an important role in the Brown litigation. As it had in past cases, Truman's SG filed an amicus brief in the Brown cases in support of overturning Plessy, and once again stressing foreign policy considerations.¹¹⁴ The SG then asked permission to participate in the initial round of oral arguments, held in late 1952. Often when the SG asks explicit permission to participate in oral argument, the Court grants it. In this instance, however, the Chief Justice simply returned the request. Daniel M. Berman, *It Is So Ordered: The Supreme Court Rules on School Desegregation* 61 (1966). One author has claimed this was because the Chief Justice "felt there was already more than enough pressure on the court to abandon the 'separate but equal' doctrine, which he was resolved to perpetuate." Berman, *supra*, at 61.

2. About-Face: Wanting the Administration on Record

By the time of the re-argument in Brown, however, the justices were eager to hear the Administration's views. 345 U.S. 972, 973 (1953) ("The Attorney General of the United States is

¹¹⁴ Ironically, the Truman Administration almost did not file in Brown. The Solicitor General, Philip Perlman, reportedly believed it was too early to end segregation in public schools. As Philip Elman paraphrased his views, "Trains, dining cars, law schools, graduate schools, yes – but no to public schools: no sir!" However, the Attorney General James McGrath was forced to resign amidst a scandal, and Perlman, who did not get on with the new Attorney General, also resigned. When Robert Stern became the Acting SG, the case was made to the new AG that the "Department had consistently taken the position that Plessy was wrong and should be overruled" and that "the Department of Justice should stick to its position and file an amicus brief in the Court." The AG agreed. See Philip Elman, *The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946-1960: An Oral History*, 100 HARV. L. REV. 817, 825-27 (1987).

invited to take part in the oral argument and to file an additional brief if he so desires.”). And for good reason. As Justice Felix Frankfurter wrote Chief Justice Vinson, “The Conference agreed with the point which Bob Jackson made very early in our deliberations, that the new Administration, unlike the old, may have the responsibility of carrying out a decision full of perplexities; it should therefore be asked to face that responsibility as part of our process of adjudication.” Letter from Justice Felix Frankfurter to Chief Justice Fred M. Vinson (June 8, 1953) (Felix Frankfurter Papers, Library of Congress); *see also* Bernard Schwartz, *Chief Justice Rehnquist, Justice Jackson, and the Brown Case*, 1988 Sup. Ct. Rev. 245, 252 (1988).

Chief Justice Vinson had indicated similar interest in private conversations with the new administration. Several days after Eisenhower was inaugurated as President, the Chief Justice spoke with then-Assistant Attorney General Warren E. Burger (later Chief Justice himself). *See* Herbert Brownell & John P. Burke, *Advising Ike: The Memoirs of Attorney General Herbert Brownell* 189 (1993). According to Eisenhower’s new Attorney General, Herbert Brownell, “the chief justice said that the Supreme Court would be interested in the views of the Eisenhower administration on the pending case of *Brown v. Board of Education*.” *Id.* Brownell further speculated that “Vinson was soliciting the new administration’s legal views to tip the balance, either by encouraging the waverers on the Court to overturn *Plessy* if the Eisenhower administration was on that side of the issue or to dodge the question until public and political support were greater and the Court would not have to risk its prestige in such a controversial area.” *Id.*

3. ‘The Eisenhower Administration’s (Reluctant) Participation in Brown

The justices were well-advised to seek out Eisenhower’s views on *Brown*. There was plenty of hints that the President did not feel the time was ripe for ordering desegregation of public schools. The new president had spent a lot of time in the South, and had warm friendships there with white Southerners. At a dinner at while *Brown* was under consideration, the President indicated his opposition to court-ordered desegregation; the Chief Justice, reported Eisenhower saying “[t]hese are not bad people. All they are concerned about is to see that their sweet little girls are not required to sit in school alongside some big overgrown Negroes.”¹¹⁵

Once the Court asked for the Eisenhower Administration’s views, the Administration proceeded reluctantly. The President did not want to participate, arguing “the federal government was not a party to the action,” but Attorney General Brownell made clear how awkward it would be to refuse the Court’s invitation. Brownell & Burke, *supra*, at 190. Even after Eisenhower acquiesced, however, the administration declined to take a stance on the issue of desegregation itself, doing nothing other than answering the specific questions historical questions the Court put. Eisenhower ultimately agreed with his Attorney General that if the government was pressed at oral argument, it could say it adhered to the prior administration’s position that *Plessy* should be overruled.

¹¹⁵ See JIM NEWTON, *JUSTICE FOR ALL: EARL WARREN AND THE NATION HE MADE* 315 (2006) (citing EARL WARREN, *THE MEMOIRS OF CHIEF JUSTICE EARL WARREN* 291 (1977)).

At oral argument, Justice Douglas had to chase the lawyer arguing the case, Assistant Attorney General J. Lee Rankin, to get a clear answer that it supported overruling Plessy. Finally, he elicited exactly what he wished:

Douglas: My question went further than that. It was, what are the merits, whether the Department of Justice had taken a position?

Rankin: . . . in order to answer your question specifically, it is the position of the Department of Justice that segregation in public schools cannot be maintained under the Fourteenth Amendment, and we adhere to the views expressed in the original brief of the Department in that regard. We did limit our brief in our –

Douglas: I just wanted to clear up the confusion in my mind.¹¹⁶

When it came to Brown II, however, regarding the remedy the Court should impose, the Eisenhower administration was quite clear in its view that matters should not be rushed. Eisenhower actually handwrote the first draft of this language, which ultimately appeared in the Administration's brief in Brown II:

[Segregation is] an institution, it may be noted, which during its existence not only has had the sanction of decisions of this Court but has been fervently supported by great numbers of people as justifiable on legal and moral grounds. The Court's holding in the present cases that segregation is a denial of constitutional rights involved an express recognition of psychological and emotional factors; the impact of segregation upon children, the Court found, can so affect their entire lives as to preclude their full enjoyment of constitutional rights. In similar fashion, psychological and emotional factors are involved – and must be met with understanding and good will – in the alterations that must now take place to bring about compliance with the Court's decision.¹¹⁷

Indeed, although Eisenhower did indeed send troops into Little Rock, his support was grudging. Not long beforehand, Ike had said “I can't imagine any set of circumstances that would ever induce me send federal troops into . . . any area to enforce the orders of a federal court.”¹¹⁸ When he did act he was careful to make clear that his rationale was enforcing order and judicial orders, and not the issue of desegregation itself. His private notes on the situation in Little Rock stated:

¹¹⁶ Brown v. Board: The Landmark Oral Argument Before the Supreme Court 249-50 (Leon Friedman ed., The New Press, 2004).

¹¹⁷ Elman & Silber, *supra*, at 842.

¹¹⁸ Mary L. Dudziak, *The Little Rock Crisis and Foreign Affairs: Race, Resistance, and the Image of American Democracy*, 70 S. Cal. L. Rev. 1641, 1678 (1997) (quoting Dwight D. Eisenhower, *The White House Years: Waging Peace, 1956-1961* 170 (1965)).

“Troops – Not to enforce integration. But to prevent opposition by violence to order of court.”¹¹⁹ He stressed to public officials that “my relationship to the problem at the moment is not one of attempting by force of arms to advance, impede, or otherwise affect the course of desegregation in the Nation’s school.”¹²⁰ In his televised remarks he went out of the way to emphasize that “[i]n [the South] I have many warm friends, some of them in the city of Little Rock.”¹²¹ And Eisenhower stressed that the issue was the unacceptability of violent interference with court orders, and also the implications for foreign policy: “At a time when we face a grave situation abroad because of the hatred that Communism bears toward a system of government based on human rights, it would be difficult to exaggerate the harm that is being done to the prestige and influence, and indeed to the safety, of our nation and the world. Our enemies are gloating over this incident and using it everywhere to misrepresent our whole nation.”¹²²

D. The Three-Branch Solution

Throughout the Brown proceedings, Justice Robert Jackson had a somewhat idiosyncratic perspective, but one that proved ultimately prescient. He felt that the lead on the issue should be taken by Congress. He conceded that in the absence of congressional action, the burden fell on the justices to end segregation, but he felt the better course of action was for Congress to act. Here is Justice Jackson, questioning Assistant Attorney General Rankin at the re-argument in Brown I:

Jackson: Before you go into that, isn’t the one thing that is perfectly clear under the Fourteenth Amendment, that Congress is given the power and the duty to enforce the Fourteenth Amendment, by legislation. . . .

Rankin: No, there is no question but—

Jackson: And the other thing that is clear is that they have never done, have never enacted an act that deals with this subject.

Rankin: There is no question but what [*sic*] Congress has the power under section 5 to enforce the Fourteenth Amendment.

Jackson: And if the Amendment reaches segregation, they have the power to enforce it and set up machinery to make it effective. There is no doubt about that, is there, and it hasn’t been done.

¹¹⁹ Handwritten notes by President Eisenhower on decision to send troops to Little Rock (Sept. 1957) (Dwight D. Eisenhower Presidential Library & Museum), *available at* http://www.eisenhower.archives.gov/research/online_documents/civil_rights_little_rock.html.

¹²⁰ Letter from President Dwight Eisenhower to Senator John C. Stennis (Oct. 7, 1957) (Dwight D. Eisenhower Presidential Library & Museum), *available at* http://www.eisenhower.archives.gov/research/online_documents/civil_rights_little_rock.html.

¹²¹ Press release, containing speech on radio and television by President Eisenhower (Sept. 24, 1957) (Dwight D. Eisenhower Presidential Library & Museum), *available at* http://www.eisenhower.archives.gov/research/online_documents/civil_rights_little_rock.html.

¹²² Press release, containing speech on radio and television by President Eisenhower (Sept. 24, 1957) (Dwight D. Eisenhower Presidential Library & Museum), *available at*, http://www.eisenhower.archives.gov/research/online_documents/civil_rights_little_rock.html.

Now if our representative institutions have failed—is that the point?

Rankin: No, because this Court has in our understanding concurrent jurisdiction.

Jackson: Have you taken it over?

Rankin: No. You both have a responsibility, and neither one can give that responsibility up to the other in our conception. There is a concurrent responsibility, and the Court has recognized it in numerous cases where it has interpreted and applied the Fourteenth Amendment.

It has not waited for Congress to act under section 5, but it has looked at section 1 and the other sections of the Amendment to see what they meant, and the force of that language that was used at that time in adopting the intention and purpose of the framers as expressed and tried to give a liberal interpretation to carry out the purposes that were pervading in the passing of the Amendment.

Jackson: I suppose that realistically the reason this case is here was that action couldn't be obtained from Congress. Certainly it would be here much stronger from your point of view if Congress did act, wouldn't it?¹²³

As it happened, Justice Jackson was right on target: desegregation moved at a glacial pace until Congress adopted the Civil Rights Act of 1964. Although President Eisenhower lent force to the courts in Little Rock, he sat on the sidelines of many other sites of violent conflict over desegregation efforts. As the historian Michael Klarman explains, “Eisenhower urged that desegregation be resolved locally, and he denied a role for the federal government in ‘the ordinary normal case of keeping order and preventing rioting.’” Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and Racial Equality* 324 (2004). Congress too had done nothing to foster the case of segregation. As a result, a decade after the decision in *Brown*, only one percent of African-American students in the South attended desegregated school. Says Klarman, “[t]he federal judiciary, acting without any congressional or much presidential backing, had proven powerless to accomplish more.” *Id.* at 362-63.

Ultimately, it was the civil rights movement that prompted Congress to act. The movement took off with sit-ins at lunch counters, and then bus trips by northern “Freedom Riders” to the South. Rallies led by Martin Luther King Jr. in Birmingham, his incarceration there, and a bombing of a black church killing four teenagers galvanized the country. In the spring of 1963, President Kennedy had declared it a moral imperative to the country to act, and that fall sent the civil rights bill to Congress. When JFK was killed in Dallas, his successor Lyndon Johnson lent all his weight to enacting the bill. Barry Friedman, *The Will of the People:*

¹²³ *Brown v. Board*: The Landmark Oral Argument Before the Supreme Court 243-44 (Leon Friedman ed., The New Press, 2004). Philip Elman succinctly summarizes Justice Jackson’s views at the time: “Let Congress deal with the problem; it’s too difficult for judges. We can’t preside over so massive a reconstruction of state educational systems.” Elman & Silber, *supra*, at 824.

How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution 248-49 (2009).

Adopted over the longest filibuster in history, the Civil Rights legislation Congress ultimately adopted provided new teeth to see that desegregation took place in the South. The Act authorized the Attorney General, upon complaint, “to institute for or in the name of the United States a civil action in any appropriate” federal court. Civil Rights Act of 1964, Pub. L. No. 88-352, § 407, 78 Stat. 241 (codified at 42 U.S.C. § 2000c-6 (2000)). The law also mandated that “such court shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section.” *Id.*

In the aftermath of the Civil Rights Act of 1964, the situation on the ground changed dramatically. The Attorney General brought lawsuits, and the Department of Health, Education and Welfare threatened to cut off education funds. As a result, by 1966 the number of African-American students in the South attending a desegregated school rose to over 6%, to 32% in 1969, and over 90% in 1973.¹²⁴

FOR DISCUSSION

1. As must be apparent at this juncture, sometimes the Court acts cooperatively with the other branches, and sometimes the branches disagree about policy. Why is it so important for the Court under some circumstances to align itself with the other branches? What steps can it take to do so?
2. Somewhat more surprisingly, appellate courts have to grapple with disagreement from the lower courts as well. What are the proper bounds of disagreement? And can you think of any methods an appellate court can use to prevent it?
3. The facts of this section suggest that courts, even the Supreme Court, suffer from certain power deficiencies. Alexander Hamilton famously called the judiciary, “the least dangerous branch.” Can you see why this might be so? What do you learn on that score from this section?
4. How do you feel about judicial decisions being subject to support from the other branches? From the lower courts?

IX. Public Opinion and Judicial Decisionmaking

In his engaging book, *From Brown to Bakke: The Supreme Court and School Integration, 1954-1978*, J. Harvie Wilkinson writes that “[i]n assessing the Supreme Court’s role in school integration, attention to its opinions is essential.” “Yet,” he continues, “the broader perspective is just as important:”

“One must look beyond the walls of doctrine to the halls of Congress and statehouses, to the chambers of district judges, to the desks of editors,

¹²⁴ Klarman 363

historians, and sociologists, and, most important, to high school corridors, civic auditoriums, country stores, suburban ranchhouses, and city streetcorners.”¹²⁵

Why is this so? Because, he argues, this is where “the verdict on the Court is delivered. It is there that the American people form a jury on the judge.”¹²⁶

But why should it matter what the American people think of the judges, who are – after all – appointed for life and ostensibly immune to public opinion? The reason: because that immunity is only ostensible: in many ways the verdict of the people helps shape the law itself.

It would be impossible to have come this far and missed the fact that an important influence on judicial decisionmaking is public opinion. The effect can be both direct and indirect. Truman’s actions toward racial desegregation were triggered in part by political calculations, and Truman’s Commission on Civil Rights – one of the actions he took – led to the Administration filing amicus briefs urging the justices to overrule *Plessy v. Ferguson*.¹²⁷ This is about as indirect and yet meaningful as one can imagine. On the other hand, as the justices contemplated the remedial decree in *Brown II*, we have seen the extent to which anticipated public reaction in the South influenced their decisionmaking – quite directly.

There are two very important sorts of questions posed by the influence of public opinion on judicial decisionmaking. The first is squarely in the wheelhouse of social scientists. What are the mechanisms by which public opinion comes to influence judicial decisions, both the outcomes and the legal rules in cases? Is it the appointment process for federal judges, or the desire of judges to be appreciated by their peers, or something else entirely?

The second set of questions is more normative (and may turn in part on the first): how ought we to feel about the relationship between public opinion and judicial decisions? At least in some areas, after all, we believe judges should be entirely uninfluenced by what the public thinks. For example, no serious person believes (we hope) that a jury’s verdict of guilty or innocent in a high-profile murder case, one in which the prosecution is seeking the death penalty, should be a function of public sentiment that the defendant is guilty and deserves to be executed. Similarly, one prominent theory of constitutional law holds that the very reason for allowing judges to interpret the meaning of the Constitution is because the judges stand separate from ordinary politics, and can reach decisions that protect minorities against majority will.¹²⁸ Yet, at times even the doctrine of the law itself incorporates public opinion, at least obliquely, in deciding what the rule should be. Thus, for example, when the Supreme Court decided that it

¹²⁵ J. HARVIE WILKINSON, FROM BROWN TO BAKKE: THE SUPREME COURT AND SCHOOL INTEGRATION, 1954-1978, at 6 (1981).

¹²⁶ *Id.*

¹²⁷ See MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY 23–24 (2000); Brief for the United States at Amicus Curiae Supporting Petitioners, *Brown v. Board of Education*, 347 U.S. 483 (1954) (Nos. 1, 2, 3, 4, 5), 1952 WL 82045.

¹²⁸ See, e.g., BRUCE ACKERMAN, WE THE PEOPLE, VOLUME I: FOUNDATIONS (1991) (favoring a “dualist” view of judicial review in which judges decide constitutional questions in a fashion separate from “ordinary politics”); JOHN HART ELY, DEMOCRACY AND DISTRUST (1980) (advancing a theory of judicial review in which judges act, among other things, to represent minority viewpoints shut out from the political process).

was unconstitutional to execute people who committed murder as a minor, or when it decided that states could not criminalize intimate practices between people of the same sex, it looked to evidence of shifting social mores.¹²⁹

These are the sorts of questions we explore in Chapter 10 of this book. For now, we introduce those themes by looking at two aspects of the relationship between *Brown* and public opinion. First, we briefly recap the argument made by several scholars that the *Brown* decision itself was driven by public opinion and received public support.¹³⁰ Then, we spend some time talking about the road from *Brown* to recent decisions regarding affirmative action and school assignment in education, bringing us full circle to where this chapter began: by asking what it is that we can learn about the meaning of *Brown v. Board of Education* and seeing how that meaning has shaped the law.

A. Brown and Public Opinion

As controversial as the *Brown* decision was in some quarters – particularly the South – from the time it was decided polls suggested the justices’ decision enjoyed majority support. Polling over the summer indicated a narrow majority favored the outcome in *Brown*, and from there on support grew.¹³¹ This is intriguing because when some scholars talk about the rule of judicial review in protecting minority interests against majority will, *Brown* often is cited as a chief example. It pays, however, to recall that *de jure* school desegregation was a regional affair, one that by the time of *Brown* was heavily under attack elsewhere. Derrick Bell, a skeptic of the minority protection thesis about judicial review, advanced a competitor view, that of “interest convergence.”¹³² The rights of minorities, he suggests, will be upheld only when it is in majority interests to do so.¹³³

Assuming *Brown* reflected majority views, what were the forces that brought the country to this place in the mid-1950s? Were they the same forces influencing the justices? Can we trace any relationship?

Scholars today agree that World War II and its aftermath had an enormous influence on national views about race, and most likely the Supreme Court’s decision in *Brown*. Start with

¹²⁹¹²⁹ See *Roper v. Simmons*, 543 U.S. 551, 565 (2005) (reviewing formal and informal state prohibitions on executions of defendants for crimes committed as juveniles as “evidence of national consensus against the death penalty for juveniles”); *Lawrence v. Texas*, 539 U.S. 558, 571–72 (2003) (observing that “our laws and traditions in the past half century . . . show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex”).

¹³⁰ See, e.g., Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 65 (1988); BARRY FRIEDMAN, *THE WILL OF THE PEOPLE* (2009); MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004).

¹³¹ See KLARMAN, *supra* note 6, at 310 (citing GEORGE H. GALLUP, *THE GALLUP POLL: PUBLIC OPINION, 1935–1971*, at 2:1249–50 (1972); Lloyd M. Wells, *The Supreme Court and Public Opinion, 1937 – 1957*, in *THE POLITICS OF JUDICIAL REVIEW, 1937 – 1957*, at 36 (John M. Church ed., 1957).

¹³² Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

¹³³ *Id.* at 523 (“[The] principle of ‘interest convergence’ provides: The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites.”).

Harry Truman. It is true that his support for the rights of African-Americans was founded in pragmatic politics. Given the “Great Migration” of African Americans from the rural South to the more urban areas of the country in the twentieth century, he and his advisors could see the importance of the black vote to the 1948 presidential election.¹³⁴ But as noted earlier, Truman was also quite personally affected by the treatment returning war veterans received at the hands of Southerners. In this he was not alone; much of the country undoubtedly saw the injustice of allowing blacks to fight on the battlefield then denying them basic equality on return.

World War II changed public attitudes toward race more profoundly. The overt and horrifying racism of Nazi Germany caused Americans to turn the mirror toward their own practices.¹³⁵ In the aftermath of the war, race was becoming a more visible issue, one not swept easily under the table. Gunnar Myrdahl summed matters up in his 1944 masterpiece, *The American Dilemma*, writing, “When we say there is a Negro problem in America, what we mean is that the Americans are worried about it. It is on their minds and on their consciences.”¹³⁶

Then came the Cold War, itself an after-effect of World War II, and foreign policy imperatives began to drive both public opinion and official U.S. government positions in matters of race. In 1947, the NAACP filed “An Appeal to the World” with the United Nations, arguing “It is not Russia that threatens the United States so much as Mississippi.”¹³⁷ Meanwhile, Communist (and other) countries had a field day pointing to American hypocrisy about civil liberties and equal treatment. This was complicating foreign policy and was a constant theme in Truman Administration filings before the Supreme Court on race issues.¹³⁸ In its brief in *Brown* the Truman Administration said “It is in the context of the present world struggle between freedom and tyranny that the problem of racial discrimination must be viewed.”¹³⁹ Historian Mary Dudziak has described at great length the “cold war imperative” that drove public opinion toward the decision in *Brown*, consistent with Bell’s interest convergence thesis.¹⁴⁰

No surprise then that much of the public applauded *Brown*. The decision was seen as fundamentally right in moral terms. But it was also seen as appropriate in light of global politics at the time. Calling *Brown* the most important decision of all time except for *Dred Scott* (which limited Congress’s ability to deal with slavery and was at least one of the indirect catalysts of the Civil War) *Time* magazine noted the “many countries . . . where U.S. prestige and leadership

¹³⁴ See KLARMAN, *supra* note 5, at 173–74; Dudziak, *supra* note 5, at 79.

¹³⁵ See PAUL G. KAUPER, FRONTIERS OF CONSTITUTIONAL LIBERTY 210 (1956) (“A nation at war with Hitler’s Germany could not reconcile racism with its democratic credo . . .”).

¹³⁶ GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 26 (1962).

¹³⁷ Dudziak, *supra* note 5, at 95 (quoting the petition as reprinted in W.E.B. du Bois, *Three Centuries of Discrimination*, 54 THE CRISIS 362, 380 (1947)).

¹³⁸ See Philip Elman & Norman Silber, *The Solicitor General’s Office, Justice Frankfurter, and Civil Rights Litigation, 1946–1960: An Oral History*, 100 HARV. L. REV. 817, 819–21 (1987).

¹³⁹ Brief for the United States at Amicus Curiae Supporting Petitioners, *Brown v. Board of Education*, 347 U.S. 483 (1954) (Nos. 1, 2, 3, 4, 5), 1952 WL 82045.

¹⁴⁰ Dudziak, *supra* note 5, at 64 (citing Derrick Bell’s interest convergence theory as the framework for understanding desegregation as a Cold War imperative).

have been damaged by the fact of U.S. segregation.”¹⁴¹ Thus, *Time* concluded, *Brown* “will come as a timely reassertion of the basic American principle that ‘all men are created equal.’”¹⁴²

B. From Brown to the Present

Still, as we have noted, *Brown* today is a paradoxical decision. On the one hand, it is iconic; anyone that challenges the ruling will be taken immediately as possessing fringe views. On the other hand, what *Brown* decided – or rather, the basis for the decision – often is the subject of virulent dispute. Was *Brown* about color blindness, or about racial subordination? *I.e.*, did *Brown* hold that school segregation violated a rule that race should almost never be the basis for legislative distinctions? Or, was the evil of school segregation that it stigmatized a minority race? Which of these interpretations one attaches to *Brown* may well determine whether race conscious school primary and secondary school assignment, or affirmative action in higher education, is permissible.

How we understand *Brown* today necessary is a function of what happened in the aftermath of *Brown* itself. In *Regents of the University of California v. Bakke*, the first case in which the Supreme Court dealt with the issue of affirmative action programs, Justice Lewis Powell wrote of the Congress that drafted Title VI of the Civil Rights Act of 1964:

There simply was no reason for Congress to consider the validity of hypothetical preferences that might be accorded minority citizens; the legislators were dealing with the real and pressing problem of how to guarantee those citizens equal treatment.¹⁴³

The same was undoubtedly true of the justices in *Brown*. Their goal was to produce a formal statement of legal equality, and their great dread was that any order they issued would be defied. Nothing suggests they were looking ahead to the problem of race being used in a way calculated to *assist* members of a racial minority.

Once Congress passed the 1964 Civil Rights Act and school desegregation began in earnest, the nature of the debate also began to change. Desegregation litigation moved from the South to the North, and with it the most common form of an integration remedy: school bussing. Bussing proved enormously unpopular. Sometimes this was driven by simple racism; it became clear in places like Boston that racism was hardly a phenomenon reserved to the South.¹⁴⁴ Even if racism were not a factor, bussing was costly, often requiring fees or taxes, neither of which is typically popular with voters. Finally, and perhaps most important, people wanted to go to school, and send their kids to school, in their own neighborhoods. Even while approving of

¹⁴¹ *To All on Equal Terms*, TIME, May 24, 1954, at 21.

¹⁴² *Id.*

¹⁴³ *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 285 (1978).

¹⁴⁴ RONALD P. FORMISANO, BOSTON AGAINST BUSING: RACE, CLASS, AND ETHNICITY IN THE 1960S AND 1970S 1 (“In 1974. . . South Boston became as much a symbol of white racism as Selma, Alabama had been in 1964. Wild, raging mobs of white men and women confronted armies of police, while youths in their teens and younger hurled rocks, bottles, and racial epithets at buses carrying terrified black youngsters to school.”).

bussing as a remedy in *Swann v. Charlotte-Mecklenburg Board of Education*, the Supreme Court acknowledged “All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes.”¹⁴⁵

As desegregation became a reality, moved north, it and was implemented through bussing, it altered the very demographics of America. Some parents began to move their children to private schools, to avoid integration or bussing or both. Many families simply fled urban areas for the suburbs, in a phenomenon described as “white flight.”¹⁴⁶ Both of these made it more and more difficult to develop plans that would achieve real integration.

Then, racial tensions spilled over onto a new front, what was called affirmative action (by proponents) and reverse discrimination (by opponents).¹⁴⁷ These programs revolved around goods government had to dispense, be they government contracts or jobs. But public and private universities and colleges also adopted affirmative action programs for their entering classes. Opponents saw these programs as zero-sum – when a minority contracting firm got a job, or there was a racial preference for hiring firefighters, some whites believed they necessarily lost out.

Racial issues started to play a role in altering the face of American politics. When Richard Nixon ran for president in 1968, the Republican Party adopted a “Southern strategy” in which it appealed to discontented white southern Democrats, pulling them into the Republican fold.¹⁴⁸ With the ghettos burning, and crime rates on the rise, Nixon attacked the Supreme Court’s liberal rulings.¹⁴⁹ Nixon’s Republican successors would employ similar tactics, continuing to focus on issues that were coded racially, if not discussed in explicit racial terms, like crime and affirmative action.¹⁵⁰

Over time, these Republican presidents reshaped the Supreme Court – from the late 1960s through the mid-1990s. While Jimmy Carter had no vacancies on the Supreme Court to fill, Nixon had four, Reagan had three more, and George Herbert Walker Bush had two. Although not infallibly so, their appointees tended to vote from the middle to the right of the Court, particularly on issues of race and crime. It was during this period that the meaning of *Brown* began to take shape, in American politics and in the law.

¹⁴⁵ *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 28 (1971).

¹⁴⁶ See JAMES S. COLEMAN ET AL., *URBAN INSTITUTE, TRENDS IN SCHOOL SEGREGATION, 1968-73* (1975) (concluding that desegregation bussing plans increased white flight out of urban areas and, as a result, increased racial imbalance in public schools).

¹⁴⁷ See Stuart S. Taylor Jr., *A Job Is a Job, Is a Job, Until It's a Job Denied*, N.Y. TIMES, July 24, 1984, at 16 (“In political Washington, it sometimes seems almost everybody likes ‘affirmative action,’ nobody likes ‘reverse discrimination,’ and hardly anybody likes ‘quotas.’ . . . What is going on is a favorite tactic in policy debates: Jousting for the semantic high ground.”).

¹⁴⁸ See KEVIN P. PHILLIPS, *THE EMERGING REPUBLICAN MAJORITY* (1969) (explaining and justifying Nixon’s Southern strategy).

¹⁴⁹ See FRIEDMAN, *supra* note 5, at 276–78.

¹⁵⁰ See DAN T. CARTER, *FROM GEORGE WALLACE TO NEWT GINGRICH: RACE IN THE CONSERVATIVE COUNTERREVOLUTION* xiv (1996); THOMAS BYRNE EDSALL WITH MARY D. EDSALL, *CHAIN REACTION* 177 (1991); NICHOLAS LAHAM, *THE REAGAN PRESIDENCY AND THE POLITICS OF RACE* 9 (1998).

1. Limits on the use of race: the 1970s

To see how *Brown* came to be understood in the law, it is important to know something about how race cases are litigated. When any government action is challenged on the ground that it discriminates – be it on the basis of age, race, type of business one has, or anything else, courts ask two questions: does the government have a reason for favoring group X over group Y? And is the government’s purpose achieved by drawing the line that it did. For example, if the government hands out drivers’ licenses, it is constitutional to have a vision test? The answer seems obvious. Safe streets are important and a vision test does much to accomplish make sure they remain safe.

What is key in these disputes is what is called the “level of scrutiny” that a reviewing court will employ. Sometimes courts look very closely at the reasons for government discrimination; sometimes they don’t look closely at all. And how closely they look will often determine the way a case will be resolved. Think again of drivers’ licenses, but now consider the requirement that a driver be sixteen years old. While achieving safe streets requires some degree of maturity and ability from drivers, why is sixteen the magic number? What about a mature fifteen year-old, or an immature eighteen year-old? When the government discriminates on the basis of age like this, courts usually do not look very closely; if they looked too close, many laws might be in jeopardy.

On matters of race, however, it has long been the rule that courts apply “strict scrutiny,” which is to say they look very, very closely to determine if drawing a racial line is justifiable. This is in part because we believe that race rarely is an acceptable basis for differential treatment. Also, strict scrutiny also helps “smoke out” legitimate grounds for discrimination from pure racial animus.

But here’s the problem: what about when racial lines are drawn in order help racial minorities rather than hurt them? That is the issue in affirmative action cases, and it also spills over into school assignment cases. It is here that the contest over *Brown*’s meaning arises most sharply.

In 1978, the Supreme Court, in the *Bakke* affirmative action case, rejected the racial subordination view of *Brown* in favor of the “colorblind” understanding of the Constitution. At issue in *Bakke* was UC Davis Medical School’s affirmative action policy, which held a certain number of seats for minority applicants.¹⁵¹ Allan Bakke, a white male who alleged he had been denied admission to medical school because of the seats reserved for blacks, challenged the program and the Supreme Court struck it down.¹⁵²

The *Bakke* Court was wildly fractured, giving Justice Lewis Powell – a Nixon appointee – the final word, and what he had to say shaped battles over race into the present. The four conservative justices would never have even reached the constitutional question; they voted that the UC Davis program was invalid under Title VI of the 1964 Civil Rights Act, which provides that “No person in the United States shall, on the ground of race, color, or national origin, be

¹⁵¹ *Bakke*, 438 U.S. at 269–76.

¹⁵² *Id.*

excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”¹⁵³ The rest of the Court, however, believed the Civil Rights Act only prohibited what the Constitution would forbid.¹⁵⁴ And so the question they addressed was: is the same level of strict scrutiny applied to racial lines drawn not to harm or subordinate minorities, but to help them. The four liberal justices felt that “benign” uses of race classifications – not to hurt or subordinate a racial minority but to help it – were entitled to less careful scrutiny, and that under that level of scrutiny the University had an acceptable purpose in remedying past discrimination.¹⁵⁵ The Court was 4-4, so the ultimate result rested on Justice Powell.

In *Bakke*, Justice Powell made a number of legal moves that would limit the ability of governments to draw racial lines to help racial minorities or further societal integration. First, he came down squarely on the side of “the Constitution is “colorblind,” rejecting the racial subordination view.¹⁵⁶ Thus, any classification by race would receive strict scrutiny. Then, Justice Powell decided that in general – with the one exception discussed below – racial classifications could only be used to remedy the effects of past discrimination. But while UC Davis argued it was doing this, Justice Powell held that such remedies only were allowed when the actor doing the remediating had been found to have discriminated itself in the past, which was not documented with regard to UC Davis. “We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations.”¹⁵⁷

However, Justice Powell did believe that a university could sometimes take some account of race in making admissions decisions if the purpose was to further “diversity” in the school environment. The traditional function of the university as a place for teaching values and fostering discourse allowed some leeway to ensure that the student body was diverse in ways that would meet this mission. Justice Powell quoted from Harvard’s affirmative action plan, which he held up as a model: “A farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a black student can usually bring something that a white person cannot offer.”¹⁵⁸ Even yet, Justice Powell carefully circumscribed the bounds of such use of race by a university. Strict quotas and decisions based only on race were out; schools could consider race as part of an analysis of the whole individual.¹⁵⁹

During that same period in which *Bakke* was decided – the 1970s – similar principles were seriously circumscribing the bounds of school desegregation remedies. How was one to achieve racially-integrated schools in the face of phenomena like white flight? In Detroit, where many whites had fled the urban center for the suburbs, making it difficult to achieve any sort of

¹⁵³ *Id.* at 412–13 (opinion of Stevens, J.); 42 U.S.C. § 2000d *et seq.*

¹⁵⁴ *Bakke*, 438 U.S. at 328.

¹⁵⁵ *Id.* at 359–61.

¹⁵⁶ *See id.* at 289–90 (“The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color.”).

¹⁵⁷ *Id.* at 307.

¹⁵⁸ *Id.* at 316.

¹⁵⁹ *Id.* at 317 (“[R]ace or ethnic background may be deemed a “plus” in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats.”).

racial mix, the trial court ordered bussing across school district lines. But in the 1974 decision in *Milliken v. Bradley*, the Supreme Court held that forced inter-district remedies were impermissible in the absence of proof that the discrimination between districts was the result of an intentional state policy.¹⁶⁰

2. The 1990s: school desegregation and affirmative action in higher education diverge?

By the mid-1990s, any aggressive attempts to ensure truly integrated schools had reached a political and legal roadblock. The country had expressed its discontent with bussing as a remedy, and the justices apparently had heard. First, in 1992, in *Freeman v. Pitts*, the Supreme Court spelled out clear criteria that would allow most districts to come out from under their prior desegregation orders.¹⁶¹ Next, in 1995, in *Missouri v. Jenkins*, the Court made it extremely difficult to achieve desegregation in the face of white flight, even in states that had long engaged in overt racial discrimination.¹⁶² Because *Milliken* had put an end to forced inter-district bussing, courts and schools turned instead to incentives to draw white students back, relying largely on “magnet” schools with sufficiently attractive features that it was worth the commute and racial mixing to get them. In Kansas City, Missouri, the school board and the district court had agreed to a remarkable series of improvements to the schools, including computers (this was the early 1990s), a planetarium, a Model United Nations meeting room, and the like.¹⁶³ But funding all this required tax increases, and at this point the Supreme Court stepped in to put a stop to it. Recall that in *Bakke* Justice Powell had stated that remediation was permissible only if the government was at fault for discrimination. In *Jenkins*, the justices concluded a government body could not be held responsible for white flight, so such remediation to achieve integration was inappropriate. As Justice O’Connor explained in her concurring opinion:

This case, like other school desegregation litigation, is concerned with ‘the elimination of the discrimination inherent in the dual school systems, not with myriad factors of human existence which can cause discrimination in a multitude of ways on racial, religious, or ethnic grounds.’ (citing Swann). Those myriad factors are not readily corrected by judicial intervention, but are best addressed by the representative branches.¹⁶⁴

Which bring us to the more recent *Parents Involved* case, the one in which the legacy of *Brown* was so contested.¹⁶⁵ *Parents Involved* an attempt by the Seattle and Louisville school districts to maintain racially integrated schools in the face of demographic changes, including residential housing segregation. The conservative justices held that the plans were unlawful. Echoing *Jenkins*, Chief Justice Roberts stated in his plurality opinion that using race was

¹⁶⁰ *Milliken v. Bradley*, 418 U.S. 717, 744–45 (“[A]n interdistrict remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race.”).

¹⁶¹ 503 U.S. 467 (1992).

¹⁶² 515 U.S. 70 (1995).

¹⁶³ *Id.* at 79–80.

¹⁶⁴ *Id.* at 112.

¹⁶⁵ *Parents Involved in Comm. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

impermissible because there had been no fining of a constitutional violation by Seattle that was being remediated and that constitutional violations in Louisville has already been remediated because its desegregation decree had already been lifted.¹⁶⁶ And *Bakke's* diversity rationale, he further stated, was inapt to primary and secondary education.¹⁶⁷

And while there is plenty of evidence to suggest the ruling in *Parents Involved* was consistent with a public still fatigued of bussing, that is not necessarily true, for reasons Justice Breyer stated in emotional terms at the end of his dissent:

Finally, what of the hope and promise of *Brown*? For much of this Nation's history, the races remained divided. It was not long ago that people of different races drank from separate fountains, rode on separate buses, and studied in separate schools. In this Court's finest hour, *Brown v. Board of Education* challenged this history . . .

Not everyone welcomed this Court's decision in *Brown*. Three years after that decision was handed down, the Governor of Arkansas ordered state militia to block the doors of a white schoolhouse so that black children could not enter. The President of the United States dispatched the 101st Airborne Division to Little Rock, Arkansas, and federal troops were needed to enforce a desegregation decree. Today, almost 50 years later, attitudes toward race in this Nation have changed dramatically. Many parents, white and black alike, want their children to attend schools with children of different races. Indeed, the very school districts that once spurned integration now strive for it. . . . [T]hey have asked us not to take from their hands the instruments they have used to rid their schools of racial segregation, instruments that they believe are needed to overcome the problems of cities divided by race and poverty. The plurality would decline their modest request.¹⁶⁸

Matters were more confused still when it came to affirmative action in higher education, both in the popular political realm, and – perhaps unsurprisingly – on the Court itself. In 1994, in *Adarand v. Peña*, the Supreme Court applied strict scrutiny to a federal government affirmative action plan regarding federal contract awards.¹⁶⁹ Prior to *Adarand*, it had seemed like if the Congress itself was implementing an affirmative action plan, that might get more respect from the courts. After all, the Fourteenth Amendment does bestow upon Congress the power to enforce the Equal Protection Clause and the Supreme Court had heretofore been deferential about Congress's choices in that regard.¹⁷⁰ But once again, Justice O'Connor held for the Court in *Adarand* that even congressional affirmative action plans must be judged by strict scrutiny. (She went to some pains, however, to point out that close judicial review was not necessarily

¹⁶⁶ *Id.* at 712–16.

¹⁶⁷ *Id.* at 725.

¹⁶⁸ *Id.* at 867–868.

¹⁶⁹ 515 U.S. 200, 226 (1995).

¹⁷⁰ See *Metro Broadcasting v. FCC*, 497 U.S. 547, 564 (1990) (applying intermediate scrutiny to benign federal racial classifications).

“fatal in fact” to the any law’s being upheld existence, something that soon enough became important.)

Following the ruling in *Adarand*, Republicans thought they had encountered a political goldmine, only to learn once again that race is American politics’ third rail. William Kristol deemed affirmative action “a winner for us any way you look at it;” and some Republicans rushed to ban affirmative action altogether.¹⁷¹ Even Bill Clinton was prepared to back away. But the demographics in the country were changing: the contest over the influx of Latino voters left everyone uncertain where public opinion on the hot-button issue stood.¹⁷² Bill Clinton ultimately suggested a fix to existing affirmative action plans, saying “mend it don’t end it,” which gained overwhelming Senate support.¹⁷³ In 1996 Bob Dole, running for President, again suggested ending all affirmative action, but again got nowhere in Congress. His co-sponsor accused the Republican leaders of “spinning around like a weather vane in a hurricane on this issue.”¹⁷⁴

Republicans were right to hesitate, for when it came to affirmative action the country was seriously conflicted. Then and now, how the issue is phrased seems to matter a lot. Voters tend to be for “affirmative action” but against “racial preferences.” Thus, voters approved referenda in California and Washington to end “preferences” but voted down Houston’s referendum on “affirmative action.”¹⁷⁵ Polling results also seem to turn on such differences in the way questions are worded.¹⁷⁶

The Supreme Court returned to affirmative action for the first time since *Bakke*, in 2003, in two cases from the University of Michigan. One case (*Gratz*) came from the college, which employed racial criteria quite explicitly as a deciding factor for admissions; the other (*Grutter*) involved a more subtle law school plan, which counted race as just one factor in an overall assessment of each individual applicant.¹⁷⁷ The cases attracted high-powered friend of the court briefs from Fortune 500 CEOs and former military leaders speaking to the necessity of affirmative action.¹⁷⁸ The justices split 5-4 in both cases, with Justice O’Connor in the majority in both cases, but switching sides as to each. The result was that in *Gratz* the college plan was struck, while in *Grutter* the law school’s plan was upheld.¹⁷⁹ The legal conclusion was that race could be used in university admissions, if not too much and not too obviously. Justice O’Connor

¹⁷¹ TERRY H. ANDERSON, *THE PURSUIT OF FAIRNESS* 233--34(2004); Republican Party Platform of 1992, adopted Aug. 17, 1992, <http://presidency.ucsb.edu/showplatforms.php?platindex=R1992>, at 23 (“[W]e reject efforts to replace equal rights with quotas or other preferential treatment.”).

¹⁷² FRIEDMAN, *supra* note 5, at 326–27.

¹⁷³ William J. Clinton, “Remarks on Affirmative Action at the National Archives and Records Administration,” July 19, 1995, in *PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: WILLIAM J. CLINTON*, 1995, bk. 2, at 1114 (1996).

¹⁷⁴ LYDIA CHAVEZ, *THE COLOR BIND: THE CAMPAIGN TO END AFFIRMATIVE ACTION* 109 (1998).

¹⁷⁵ FRIEDMAN, *supra* note 5, at 361.

¹⁷⁶ *See, e.g., Public Backs Affirmative Action, But Not Minority Preferences*, PEW RESEARCH CENTER (June 2, 2009), <http://www.pewresearch.org/2009/06/02/public-backs-affirmative-action-but-not-minority-preferences/>.

¹⁷⁷ *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003).

¹⁷⁸ Brief of General Motors Corporation as Amicus Curiae in Support of Respondents, *Gratz v. Bollinger*, 539 U.S. 244 (2003) (Nos. 02-241, 02-516), 2003 WL 399096; Brief of 65 Leading American Businesses as Amici Curiae Supporting Respondent, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (Nos. 02-241, 02-516) 2001 WL 34624918; Consolidated Brief of Lt. Gen. Julius W. Becton, Jr., et al. as Amici Curiae Supporting Respondent, 539 U.S. 306 (2003) (Nos. 02-241, 02-516), 2003 WL 1787554.

¹⁷⁹ *Grutter*, 539 U.S. at 328; *Gratz*, 539 U.S. at 275–76.

attracted derision for suggesting affirmative in the *Grutter* opinion that affirmative action plans like the University of Michigan Law School's were fine – for now – but that in some period, say the next twenty-five years, they should be phased out.¹⁸⁰

The split decision in *Grutter* and *Gratz* seemed to reflect where the country was at on the issue. That's certainly how the media and pollsters saw it. The *Washington Post* concluded Justice O'Connor "has a knack for landing pretty near the spot where the public uneasily settles."¹⁸¹ Ken Starr, a conservative lawyer who had prosecuted President Bill Clinton in the Whitewater and Monica Lewinsky scandals, told *CNN* "the court, as we saw, is very deeply ambivalent about affirmative action, just as the country as a whole is."¹⁸² The director of the Pew Research Center commented on "how closely the court resembled public sentiment."¹⁸³

Not even ten years into Justice O'Connor's twenty-five year window, however, many believed the Supreme Court was poised yet again to eliminate affirmative action – this time in a case from the Texas, *Fisher v. University of Texas at Austin*.¹⁸⁴ After the federal courts had struck down a prior affirmative action plan at UT-Austin, the state – at the urging of Governor George W. Bush – adopted a "10% plan," by which the top 10% of graduating seniors at any high school in Texas meeting certain requirements would be admitted.¹⁸⁵ Bush, coming from a southern border state was savvy about the importance of the Latino vote and generally supported affirmative action.¹⁸⁶ He filed a brief in the Michigan cases opposing the plans there but touting his 10% plan as a race-neutral alternative.¹⁸⁷ Bush said, when his brief was filed, "I strongly support diversity of all kinds, including racial diversity in higher education."¹⁸⁸ But even with the 10% plan, UT-Austin still felt minorities were under-represented in its classrooms, and after following *Grutter* had adopted race-conscious measure.

But then, the Supreme Court punted. Rather than any bold pronouncement, in *Fisher*, the justices simply sent the case back to the lower courts, saying the judges there had not followed the instructions from *Grutter* clearly enough. The Court was practically unanimous.¹⁸⁹

Brown's legacy thus remains contested. True, the colorblindness rationale has triumphed over the subordination argument – at least for now. Yet, note the irony that in some ways we have returned to a pre-*Brown* distinction between graduate (and undergraduate) schools on the one hand and primary and secondary education on the other. While the Court has been very strict

¹⁸⁰ *Grutter*, 539 U.S. at 343 ("We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.")

¹⁸¹ David Von Drehle, *Court Mirrors Public Opinion*, WASH. POST, June 24, 2003 at A1.

¹⁸² *Late Edition with Wolf Blitzer*, CNN, June 29, 2003.

¹⁸³ Von Drehle, *supra* note 54.

¹⁸⁴ 570 U.S. ___, 133 S. Ct. 2411 (2013).

¹⁸⁵ Patrick Healy, *Texas Plan for College Diversity Draws Fire*, BOSTON GLOBE, Aug. 22, 2000 at A1.

¹⁸⁶ See TOM HAMBURGER AND PETER WALLSTEN, ONE PARTY COUNTRY: THE REPUBLICAN PLAN FOR DOMINANCE IN THE TWENTY-FIRST CENTURY 55 (2006). ("No Republican leader in the years after 1992 did more than George and Jeb Bush to turn the GOP around on the issue of race.")

¹⁸⁷ Brief for the United States as Amicus Curiae Supporting Petitioner, *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516), at 17.

¹⁸⁸ *Remarks on the Affirmative Action Case*, Jan. 15, 2003, in PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: GEORGE W. BUSH, 2003, bk. 1 (2007), 56.

¹⁸⁹ Justice Kagan did not participate, and Justice Ginsburg alone dissented.

about refusing to allow the consideration of race in primary and secondary pupil assignment, adhering to the colorblindness rationale, it has left more room for considering the non-subordinating use of race, albeit disguised somewhat, in undergraduate and graduate admissions.

Matters are more complicated still, because the deciding vote on the Court at the moment is Anthony Kennedy, and his views are decidedly, well, mixed. He wrote the opinion in *Fisher*. Referring very deliberately to Justice Powell's decision in *Bakke*, Justice *Kennedy* stressed that it is "irrelevant that a system of racial preferences in admissions may seem benign," and emphasized that judicial scrutiny of any race-based classification must be strict.¹⁹⁰ This has been a constant view of his, but even yet he touted the virtues of a "diverse student body," which "serves values beyond race alone, including enhanced classroom dialogue and the lessening of racial isolation and stereotypes."¹⁹¹

In *Parents Involved*, though, Justice Kennedy also split the baby – and technically here too his is the deciding vote. Standing alone, he poked fingers at both sides of the Court. While he joined the Chief Justice and provided the fifth vote to strike down Seattle's and Louisville's pupil assignment rules, he criticized the Chief Justice for "an all-too-unyielding insistence that race cannot be a factor in instances when, in my view, it may be taken into account:

The plurality opinion is too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race. The plurality's postulate that "[t]he way to stop discrimination on the basis of race is to stop discrimination on the basis of race," is not sufficient to decide these cases. Fifty years of experience since *Brown v. Board of Education* should teach us that the problem defies so easy a solution. School districts can seek to reach *Brown*'s objective of equal educational opportunity. The plurality opinion is at least open to the interpretation that the Constitution requires school districts to ignore the problem of de facto resegregation in schooling. I cannot endorse that conclusion. To the extent the plurality opinion suggests the Constitution mandates that state and local authorities must accept the status quo of racial isolation in schools, it is, in my view, profoundly mistaken.¹⁹²

Yet, Justice Kennedy was even harder on the dissenters, emphasizing that strict scrutiny was the proper standard under the precedents and that such scrutiny must indeed be strict.¹⁹³ Just as the Chief Justice was wrong to believe simply ending race discrimination was the answer:

"The idea that if race is the problem, race is the instrument with which to solve it cannot be accepted as an analytical leap forward. And if this is a frustrating duality of the Equal Protection Clause it simply reflects the duality

¹⁹⁰ *Fisher*, 133 S. Ct. at 2417.

¹⁹¹ *Id.* at 2418.

¹⁹² *Parents Involved*, 551 U.S. at 787–88.

¹⁹³ *See id.* at 790–91 ("The dissent's reliance on this Court's precedents to justify the explicit, sweeping, classwide racial classifications at issue here is a misreading of our authorities that, it appears to me, tends to undermine well-accepted principles needed to guard our freedom.").

of our history and our attempts to promote freedom in a world that sometimes seems to be set against it.”¹⁹⁴

How exactly Justice Kennedy squares that circle is a fine question. His answer seems to be that school boards “may pursue the goal of bringing together students of diverse backgrounds and races through other means.” These include “strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; . . . recruiting students and faculty in a targeted fashion” and the like.¹⁹⁵ One wonders how exactly these are not race-based approaches, and one also wonders if these approaches can work – and if not, whether Justice Kennedy would allow even more explicit uses of race. Indeed, one cannot help but wonder if the Court’s view is that using race is fine so long as no one can notice very much. Yet again, a country and court dancing around America’s never-ending dilemma.

The battle is hardly over; this Term the justices will take up the latest foray, a Michigan referendum that prohibits the use of discrimination on the basis of race, sex, color, ethnicity or national origin in “public employment, public education, or public contracting.”¹⁹⁶ The referendum was a clear response to the Michigan decisions, and the federal appeals court struck it down, at least as applied to public education.¹⁹⁷ The court was badly fractured, and many opinions were written. By the time you read this, we may have a better idea of how the justices are likely to rule.

FOR DISCUSSION

1. Assume for the sake of argument that there is some relationship between public opinion and judicial outcomes. Do you have any thoughts about which way the causal arrow moves?
2. Suppose that public opinion influences the justices. Do you have any hypothesis about the mechanisms that account for this? Why would life tenured judges issue opinions that at least in some instance seem to mirror public opinion?
3. In *Missouri v. Jenkins*, Justice O’Connor points to the other branches of government for the relief of discrimination caused by social forces such as white flight.¹⁹⁸ Of course, given the politics of the day, surely she understood no such relief would be forthcoming. Do you think similar forces influenced her decision not to allow the use of the taxing power to construct magnet schools and improve schools in racially segregated areas?

¹⁹⁴ *Id.* at 797.

¹⁹⁵ *Id.* at 789.

¹⁹⁶ *Coalition to Defend Affirmative Action v. Schuette*, No. 12-682

¹⁹⁷ *Coalition to Defend Affirmative Action v. Schuette*, 701 F.3d 466, 470 (6th Cir. 2012).

¹⁹⁸ *Jenkins*, 515 U.S. at 112 (“This case . . . is concerned with ‘the elimination of the discrimination inherent in the dual school systems, not with myriad factors of human existence which can cause discrimination in a multitude of ways on racial, religious, or ethnic grounds.’ Those myriad factors are not readily corrected by judicial intervention, but are best addressed by the representative branches; time and again, we have recognized the ample authority legislatures possess to combat racial injustice”) (internal citations omitted).

* * *

It would be a mistake to come to the end of this chapter focused only on public opinion as a mechanism for influencing the content of the law and the direction of outcomes. Reflect back over the various other influences on judging that we have discussed. Now think about the story of the aftermath of *Brown*, as it relates to affirmative action in higher education and school assignment in primary and secondary education. Can you identify any of the other influences we have discussed in this chapter at work in that story besides public opinion? What are they?

One final question: we told you at the outset that *Brown* was an unusual case. Have you developed any intuitions about how the factors we have discussed here might play out in more mill run judicial decisions?