CHAPTER ONE

AN INTRODUCTION TO JUDICIAL DECISION-MAKING

I. WHAT THIS COURSE IS ABOUT

Judges are some of the most important decision makers in the American system of government. Governance in the United States is a complex affair, involving many officials, in all three branches of government, at all levels of our federal system. Still, judges make much of the law in America. Even when interpreting legislative statutes or executive regulations, judges often determine how those statutes and regulations will apply.

Many academics express concern that too much attention has been paid to the work of judges, at the expense of their colleagues in the legislative and executive branches. Certainly, judicial decisions are the primary materials in most law school courses and the primary focus of much legal scholarship. But even with all this talk about what judges have done, we know far too little about how judges reach their decisions or the factors that influence the content of judge-made law—far less than we know about the workings of the other branches of government. And that lack of knowledge is sharpened by a split in how lawyers and academics in other disciplines tend to look at the judicial process.

That lack of knowledge is what this book seeks to remedy.

When lawyers think about judging, they typically take an "internal" perspective, which is to say they try to understand how one judicial decision follows from prior decisions and how it might influence later decisions. Judge-made law often is viewed as a closed or autonomous system, about which one need know little except what is contained in the legal texts themselves. If one is curious about, say, affirmative action in education, one could look at the main legal opinions—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 universities could take race into account to ensure a "diverse" student body, so long as race was just one of many factors and each applicant was considered based

on a bundle of his or her own characteristics.) And if one wanted to understand whether those rules were altered by the 2013 and 2016 decisions in *Fisher v. University of Texas*, one need only read those opinions.[1]

Social scientists, on the other hand, take an "external" perspective, focusing on factors outside the law that seem to govern judicial decisions. Many social scientists are skeptical that any legal precedent determines the outcome of a case or set of cases, and few believe that precedent offers a complete explanation of how law and legal institutions work. For example, a social scientist might say that the decisions in *Grutter* and *Gratz* were all about the preferences of the justices of the Supreme Court who decided those cases, and that Justice Sandra Day 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 and to Justice Anthony Kennedy's role as the new Court "median." Of course, the identity of the judge is hardly the only external factor that might matter. Our hypothetical social scientist might also try to explain the cases by referring to changing public opinion about affirmative action or the need for compromises to form majorities on the Supreme Court.

Good lawyers may be perfectly aware that factors beside the texts themselves decide cases. But even those lawyers may not be sure what to do with this awareness. Take a trite but telling example: a lawyer would hardly feel comfortable standing before a trial court in an affirmative action case and saying, "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." Perhaps for this reason, law professors devote little time to exploring with students what drives judicial decisions besides legal reasoning. That's understandable but unfortunate. As we are going to see, a lot more goes into legal decisions than law, and understanding those factors can be of inordinate value to scholars and practitioners alike.

What is peculiar about the long-standing divide between legal and social-science scholars of judicial decision-making is that in other areas of study about the law and legal institutions, the two groups collaborate with great benefit to us all. Many leading law schools have added social scientists to their faculties, realizing that an external perspective helps to understand all the institutions of American law, not only courts. 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. At the same time,

[1] *See* 570 U.S. 297 (2013); 136 S.Ct. 2198 (2016).

more and more social scientists have come to realize that if they want to understand how judging and legal institutions work, they need to study legal reasoning.

When the focus in law schools shifted toward the output of legislatures and administrative agencies, legal scholars and scholars from the social sciences joined to learn how those institutions work. The result was an explosion of research on the institutional design of legislative and administrative bodies and a deeper understanding of how that institutional design influences what we call "law."

And yet, because of the deeply ingrained system of judicial precedent (which we will examine in Chapter Six, about "hierarchy"), judicial decision-making seems to be the last bastion of the purely internal perspective of law. Judges remain idealized and mysterious, as though lawyers and legal scholars are loath to know what besides law determines judicial decisions. While scholars of the law today are savvy about how legislative politics drive the content of statutes, they remain notably inattentive to the means by which "judicial politics" drives the content of judicial decisions.

The premise of this course is that the internal and external views of judicial decision-making not only can be united, but they must be. Unless one is prepared to say that either view is without value, then the pertinent question—which animates this course—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.

We believe that social scientists cannot study judicial behavior and decision-making in an adequate way without also trying to understand the internal perspective on law. Legal reasoning is infinitely richer and more complex than many accounts by social scientists convey. To truly appreciate the workings of the courts, the judicial process, and judicial decisions, it is essential to take consider the textured workings of the law.

At the same time, we are convinced that many aspects of what social scientists have learned about judicial behavior have an important bearing on the law and legal institutions. Lawyers who adopt a strategy to win a case or set of cases and thereby succeed for a client—and perhaps change the law in the process—necessarily will profit from understanding what social scientists can teach about how and why judges actually decide cases. But something even more fundamental is true. The sorts of lessons social science teaches us about judicial behavior have an enormous influence *on the law itself*—on such questions as whether legal rules are broad or narrow, whether they grant discretion to lower court judges and other actors, and whether they are likely to be implemented or find adherence.

In short, we have written this book because we believe that 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 before them. We are confident that after studying this book, you will think so, too.

II. A CASE TO BEGIN: *BROWN V. BOARD OF EDUCATION*

One of the features of this book we hope you will like is that it is full of examples, not only judicial decisions, which are common in law-school course materials, but also excerpts from social-science studies, charts, graphs, congressional testimony, and much else. The balance of this chapter is one such example, played out on a grand scale to introduce you to the themes we will explore throughout the book.

The chapter is built around the Supreme Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), which held that a state-mandated system of racially segregated schools violates the Constitution.

But why *Brown*, which is more than 60 years old?

What makes the *Brown* decision particularly apt to demonstrate the themes of the course is that we know a great deal about how the 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, nor a less iconic one. By looking at these sources, we can document the various internal and external influences on the justices that shaped the outcome of the case, the legal rule that it announced, and the form of the remedy that the Supreme Court imposed.

You might object that *Brown* is a poor exemplar precisely because it is so iconic. Yes, external factors might have influenced the justices in *Brown*, but can we generalize about how such factors operate in more common and less epochal 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 is that we must be careful about the inferences and conclusions we draw from points of data. Throughout the book we will use cases like *Brown* as exemplars, but we also will 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 to assess what was going on. Still, it is instructive to begin with a tangible example in which the historical record suggests that the sorts of factors we study in this book do matter to real judges and do influence the development of the law. Later, we can ask again whether *Brown* is so idiosyncratic that these other factors might not play out in a more run-of-the-mill judicial case. As you might suppose, we don't think so.

We begin with the decision of the justices in *Brown*. 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 will find below most of Chief Justice Earl Warren's reasoning. The chief justice purposely confined the opinion to a length he felt could be published on a single page of most newspapers; the opinion was, in fact, widely disseminated in just that way.

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.[11] 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. . . .

Beginning with the text of the opinion, and moving out from there, let's try to understand what decided the *Brown* case.

III. WHAT DECIDED *BROWN*?

A. *BROWN* AS LAW

The most obvious way to begin to understand *Brown* is from the internal perspective, as law. This section asks: Did law compel the decision

---

[11] *See, e.g.*, Kenneth Bancroft Clark, Midcentury White House Conference on Children & Youth, Effect of Prejudice and Discrimination on Personality Development (1950); Helen L. Witmer & Ruth Kotinsky, Midcentury White House Conference on Children & Youth, Personality in the Making chap. VI (1952); Max Deutscher et al., *The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion*, 26 J.PSYCHOL.: INTERDISC. & APPLIED 259 (1948); Isidor Chein, *What are the Psychological Effects of Segregation Under Conditions of Equal Facilities?*, 3 INT'L J. OPINION & ATTITUDE RES. 229 (1949); Theodore Brameld, *Educational Costs*, *in* Discrimination & Nat'l Welfare 44–48 (R. MacIver, ed., 1949); E. Franklin Frazier, The Negro in the United States 674–81 (1949). *See generally* Gunnar Myrdal, An American Dilemma: The Negro Problem and Modern Democracy (1944).

in the *Brown* case? Did law permit the decision? Indeed, we will go one step further and ask whether *Brown* was decided "according to law"?

You might think that a foolish question: any respectable lawyer today will tell you *Brown* was rightly decided. What is true today wasn't true in 1954, however. *Brown* engendered violent opposition. Much of that opposition was directed at the outcome, without 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, as heretical as this might seem, viewed in the context of their time *Brown*'s 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 this is the case is a more difficult endeavor—especially for a lawyer looking at nothing but the law.

In 1956, the vast majority of Southern members of Congress signed on to what became known as "The Southern Manifesto." The Manifesto was published at the beginning of the period of "massive resistance," during which many Southern leaders did whatever they could to obstruct court orders 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.[2]

Those are strong words: a "clear abuse of judicial power." But the phrasing was intentional. Though the signers of the Southern Manifesto were angry, and although there were many bigots among them, they included some highly regarded constitutional scholars. Their argument was framed using traditional methods of constitutional interpretation. In reading what follows, the question to ask yourself is: Were they completely out of line in their challenge to *Brown* as law?

1. The Meaning of the Text

The plaintiffs' claims in Brown (and the accompanying cases) were governed by the Fourteenth Amendment to the United States Constitution, which provides in relevant part:

> . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without

[2] 102 CONG. REC. 4460 (1956) (emphasis added).

> due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[3]

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.[4]

Does the argument that the amendment doesn't mention education *specifically*, standing alone, resolve the question the Court took up in *Brown* 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 for 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."[5] (Justice Jackson never published the concurrence he drafted, for reasons we will explain shortly.)

2. The Intentions of the Framing Generation

When it comes to interpreting most texts—not just 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 requiring people to be 16 years of age to get drivers' licenses, or to be 18 to vote, deny adolescents the "equal protection of the laws"? 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)? "Equal protection of the laws" is stated with sufficient generality that we need some way to know what the phrase means in the context of real cases.

One of the classic ways to determine constitutional meaning is to seek guidance from those who wrote or ratified the statute. 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?"[6] Often, answering that question

---

[3] U.S. CONST. amend. XIV, § 1 (emphasis added).

[4] 102 CONG. REC. 4460 (1956).

[5] *See* Bernard Schwartz, *Chief Justice Rehnquist, Justice Jackson, and the* Brown *Case*, 1988 SUP. CT. REV. 245, 257 (1988) (quoting Memorandum from Justice Jackson (Mar. 15, 1954) (Robert H. Jackson Papers, Library of Congress)).

[6] On this topic see generally Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611 (1999) (describing the theory and historical development of public meaning originalism).

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.
>
> The very Congress which proposed the amendment subsequently provided for segregated schools in the District of Columbia.
>
> When 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 the authors' textual argument, this line of reasoning begins to seem pretty damning of any interpretation that the Amendment requires school desegregation, does it not? Recall that Justice Jackson said "the sweeping generalities of the Fourteenth Amendment can be read to require a full and equal racial partnership." But he followed that by saying: "If we turn from words to deeds as evidence of purpose, we find nothing to show that the Congress which submitted these Amendments understood or intended to prohibit the practice here in question."[8]

Most constitutional interpreters agree. The ratifying generation was pretty clear—by actions if not by words—that segregated education was not condemned by adoption of the Fourteenth Amendment.[9]

This history of the Fourteenth Amendment suggests that the amendment was not intended to eliminate racial segregation in primary school education. To get around that history, constitutional interpreters are required to fall back on the "majestic generalities" of the Fourteenth Amendment. The framers may not have planned for nor specifically contemplated desegregated schools, but neither did they prohibit them.

---

[7] 102 CONG. REC. 4460 (1956).

[8] *See* Bernard Schwartz, *Chief Justice Rehnquist, Justice Jackson, and the* Brown *Case*, 1988 SUP. CT. REV. 245, 257 (1988) (quoting Memorandum from Justice Jackson (Mar. 15, 1954) (Robert H. Jackson Papers, Library of Congress)).

[9] *See* Michael J. Klarman, Brown, *Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1884 (1995); *but see* Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995); (arguing that had the *Brown* Court "turn[ed] the clock back" to 1875, it "would have discovered strong support for its holding" that school segregation is inconsistent with the Fourteenth Amendment); Steven G. Calabresi & Michael W. Perl, *Originalism and* Brown v. Board of Education, 2014 MICH. ST. L. REV. 429, 436 (2014) (". . . the Fourteenth Amendment prohibited segregated schools as an original matter based exclusively on evidence drawn from its public meaning in 1868").

However, that sort of argument has its own challenges. If specific ratification history does not limit the scope of the Fourteenth Amendment's Equal Protection Clause, what does? And if the Equal Protection Clause did not bar segregated schools in the post-bellum period, when and how, precisely, did this change?

3. Precedent

The next factor constitutional interpreters often look to is precedent. Many years passed between the adoption of the Fourteenth Amendment in 1868 and 1954, when *Brown* was decided. In the interim, many 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 state governments. When judges talk about precedents, though, they usually mean *judicial* precedents.

Here is what the Southern 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.[10]

This is starting to look pretty bad for *Brown*, isn't it? As the Southerners tell the story, a long line of precedents supported their position.

In truth, the precedential argument is 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 to challenge the lack of a law school for African Americans in Texas. Texas originally made an accommodation by having 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. The Court 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."[11]

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 looking into the classroom from his seat outside of it, as shown in Figure 1.1.

---

10 102 CONG. REC. 4460 (1956).

11 339 U.S. at 634.

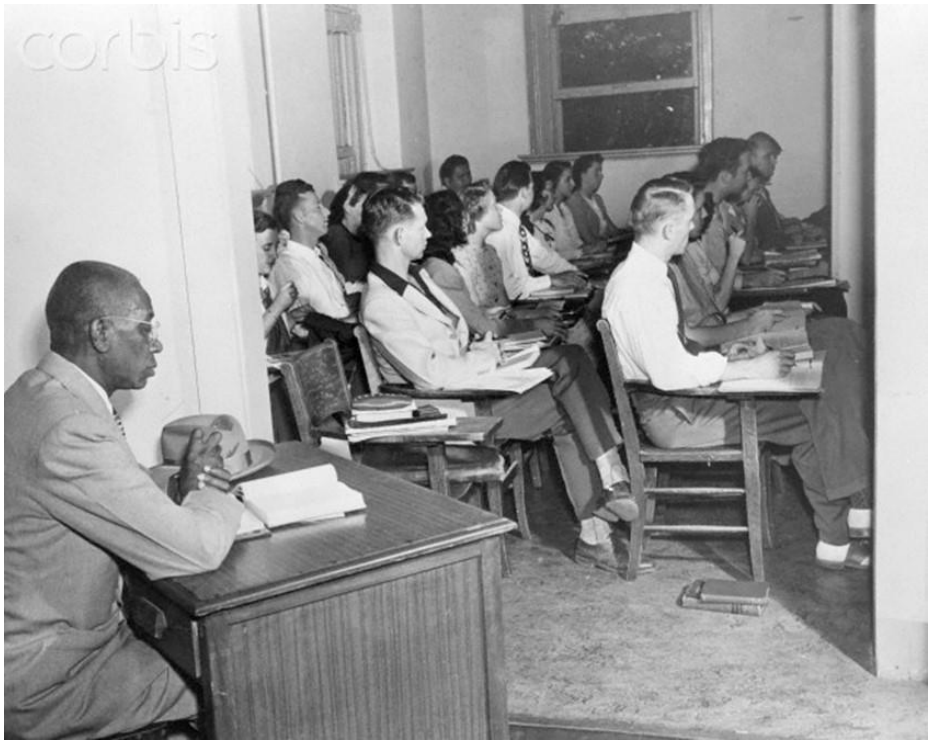

Figure 1.1. Photograph of George McLaurin seated outside of a classroom at the University of Oklahoma in 1948. Copyright: Bettman/Corbis.

McLaurin also had to eat in a special place in the cafeteria and sit in a special seat in the library. The Court held that this violated the Equal Protection Clause, because McLaurin "is handicapped in his pursuit of effective graduate instruction. 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."[12]

Still, it was hardly clear as a matter of precedent before *Brown* was decided that segregated primary school education was unlawful. *Brown*'s predecessor cases involved graduate students, and one might argue that graduate students had a unique need for contact with professors and classmates to get adequate training. Besides, 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."[13] In each case the claim was that the graduate education the state offered was not actually equal. Yet, at the time, some Southern states were devoting substantial resources to equalizing their school systems, precisely to fend off a ruling like *Brown*. In 1951, for example, South Carolina

[12] 339 U.S. at 641.

[13] Brown v. Bd. of Educ., 347 U.S. 483, 492 (1954).

embarked on a major initiative to equalize educational facilities and opportunities for black and white students.

4. And More . . .

There is more to interpreting the Constitution than text, original understandings, and judicial precedent. Lawyers and judges often look to a variety of additional factors, including pre- and post-ratification practice, evolved understandings, normative justification, and consequentialist limitations on the right.

The difficulty is that the further one goes beyond text, intent, and precedent, the more controversial the interpretive method becomes. Taking into account anticipated consequences, or what is morally correct, can engender disagreement very quickly, raising the question of why judges rather than democratic bodies should be making these decisions.

All of this helps explain why, 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."[14]

At this juncture, are you confident that law alone decided *Brown*, determining the outcome of the case? Or do we need to plumb deeper to understand and justify the decision? Chapter Two of this book looks at what it means for a case to be decided by law and how lawyers think about legal indeterminacy—i.e., what to do when the existing precedents or other interpretive tools only go so far in resolving a case.

B. *BROWN* AS IDEOLOGY

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 schoolchildren 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 Three, some scholars look to the political predispositions of judges to explain how cases are decided. Typically found in political science departments, these scholars contend that the decisions of Supreme Court justices—like those of other political actors—are shaped

[14] RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY AND JUSTICE 714 (2004).

by the justices' policy preferences. According to a well-known political science theory of judicial decision-making called "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."[15] The attitudinal model may sound quite familiar to you, because it is how you often see the Supreme Court being discussed in newspapers or on television talk shows. Pundits tend to put the justices into "liberal" and "conservative" camps, a less methodologically rigorous version of attitudinalism.

If the law does not fully account for the outcome in *Brown*, does the attitudinal approach explain the decision?

Recourse to the attitudinal perspective 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 initially were consolidated and placed on the Court's docket in the 1952 Term. At that time, the Court was led by Chief Justice Fred Vinson. But the Court did not decide the case in the 1952 Term, choosing instead to hold reargument the following year. On September 8, 1953, before the case could be reargued on the scheduled date in October, Chief Justice Vinson died. President Eisenhower acted quickly to select the governor of California, Earl Warren, for a recess appointment beginning on October 1, 1953.[16]

Once we have identified the relevant justices, we need to devise a way to measure their ideologies. One way to do this is by relying on a proxy. The most common proxy used by attitudinalists is information about the presidents who appointed the justices. Certainly, in recent history, presidents have appointed justices who appear to share their views on legal and social policies. So 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.

Table 1.1 shows the composition of the Court during the 1952 to 1954 Terms in which *Brown I* and *Brown II*—a follow-up case on the enforcement of *Brown*, which we will explore later in this chapter—were

---

[15] JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 4, 86 (2002). 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, 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 id*. at chap. 2.

[16] 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 President Eisenhower's additional recess appointments of Justice William J. Brennan Jr. in 1956 and Justice Potter Stewart in 1959.

decided. Because desegregation was largely a regional issue, the table also presents information about the justices' home states.[17]

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

Table 1.1. Composition of the U.S. Supreme Court during the 1952 to 1954 terms.

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. But is that assumption correct?

First, as we will see, one key player (perhaps *the* key player) in the resolution of the *Brown* litigation was Chief Justice Warren—the lone Republican appointee. Many credit Chief Justice Warren with the unanimous result in *Brown*.

Second, being a Democrat in 1954 could be very different than being a Democrat today. This is apparent from looking at the background of some of the justices on the Vinson Court appointed by Democrats. 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

[17] Home state is defined as the justices' "childhood location" as identified in the *U.S. Supreme Court Compendium*. LEE EPSTEIN ET AL., U.S. SUPREME COURT COMPENDIUM: DATA, DECISIONS, & DEVELOPMENTS tbl.4-6 (5th ed. 2012).

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 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 segregation issue until he came to the Court. A former senator from Indiana, Sherman Minton, an "almost pathological Democrat,"[18] was the lone dissenter in *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 did not suggest that he would necessarily support *Plessy*'s invalidation. So why did President Truman appoint him? Although Truman's position on civil rights was progressive, he seems to have based his Supreme Court selections on personal and professional friendships rather than shared political conviction.[19] For example, Justice Burton—another Truman appointee—was a Republican senator from Kentucky at the time of his nomination.

So even though all the justices on the Court prior to the arrival of Chief Justice Warren were appointed by Democrats, they differed sharply. Whether such differences emerged as a result of varying backgrounds, ideologies, or views of the proper judicial role, the disparities are evident in their voting records. Indeed, if you look at Figure 1.2, which provides information about the dissent rates on the Court for the 1925 to 1964 Terms, you cannot help but notice that these justices appointed by Democratic presidents often disagreed vehemently. The late 1940s and early 1950s were characterized by an astonishingly high dissent-rate relative to prior decades. The dissent rate peaked in the 1952 Term, when the Court produced unanimous outcomes in only 20 percent of its decisions. This is the lowest proportion of unanimous decisions per term since the Court's inception and has never been replicated.[20]

---

[18] According to Felix Frankfurter, that is. *See* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY AND JUSTICE 612 (2004).

[19] DAVID ALISTAIR YALOF, PURSUIT OF JUSTICES: PRESIDENTIAL POLITICS AND THE SELECTION OF SUPREME COURT NOMINEES 21 (1999); Russell W. Galloway, 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").

[20] Since 1952, the proportion of unanimous decisions each term has hovered around .6. *See* LEE EPSTEIN ET AL., U.S. SUPREME COURT COMPENDIUM: DATA, DECISIONS, & DEVELOPMENTS (5th ed. 2012).

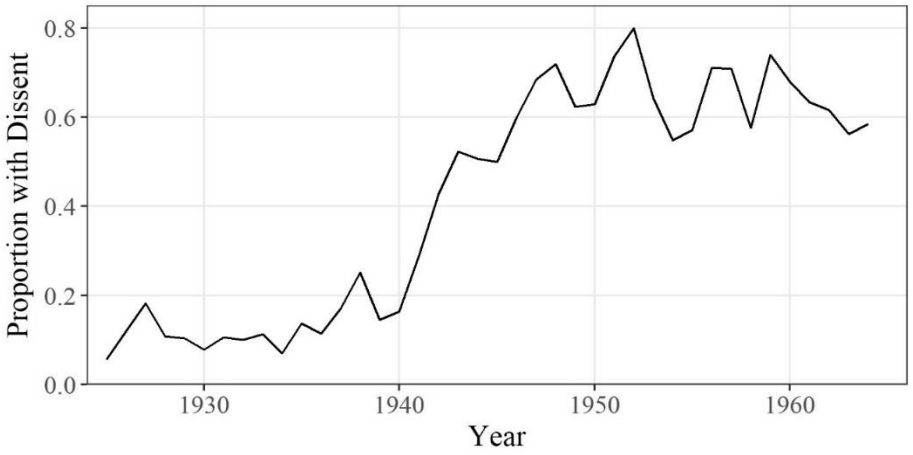

Figure 1.2. Proportion of Supreme Court decisions with at least one dissent, 1925–1964.[21]

Disagreement was the norm even in the sorts of 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 percent of their decisions involving civil rights and liberties in the 1949 to 1952 Terms.

Given this look at the backgrounds of the justices who decided *Brown I* and *Brown II*, are you persuaded that ideology resolved the cases?

We have looked at law, and we have looked at ideology. For a fair number of legal scholars and political scientists who study judicial decisions, these are the two explanations that tend to get sustained attention. Are you convinced these two suffice? We aren't. Indeed, we believe that what follows (and comprises the bulk of this course) is far more valuable for understanding why cases like *Brown* and a large percentage of other legal disputes get decided as they do. (The size of that percentage is open to question. The issues that come into play when disputes get litigated will be discussed in Chapter Two, on law, and in Chapter Four, on judicial agenda-setting.)

C. *BROWN* AS AGENDA-SETTING

Suppose that in May 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 alleviate that

[21] *Id.* at tbl.3-2.

wrong. Could they? The answer is an easy no. As a matter of well-settled legal doctrine, the justices had to wait for a case to bring the issue to them.

This highlights a critical point about courts. Unlike other branches of government, judges do not set their own agenda. One of the most important implications is that litigants have a certain degree of power in influencing what gets resolved by judges, and when. (Some types of litigants, we will see, have more power than others, and this affects the content of the law.) Fittingly, then, the focus of our story now 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*.

The NAACP was created in 1909. Although the initial impetus was racial violence, the organization's focus quickly expanded, encompassing issues such as voting rights and racial 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. The use of the filibuster in the Senate allowed Southerners to block most race legislation coming from the House. Even anti-lynching legislation could not get through Congress. Presidents took a number of measures to help, but the executive branch could only accomplish so much on its own. Though few, there had been enough important court decisions protecting African Americans from injustice to make the judiciary seem a promising situs for progress.[22]

The NAACP's litigation campaign began in earnest in the 1930s.[23] Charles Hamilton Houston—dean of the Howard Law School and a prominent NAACP lawyer—explained in the October 1935 issue of *The Crisis* that "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."[24]

The NAACP faced a dilemma, however: whether 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

---

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

[23] *See* Thurgood Marshall, *An Evaluation of Recent Efforts to Achieve Racial Integration in Education Through Resort to the Courts*, 21 J. NEGRO EDUC. 316, 318–19 (1952). As early as 1926 the NAACP's Annual Report declared that the federal courts were the best option for advancing civil rights. *See* MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950, at 1 (2005).

[24] *Id.* at 44.

the ground that it did not afford African Americans equal opportunities. Challenging segregation itself would require a head-on attack on *Plessy*.

As we have seen from the cases before *Brown*, 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. Desegregating graduate or undergraduate education was seen as less threatening to the South than seeking to desegregate public primary and secondary schools. As Thurgood Marshall (then lead counsel for the NAACP) 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."[25] The goal of the equalization litigation was twofold: first, to improve educational opportunities in the short term; and second, to raise the cost of segregation so it became prohibitive.

The NAACP scored an early victory in the case of *State of Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938). 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's 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.

Toward the end of the 1940s, a variety of factors were leading the NAACP to conclude that it ought no longer to seek equalization and should move instead to eliminate segregation.[26] Equalization suits were expensive to litigate. And even though disparities sometimes were evident, proving them could be complicated, as in the case of South Carolina, which 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

[25] Alfred Kelly, *The School Desegregation Case*, *in* QUARRELS THAT HAVE SHAPED THE CONSTITUTION 318 (John A. Garraty ed., rev. ed. 1987).

[26] *See* Tushnet, *Litigation Campaigns and the Search for Legal Rules*, at 101–03.

and prestige."[27] Thurgood Marshall believed that line contained an important message for the NAACP's litigation strategy. If the "intangibles" of racial segregation could render an otherwise equal educational experience unequal, then perhaps segregated primary education was vulnerable.

The case that became *Brown v. Board of Education* was the product of four cases filed in the lower courts to test the boundaries of *Sweatt*. The cases were litigated as challenges to the lawfulness of segregation, but they included information about unequal schooling opportunities. 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 but equal was unconstitutional. 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 grounds that the schools were equal or in the process of being equalized and that the Constitution did not require integration. Those losses paved the way for the Supreme Court's eventual decision abandoning "separate but equal" in *Brown*.

Brown, then, was the result of a very deliberate NAACP litigation campaign to change the nation's law. But as we discuss in more detail in Chapter Four, judicial agenda-setting is not solely about the power of litigants. Courts themselves can influence the types of cases that are brought and the order in which cases are decided. Indeed, in the lead-up to *Brown*, Thurgood Marshall believed the Supreme Court was signaling to him exactly what he was to do. As he wrote to one of his expert witnesses, "[T]he decisions are replete with road markings telling us where to go next."[28] Marshall was hardly alone; Arthur Krock, a correspondent for *The New York Times*, saw the Court's intentions 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 [the plaintiff] 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

---

[27] 339 U.S. at 634.

[28] MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950, at 135 (2005).

today that it will sympathetically entertain any plea of inequality.[29]

FOR DISCUSSION

1. As *Brown* makes clear, litigation campaigns are serious efforts that require a bankroll and stamina. Does this suggest any concern about bias in the law?

2. What parties are most likely to launch and succeed in litigation campaigns? Which are least likely?

3. Are such concerns unique to high-profile cases like *Brown*? If not, might anything be done to level the litigation playing-field?

4. 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?

D. INFORMATIONAL AND INSTITUTIONAL CONSTRAINTS IN *BROWN*

While *Brown* was pending before the Supreme Court, Justice Frankfurter observed in a memo to the other justices that the case concerned a social policy "with entangling passions . . ., [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."[30]

Justice Frankfurter's point captures an important reality about the nature of litigation and the limits on judicial capacity. Judges are required to resolve complicated and often contested facts, and they must do so in the face of heavy caseloads, and with presentations that often are controlled by litigants. Judges operate with small staffs. In contrast, legislators can hold hearings, subpoena expert and lay witnesses, and appoint commissions to explore factual issues and construct policy solutions. Those sorts of challenges to judicial decision-making are the subject of Chapter Five.

The Supreme Court justices who heard the *Brown* case were not experts in educational policy, child psychology, or school system logistics. And the adversarial process of litigation limited the tools available to the Court to resolve the relevant facts about segregated elementary schools. For example, in reaching its conclusion that state-sanctioned segregated education violated the Fourteenth Amendment, the *Brown* Court relied in part on the harmful effect of segregated education on African-American

[29] *Id.* at 133.

[30] *Id.* at 4.

children. At trial the plaintiffs presented expert testimony by social psychologists. One of these experts 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 the NAACP's lawyer Robert Carter:

> 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.[31]

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.[32] 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."[33] According to the *Plessy* Court, any such assumption stems not from the legal segregation regime, but rather "because the colored race chooses to put that construction upon it."[34]

Soon after *Brown*, questions arose as to 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. 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

---

[31] The Supreme Court's decision in Brown consolidated five separate cases from different jurisdictions; this testimony was from *Briggs v. Elliott*, the case litigated initially in Clarendon County, South Carolina.

[32] Brown v. Bd. of Educ., 347 U.S. 483, 494 n.11 (1954).

[33] Plessy v. Ferguson, 163 U.S. 537, 551 (1896).

[34] *Id.*

methodologically unsound."[35] Critics of the doll studies note that the research did not provide a convincing rationale for its sampling strategy, calling into question the representative nature of the children involved. Nor did the studies control for any variation in the students' backgrounds that might explain the results. Perhaps most fundamentally, Clark's studies did not demonstrate that *segregated education*, rather than some other environmental or social forces, caused the children's consciousness of race. In particular, Clark did not present evidence regarding how the study's 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. 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. What, after all, were the justices supposed to do? 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, more than 80 percent of whom agreed that "the effects of [enforced] segregation is psychologically detrimental to the members of the segregated group."[36] Should the justices have second-guessed that conclusion? On what basis?

The challenge for the justices was compounded by the reality that the relevant facts were not only backward-looking—concerning the effects of segregation on the plaintiffs and others like them—but also forward-looking, concerning the effects of the Court's own decision. As Chief Justice Warren noted in his opinion for the Court, the justices were being asked to render judgments that would have "wide applicability."[37] Once the justices

---

[35] Mark G. Yudof, *School Desegregation: Legal Realism, Reasoned Elaboration, and Social Science Research in the Supreme Court*, 42 L. & CONTEMP. PROBS. 57, 70 (1978).

[36] Appendix to Appellants' Briefs at 11, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (citing M. Duetscher & I. Chein, *The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion*, 26 J. PSYCH. 259–287 (1948)).

[37] 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) (finding that students are admitted "as individuals," not as a class or group, in suit to force desegregation in North Carolina schools).

decided to rule for the plaintiffs, they had to issue a ruling about what should happen next. This was no easy task, for 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. 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 ills inherent in segregation of Negro children can be terminated without substantially diminishing the quality of education for all children. The Court . . . surely cannot assume that [simply] scrambling [the school districts] is all there is to it.[38]

FOR DISCUSSION

1. Did Justice Frankfurter's concern shape the decision in *Brown*? If so, was his concern for the way the Court's decision might be implemented an inevitable feature of the judicial system's operation, or a flaw that should concern us? (We describe the Supreme Court's decree in *Brown* in more detail in the next section.)

2. Besides fact-finding, might other obstacles get in the way of accurate and enlightened judicial decision-making? Might such constraints affect the outcome in cases other than *Brown*, as well as the very content of the law?

E. *BROWN* AND DECISION-MAKING 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. Appellate courts are, by design, "collegial," meaning that multiple judges decide each case. Not only must each judge on an appellate court reach an individual judgment as to the correct decision, but that judge also must work with her colleagues to come to an agreement that speaks for the court as a whole.

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 schools in the school boards and those decisions "varied from student to student." Davis Marcys, *Flawed But Noble: Desegregation Litigation and Its Implications for the Modern Class Action*, 63 FLA. L. REV. 657, 685 (2011).

[38] Memorandum from Justice Frankfurter to the Court at 2–3 (January 15, 1954) (on file with Tom C. Clark Papers, Tarlton Law Library, University of Texas Law School).

Although some scholars see this process as deliberative, with many minds combining to reach the best and most principled outcome, other scholars see decision-making on a collegial court as strategic, with judges jockeying to assemble a majority opinion.

The deliberations over the outcome in *Brown v. Board of Education* illustrate some of the challenges of decision-making on a collegial court, a topic we take up in full in Chapter Seven. (We will discuss the content of Chapter Six in just a moment. Try as we might, we could not get the events in *Brown* to mirror the organization of this book.)

1. Brown I

Recall that the Supreme Court heard arguments in *Brown* twice: first in 1952, and then again in 1953. The consensus among legal historians is that *Brown* probably would have come out differently if it had been decided after the first hearing in 1952. (Even now, the matter is not fully free from debate; careful historians read the same documents and come to differing conclusions as to whether delay ultimately favored the plaintiffs as to the outcome.) At the first conference to discuss the cases, on December 13, 1952, the justices 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. 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 as depicted in Table 1.2 (with justices who were wavering indicated in the shaded italic cells).

Justice	Vinson	Reed	Clark	Frankfurter[39]	Jackson	Burton	Minton	Douglas	Black
Uphold *Plessy*?	Yes	Yes	Yes	*Yes*	*Yes*	No	No	No	No

Table 1.2. Preliminary votes of the justices in *Brown* at the conference held on December 13, 1952.

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

[39] 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 V. Tushnet & Katya Lezin, *What Really Happened in* Brown v. Board of Education, 91 COLUM. L. REV. 1867, 1905–06 (1991).

segregation, absent a strong showing from the other justices toward the opposite result.

Among the wavering justices, the tension between what seemed morally correct and the existence of *Plessy* as a contrary precedent posed the most difficulty. There can be little doubt that Justice Frankfurter was deeply opposed to segregation. Although Justice Jackson's position was more ambiguous, he apparently would have gone along with a decision to desegregate if the Court had acknowledged it was making a "political" rather than a legal judgment.[40] But both justices saw *Plessy* and the existing understanding 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 cautious rather than activist. Jackson's assertion that desegregation only could be achieved through a "political" decision was particularly disturbing to Frankfurter's mindset.

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.

Then fate intervened. Chief Justice Vinson died in September of that year. Frankfurter responded by calling Vinson's death "the first indication I have ever had that there is a God."[41] President Eisenhower chose California's governor, Earl Warren, to replace Vinson.

With Chief Justice Warren in the center chair, the Court heard reargument on Frankfurter's historical questions in December 1953. The *Brown* Court ultimately would deem that history "inconclusive." Yet Frankfurter might have seen it as opening an area of constitutional discretion to decide for the *Brown* plaintiffs as a matter of law rather than politics.[42]

In any event, once Warren took the helm the Court was able to move quickly to a unanimous decision in *Brown*. Scholars such as Richard Kluger

---

[40] *Id.* at 1894.

[41] KLUGER, SIMPLE JUSTICE, at 656.

[42] Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948–1958*, 68 GEO. L.J. 1, 43 (1980). 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.

attribute this to Warren's leadership. Others, including Warren himself, portray the unanimity of the decision as a gradual process of the justices working their way to the result.[43]

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 other justices 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."[44] 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, due to concerns about the Southern reaction to *Brown*, the hesitant justices "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 despite their hesitation on the legal issues.

2. Brown II

Earl Warren's best idea, however, may have been to move discussion away from the merits of the case and toward the question of the appropriate remedy. In an 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."[45] With everyone focused on the remedy, the outcome on the merits slowly became a foregone conclusion. When *Brown I* was announced in May 1954, the justices set the case for reargument yet again on the question of remedy.

There can be little doubt 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. (We will come to this sort of concern for enforcement as an additional basis for judicial decision-making in just a bit.) During the summer before the decree reargument, the chief justice had the law clerks extensively study what a desegregation decree would mean in terms of redrawing school boundaries, arranging for transportation, and similar practicalities. Many justices worried about evasion, if not outright violence. Justice Black had stressed that "the Court should not issue what it cannot enforce."[46] Minton similarly believed "big

---

[43] *See* Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948–1958*, 68 GEO. L.J. 1, 34–35 (1980).

[44] KLUGER, SIMPLE JUSTICE, at 679.

[45] Hutchinson, *Unanimity and Desegregation*, at 40.

[46] KLUGER, SIMPLE JUSTICE, at 740.

talk in [the] opinion and little words in [the] decree would be bad."[47] Indeed, 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."[48] Frankfurter, too, stressed that the "most important problem is to fashion appropriate provisions against evasion."[49] The justices agreed, yet again, that it was "[v]ital to be unanimous."[50]

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; Black presciently noted that allowing time would only encourage defiance. He was skeptical that desegregation would happen at all and wanted to afford immediate relief to the named plaintiffs only. But most of the other justices, from the time they began to consider the case in 1952, stressed the value of a gradual approach. Clark urged "slow speed," while Frankfurter hoped that segregation would move "by gradual infiltration" to the more reticent areas.[51] Toward the end, Frankfurter came to believe the Court had to offer "criteria not too loose to invite evasion, yet with enough 'give' to leave room for variant local problems."[52]

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. Second, they debated whether simply to remand to allow the trial courts to fashion decrees or whether to provide more guidance. Warren's view was that "some guidance" was essential: "Rather cruel to shift back and let them flounder."[53]

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. 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." But then, famously, the opinion ordered that the schools be desegregated "with all deliberate speed," a favorite phrase of Frankfurter's. As he explained in another context, "mere speed is not a test of justice. Deliberate speed is. Deliberate speed takes time. But it is time well spent."[54] The opinion took note of the "varied local school problems"

---

47 Tushnet & Lezin, *What Really Happened in* Brown v. Board of Education, at 1927.

48 *Id.*

49 Hutchinson, *Unanimity and Desegregation*, at 51.

50 *Id.* at 55. The quote was Justice Harlan's but many others said the same.

51 Tushnet & Lezin, *What Really Happened in* Brown v. Board of Education, at 1925.

52 Hutchinson, *Unanimity and Desegregation*, at 54.

53 *Id.* at 55 (quoting Frankfurter's notes).

54 *Id.* at 58.

that would 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. 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. "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."[55]

FOR DISCUSSION

1. Do you agree with Justice Stevens? Why or why not?

2. Can you see how the collegial interaction shaped the outcome in *Brown*?

3. Can you think of how collegial decision-making might influence outcomes and the law in other cases?

F. ENFORCING *BROWN*: JUDICIAL DECISION-MAKING IN A HIERARCHICAL SYSTEM

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."[56] Southern governors flat out challenged the Court. James F. (Jimmy) Byrnes, a South Carolina judge and politician who had briefly sat on the Supreme Court, stated that "South Carolina will not, now nor for some years to come, mix white and colored children in our schools."[57] Georgia's fiery Herman Talmadge announced: "As long as I am governor, Negroes will not be admitted to white schools."[58] Southern states engaged

---

[55] JOHN PAUL STEVENS, FIVE CHIEFS: A SUPREME COURT MEMOIR 100 (2011).

[56] J. HARVIE WILKINSON, HARRY BYRD AND THE CHANGING FACE OF VIRGINIA POLITICS, 1945–1966, at 113 (1968) (quoting RICHMOND TIMES-DISPATCH, Feb. 25, 1956).

[57] BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 246 (2009).

[58] *Id.*

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 justices seem not to have sufficiently anticipated one of the most problematic sources of resistance to the mandate in *Brown*: the lower federal courts. Court systems tend to be hierarchical, with trial judges, who deal with questions of fact and enforcement, at the bottom of the ladder, and appellate courts, which resolve broad questions of law, at the top.

Under the principle of "stare decisis," lower courts are supposed to follow the rules handed down by higher courts. End of discussion. Lawyers and legal scholars tend to assume the lower and higher courts will cooperate. But political scientists expect political contests among the various courts and model this competitive behavior to see how it will affect the nature of the rules that get handed down and whether those rules will be followed. We will discuss the hierarchical relationships among judges in more depth in Chapter Six.

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

Some lower courts engaged in outright defiance of *Brown*, to a degree remarkable in the annals of judicial decisions. In 1955, a desegregation suit was filed in Dallas, Texas, which the district 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.[59] While we have "Civil rights," the judge said, "there are also Civil wrongs." Noting that "the white schools are hardly sufficient to hold the present number of white students," he said "it would be unthinkably and unbearably wrong to require the white students to get out so that the colored students could come in."[60] Thus, he declined to enter an injunction ordering desegregation and simply dismissed the suit for a second time.

---

[59] Bell v. Rippy, 146 F. Supp. 485, 486 (N.D. Tex. 1956).

[60] *Id.* at 487.

But more often, as the Texas litigation also demonstrates, the lower courts simply engaged in 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, South Carolina, in the case of *Briggs v. Elliott*. 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, they wrote, "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 the *Briggs* court 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 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.[61]

This *Briggs* dictum became the support for innumerable delays, in Charleston and elsewhere.[62]

A small number of remarkable federal judges did struggle to see that the Supreme Court's will was done. But in the face of recalcitrance, even from federal judges, desegregation barely occurred in the aftermath of *Brown*. This stalemate would persist for a full decade, until the other branches of the federal government stepped in.

FOR DISCUSSION

1. The aftermath of *Brown* serves as a cautionary tale for those who look at the interaction between appellate courts and lower courts only through the internalist lens of stare decisis. If the justices in *Brown* had foreseen the problems in the lower courts, might the rule in *Brown II* have looked somewhat different?

---

[61] 132 F. Supp. 776, 777 (E.D.S.C. 1955).

[62] *See, e.g.*, Avery v. Wichita Falls Indep. Sch. Dist., 241 F.2d 230, 233 (5th Cir. 1957).

2. Is *Brown* unique in this way, or might lower courts regularly try to impose their will on the law? If resistance is likely, what might appellate judges do ensure that lower courts follow the dictates of higher courts?

3. Can you see how these dynamics might shape the content of the law itself?

G. DOES *BROWN* SHED LIGHT ON THE PROCESS OF SELECTING AND RETAINING JUDGES?

Before turning to the responses to *Brown* by the other branches of government, we need to consider one other crucial aspect of court systems: the manner in which judges are selected. One reason that the justices who decided *Brown* may not have anticipated judicial resistance was that the cases were in federal court. Federal judges are chosen by the president, with the advice and consent of the Senate.[63] Perhaps more important, they hold their office for life, and their salaries cannot be reduced. These protections are thought to insulate judges from public opinion and other forces that might threaten their independence and to ensure that the judges can follow the facts and the law where they lead.

Compare the protection afforded federal judges to the vulnerability of state judges, most of whom stand for popular election in one form or another. If you were on the NAACP legal team, would you have wanted to file your desegregation case in state or in federal court? And if you were on the Supreme Court at the time you were handing down the *Brown* decisions, might you have shaped your decree differently, knowing what we know now about how the lower federal courts responded to the decision? How so?

It might seem, based only on this short discussion, that the selection mechanism used in federal courts would be preferable to the elections used to choose lower-court judges. But *Brown* itself provides a cautionary tale, given that the lower federal courts defied the Supreme Court. Additional points confound easy thinking as to the preference for life tenure. First, putting unelected judges in charge of a volatile social policy like desegregation leads to the frequent accusation that they are undemocratic. This makes unpopular rulings vulnerable in ways we will soon discover. Second, on other divisive issues, such as gay marriage, elected state judges often have been at the fore.[64] What explains why these seemingly vulnerable judges have stuck their necks out on a controversial issue like gay marriage?

---

[63] U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the Supreme Court, and all other Officers of the United States . . .").

[64] *See* William B. Rubenstein, *The Myth of Superiority*, 16 CONST. COMMENT. 599 (1999).

Chapter Eight tackles the complicated issues of judicial selection and retention. Given that state judges mostly face election (and re-election), what else might threaten their independence? As for federal judges, might it matter that they typically are selected from the state or region in which they will sit? Would the reaction to *Brown* have been different if the federal judges charged with implementing *Brown* in the South had not themselves been Southerners?

H. ENSURING COMPLIANCE AFTER *BROWN*: JUDGING IN A SYSTEM OF SEPARATED POWERS

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, which influences the way they decide cases.

The fragility of the decision in *Brown* became clear during one of the ugliest examples of massive resistance, which occurred in Little Rock, when Arkansas's segregationist governor, Orval Faubus, whipped up the state against integration. A federal judge ordered a small number of black students admitted to Little Rock's Central High School, and Faubus called out the State Guard to bar their entrance to the school. In litigation over the event that subsequently reached the Supreme Court, captioned *Cooper v. Aaron*, 358 U.S. 1 (1958), the justices described events as follows:

> 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 Unconstitutional 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.

[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.[65]

The Supreme Court's description of a "large and demonstrating crowd" was 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.[66]

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* was individually signed by each of the nine justices. In it they equated their decisions with the Constitution:

> 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

---

[65] 358 U.S. at 8–12.

[66] 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).

> 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."
>
> No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it. . . .[67]

If you stop and think, this aspect of the Supreme Court's opinion in *Cooper v. Aaron* is more than a little odd. Absent a way to bring the chaos in Little Rock under control, wasn't the Supreme Court opening itself to ridicule by insisting that its decisions were "supreme" while all over the South officials were flaunting those very decisions? To answer these questions, we need to look beyond the courts to the other branches of the federal government. The act of judging, as it turns out, is not only about the judiciary.

1. The Court and the Executive Branch

a. The Executive Spurs on the Court

In the 1940s, the NAACP got a boost in its campaign against racial segregation when President Truman signed off on the idea that the Department of Justice should file "amicus" or "friend of the court" briefs in the Supreme Court in significant racial cases.[68] 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, generally accepted to have a special relationship with the justices, offering wise counsel and a carefully balanced perspective, while advancing the government's cause. Indeed, the SG is sometimes referred to as "the tenth justice" because of this special role. (We discuss the burgeoning literature in political science documenting the influence of the SG on the Supreme Court in Chapter Four.).

The first amicus brief the SG ever filed was in *Shelley v. Kraemer*, 334 U.S. 1 (1948), a landmark case in which the Supreme Court decided unanimously that racially discriminatory covenants that barred selling property to black people were unenforceable in court. Philip Elman, a lawyer in the solicitor general's office with close backchannel ties to Felix Frankfurter, later recounted: "It was not an ordinary brief. It was a

---

[67] 358 U.S. at 18.

[68] *See* Lynda G. Dodd, *Presidential Leadership and Civil Rights Lawyering in the Era Before Brown*, 85 IND. L.J. 1599, 1638 (2010).

statement of national policy."[69] The brief weighed in at a bulky 150 pages. 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 spur 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. As Philip Elman explained, "We took a flat, all-out position that segregation and equality were mutually inconsistent, that separate but equal was a contradiction in terms."[70]

b. The Court Needs the Executive

In light of this history, it was notable that the Court initially turned a cold shoulder to the Truman administration's efforts to play an important role in the *Brown* litigation. As in past cases, Truman's SG filed an amicus brief in the *Brown* cases in support of overturning *Plessy*, once again stressing foreign policy considerations.[71] The SG then asked permission to participate in the initial round of oral arguments, held in late 1952. Typically, when the SG asks permission to participate in an oral argument, the Court grants it. In this instance, the chief justice simply returned the request. One author has claimed this was because Chief Justice Vinson "felt there was already more than enough pressure on the court to abandon the 'separate but equal' doctrine, which he was resolved to perpetuate."[72]

By the time of the re-argument in Brown, however, the justices were eager to hear the administration's views. Part of the reason was that the administration had changed: President Eisenhower had replaced President Truman in January 1953. As Justice 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

---

[69] 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).

[70] *Id.* at 821.

[71] 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, 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 acting SG, the case was made to the new attorney general 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 id.* at 825–27.

[72] DANIEL M. BERMAN, IT IS SO ORDERED: THE SUPREME COURT RULES ON SCHOOL DESEGREGATION 61 (1966).

perplexities; it should therefore be asked to face that responsibility as part of our process of adjudication."[73] By this point, the justices were anticipating the very sort of defiance the *Brown* decision ultimately encountered.

The justices were well advised to seek out the Eisenhower administration's views on *Brown*. There were plenty of hints that the new president did not feel the time was ripe for ordering desegregation of public schools. Eisenhower had spent a lot of time in the South and had warm friendships there with white Southerners. At a dinner 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."[74] The president did not want to participate in the case, 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.[75]

Even after Eisenhower acquiesced in participating, the administration declined to take a stance on desegregation itself, doing nothing but answering the specific historical questions the Court asked. Eisenhower ultimately agreed with his attorney general that if the government were pressed at oral argument, it could say it adhered to the prior administration's position that *Plessy* should be overruled. 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 the administration supported overruling *Plessy*. Finally, Douglas 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: . . . [I]n 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—

---

[73] Letter from Justice Felix Frankfurter to Chief Justice Fred M. Vinson (June 8, 1953) (on file with the Library of Congress); *see also* Bernard Schwartz, *Chief Justice Rehnquist, Justice Jackson, and the* Brown *Case*, 1988 SUP. CT. REV. 245, 252 (1988).

[74] 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)).

[75] HERBERT BROWNELL & JOHN P. BURKE, ADVISING IKE: THE MEMOIRS OF ATTORNEY GENERAL HERBERT BROWNELL 190 (1993).

Douglas: I just wanted to clear up the confusion in my mind.[76]

When it came to *Brown II*, regarding the remedy the Court should impose, the Eisenhower administration was quite clear 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.[77]

Which brings us to the Court's assertion of its supremacy in *Cooper v. Aaron*. With such a hesitant executive at the helm, anyone unfamiliar with events might have assumed the justices were courting disaster.

What puts the Court's decision into perspective—and what we confess we have been hiding from you until now—is that by the time the Court rendered its ruling in *Cooper*, President Eisenhower had already sent in federal troops to get the chaos in Little Rock 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."[78] Thus, the justices could easily assert supremacy knowing the executive would back them up.

Still, Eisenhower's support was grudging and limited in its rationale. Not long before, Eisenhower had said, "I can't imagine any set of circumstances that would ever induce me [to] send federal troops into . . .

---

[76] BROWN V. BOARD: THE LANDMARK ORAL ARGUMENT BEFORE THE SUPREME COURT 249–50 (Leon Friedman ed., 2004).

[77] 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, 842 (1987).

[78] Cooper v. Aaron, 358 U.S. 1, 12 (1958).

any area to enforce the orders of a federal court."[79] When he did act he was careful to make clear that his rationale was enforcing order and judicial rulings, and not the issue of desegregation itself. His private notes on the conflict in Little Rock stated: "Troops—Not to enforce integration. But to prevent opposition by violence to order of court."[80] 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."[81]

2. Congress Steps in

Throughout the *Brown* proceedings, Justice Jackson expressed the view that Congress should take the lead in ending segregation. He conceded that in the absence of congressional action, the burden fell on the justices, but he felt the better course would be 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 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.
>
> 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

---

[79] 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, WHITE HOUSE YEARS: WAGING PEACE, 1956–1961 170 (1965)).

[80] Handwritten Notes by President Eisenhower on Decision to Send Troops to Little Rock (Sept. 1957) (Dwight D. Eisenhower Presidential Library & Museum).

[81] Letter from President Dwight Eisenhower to Senator John C. Stennis (Oct. 7, 1957) (Dwight D. Eisenhower Presidential Library & Museum).

> 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?[82]

As it happened, Justice Jackson was right. Even a willing executive was not going to be enough to convert *Brown* from an aspirational statement to actual change on the ground for African-American children. Desegregation moved at a glacial pace for the first decade after *Brown*. As of 1963, only one percent of African-American students in the South attended desegregated schools.

Ultimately, it was the civil rights movement that persuaded Congress—pushed as well by the executive branch—that national legislation was needed. The movement held the country's attention with sit-ins at lunch counters and 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 teenage girls, galvanized national sentiments. In the spring of 1963, President Kennedy declared it a moral imperative for the country to act, and that fall he sent the civil rights bill to Congress. When Kennedy was killed in Dallas, his successor, Lyndon Johnson, lent all his weight to enacting the bill.

Adopted over the longest filibuster in history, the civil rights legislation that Congress ultimately adopted provided new teeth to the order that desegregation take 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. The law also mandated that "such court shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section."[83]

In the aftermath of the Civil Rights Act of 1964, the situation on the ground changed dramatically. The attorney general brought lawsuits, and

---

[82] 49A LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE U.S.: CONSTITUTIONAL LAW (Kurland & Casper eds., 1975).

[83] Civil Rights Act of 1964, Pub. L. No. 88–352, 78 Stat. 241.

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 more than 6 percent, and then to 32 percent in 1969, and to greater than 90 percent in 1973. Acting together, all three branches of the federal government were able to shift national policy on the ground.

In retrospect, then, the Supreme Court's hesitancy about the decree in *Brown* proved warranted, and the justices' attentive eye on the other branches as allies proved prescient. (Whether Justice Stevens's view that a sharper decree handed down by a split Court would have done better remains a good question, albeit a counterfactual one.)

As must be apparent at this juncture, sometimes the Court acts cooperatively with the other branches, and sometimes the various 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? And when can it act in opposition? Do these questions present themselves only in major cases like *Brown*, or might similar considerations present themselves in more mundane situations? These are the sorts of issues we will tackle in Chapter Nine, on judging in a system of separated powers.

I. PUBLIC OPINION AND JUDICIAL DECISION-MAKING

In his engaging book *From Brown to Bakke: The Supreme Court and School Integration, 1954–1978*, J. Harvie Wilkinson III writes that "[i]n assessing the Supreme Court's role in school integration, attention to its opinions is essential." Yet, he continues, taking a broader perspective is also essential:

> 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, historians, and sociologists, and, most important, to high school corridors, civic auditoriums, country stores, suburban ranchhouses, and city streetcorners.[84]

Wilkinson deems this perspective imperative because this is where "the verdict on the Court is delivered. It is there that the American people form a jury on the judge."[85]

Why should it matter what the American people think of the judges, at least the federal ones, who are appointed for life and ostensibly immune

---

[84] J. HARVIE WILKINSON III, FROM BROWN TO BAKKE: THE SUPREME COURT AND SCHOOL INTEGRATION, 1954–1978, at 6 (1981).

[85] *Id.*

to public opinion? That is the subject of Chapter Ten, the final chapter in this book, on public opinion and its relationship to judging.

As controversial as the *Brown* decision was in some quarters, particularly in the South, polling over the summer of 1954, shortly after the opinion was issued, indicated a narrow majority favored the outcome in *Brown*, and from there support grew. This is intriguing because when some scholars talk about the role of judicial review in protecting minority interests against majority will, they often cite *Brown* as a chief example. Recall, however, that *de jure* school desegregation was a regional affair, which by the time of *Brown* was heavily under attack in many quarters. Derrick Bell, a skeptic of the minority-protection thesis about judicial review, advanced a competing theory, that of "interest convergence." The rights of minorities, he suggests, will be upheld only when doing so is in the majority's interest.[86]

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

Scholars today agree that World War II and its aftermath had an enormous influence on national views about race, and most likely on the Supreme Court's decision in *Brown*. Start with Harry Truman, whose support for the rights of African Americans was founded in part 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, Truman and his advisors could see the importance of the black vote to the 1948 presidential election. But Truman was also 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. In the aftermath of the war, racism became a more visible issue, one not easily ignored. Gunnar Myrdahl summed up matters in his 1944 masterpiece, *The American Dilemma*: "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."[87]

---

[86] Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) ("[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.").

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

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. The NAACP filed an appeal to the United Nations about Southern Jim Crow policies and in its plea for help said that the real threat to liberty was not Russia but American segregation. Communist (and other) countries had a field day pointing to American hypocrisy about civil liberties and unequal treatment. This complicated foreign policy and was a constant theme in the Truman administration's filings on race issues before the Supreme Court. In its brief in *Brown*, the Truman administration said "[i]t is in the context of the present world struggle between freedom and tyranny that the problem of racial discrimination must be viewed."[88] The 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.[89]

No surprise then that much of the public applauded *Brown*. The decision was seen as fundamentally right in moral terms. But it also was seen as appropriate in light of the era's global politics. 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 have been damaged by the fact of U.S. segregation." Thus, *Time* concluded, *Brown* "will come as a timely reassertion of the basic American principle that 'all men are created equal.' "[90]

In light of this analysis, is it realistic to say that the decision in the case was the result of "law"? Or was it the result of some something broader, call it the "national gestalt"?

To the extent that changing public attitudes played a role in the outcome of *Brown*, two sorts of questions arise. The first, squarely in the wheelhouse of social scientists, asks: What are the mechanisms by which public opinion comes to influence judicial decisions? Does the appointment process for federal judges play a role? The desire of judges to be appreciated by their peers? Something else entirely?

The second set of questions is more normative (and may turn in part on the answer to the first): How ought we feel about the relationship between public opinion and judicial decisions? At least in some areas, we believe judges should be entirely uninfluenced by what the public thinks.

---

[88] 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.

[89] Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STANFORD L. REV. 61, 64 (citing Derrick Bell's interest convergence theory as the framework for understanding desegregation as a Cold War imperative).

[90] *To All on Equal Terms*, TIME, May 24, 1954, at 21.

No serious person believes (we hope) that a jury's verdict 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. 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.[91] Is the decision in *Brown* more or less legitimate to the extent that it reflects majority preferences?

J. WHAT DECIDED *BROWN*?

Having canvassed a wide variety of factors that seem to have influenced the justices who decided *Brown*, we can now return to the two questions we posed at the beginning of this chapter.

First, what factor(s) explain the justices' decision in *Brown*? Are you prepared to maintain that it was the law—and only the law—that decided the case? Or, if you are of the attitudinal frame of mind, that it was some combination of the law and the policy preferences of the justices who happened to inhabit the Supreme Court at that time? Or, do you think that the justices' decision was the result of a mélange of influences, large and small?

Second, if you are persuaded that a much wider range of factors was at play, how idiosyncratic do you believe *Brown* to be? In other words, which of the many forces you have seen here might have some bearing in more run-of-the-mill cases?

The remainder of this book offers an in-depth look into each of the influences we have explored in the context of *Brown*. As you will see, these factors can help us understand judicial decision-making well beyond marquee cases like *Brown*. These factors loom large in litigation brought by interest groups, by the government, by impoverished plaintiffs, and by wealthy ones. The influences we discuss matter in cases of statutory interpretation, and even in common-law (judge-made law) cases. They sneak in when major precedents are at stake, but also when a collegial court must assess whether a lesser rule is capable of application by lower courts. All the factors won't be present in each case, but taken as a whole they are omnipresent.

---

[91] *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: A THEORY OF JUDICIAL REVIEW (1980) (advancing a theory of judicial review in which judges act, among other things, to represent minority viewpoints shut out from the political process).

By the time you finish this book, and this course, you will have a much richer understanding of how judging—and the law—work. You will, we hope, see judging and the law through new eyes.