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When cases challenging the constitutionality of racial segregation in public schools reached the Supreme Court in 1951-1952, the social and political context had changed dramatically since 1927, when justices last (obliquely) had considered the question. Several million blacks had migrated from southern farms to northern cities, in search of greater economic opportunity and relative racial tolerance. One largely unintended consequence of this Great Migration was black political empowerment, as African Americans relocated from a region of pervasive disfranchisement to one of relatively unrestricted ballot access. Moreover, blacks in large northern cities frequently held the balance of power between the two major political parties.¹

Demographic shifts, industrialization, and the dislocative impact of World War II produced an urban black middle class with the education, disposable income, and lofty expectations conducive to involvement in social protest. Economic gains enabled blacks to challenge the racial status quo by freeing them from white control and by creating a powerful lever, the economic boycott, for extracting racial reforms. Economic progress also inclined blacks to contest traditional racial practices, by dramatizing the disparity between their economic and social status. Southern urbanization empowered blacks politically, because cities had looser restrictions on black suffrage. Urban blacks found it easier to coordinate social protest, because of less oppressive racial mores and the relative ease of overcoming collective-action problems, given better transportation and communication.

Ideological forces also helped transform American racial attitudes and practices. The war against fascism impelled many Americans to reconsider racial preconceptions, to clarify the
differences between Nazi Germany and the Jim Crow South. The ensuing Cold War pressured Americans to show noncaucasian Third World nations why they should not equate democratic capitalism with white supremacy. Finally, developments in transportation and communication—television, interstate highways, expansion of air travel—bound the nation into a more cohesive unit. The homogenization of America hindered the white South from maintaining deviant social practices such as Jim Crow.

Potent as these background forces for racial change were, by the early 1950s they had yet to produce dramatic changes in southern racial practices. Southern black voter registration had increased from roughly 3% in 1940 to about 20% in 1952, but 80% of southern blacks remained voteless, and many Deep South counties with black majorities still disfranchised African Americans entirely. Many southern cities had instituted less offensive bus-seating practices, but none had desegregated. Many others had desegregated police forces and minor league baseball teams, and disparities in public funding of black and white schools were rapidly decreasing. In large border-state cities—Baltimore, Kansas City, St. Louis, Louisville, Wilmington—segregation in public accommodations was eroding, and Catholic parochial schools were starting to integrate. Yet, racial segregation in public grade schools remained completely intact in southern and border states and the District of Columbia. Public school segregation lay near the top of white supremacists’ hierarchy of racial preferences. For the Court to invalidate it was certain to generate far greater controversy and resistance than striking down the white primary or segregation in interstate transportation.

Five cases challenging the constitutionality of public school segregation reached the Court in 1951-1952—litigation that has come to be known as *Brown v. Board of Education*. Justices were unenthusiastic about confronting so quickly the question they had deliberately evaded in the 1950 university segregation cases, and the National Association for the Advancement of Colored People
(NAACP) had not planned to force the issue this soon. Moreover, the five cases were hardly representative. Three were from jurisdictions—Kansas, Delaware, and the District of Columbia—where whites were not deeply committed to segregation and judicial invalidation probably would not cause great disruption. The other two, however, came from Clarendon County, South Carolina, and Prince Edward County, Virginia, where blacks were 70% and 45% of the population, respectively. Broad forces for racial change had barely touched these counties, where judicial invalidation of segregation could jeopardize public education. NAACP secretary Roy Wilkins later confided that Clarendon County “would be the last place I’d pick” to integrate. Yet, ironically, the NAACP’s 1950 decision no longer to accept equalization cases had pushed blacks in these counties to convert grievances against inferior schools and lack of bus transportation into broad desegregation challenges. The Association would not abandon courageous blacks willing to challenge Jim Crow under oppressive conditions, but it did pressure them to attack segregation directly, which they otherwise probably would not have done. Some civil rights leaders questioned the wisdom of pushing a desegregation suit on the Court at this time, worrying that the strategy might backfire and produce a disastrous defeat. Why run the risk, they wondered, if narrower challenges to racial inequality were virtually certain to succeed? Even Thurgood Marshall had doubts whether the justices were yet prepared to invalidate school segregation. As we shall see, such concerns were well-founded. 2

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On May 17, 1954, Brown v. Board of Education unanimously invalidated racial segregation in public schools. The Court emphasized the importance of public education in modern life, refusing to be bound by the views of the Fourteenth Amendment’s drafters or late nineteenth-century justices,
most of whom held more benign views of segregation. Segregated public schools were “inherently unequal” and thus violated the equal protection clause of the Fourteenth Amendment. Because a practice just invalidated in states could not possibly be permitted in the Free World’s capital, justices ruled in the companion case of *Bolling v. Sharpe* that the due process clause of the Fifth Amendment imposed identical restrictions on the District of Columbia.\(^3\)

*Brown*’s unanimity can be misleading. Some scholars have concluded that justices easily invalidated school segregation and that a contrary ruling in *Brown* was “scarcely imaginable” by 1954. This view is mistaken; justices were deeply conflicted. When first argued in the fall of 1952, the outcome of the School Segregation Cases was uncertain. Before analyzing why many justices found *Brown* difficult, let us reconstruct deliberations as the Court first considered the constitutionality of school segregation.\(^4\)

Fred Vinson began the discussion, as the Chief Justice traditionally does. Vinson was from Kentucky, a border state with southern leanings and a long tradition of segregated education. There is a “[b]ody of law back of us on separate but equal,” Vinson announced, and “Congress has not declared there should be no segregation.” It was “[h]ard to get away from [the] long continued interpretation of Congress ever since the Amendments.” District of Columbia schools “have long been segregated.” Vinson was making two points. First, a long line of precedent upheld segregation as constitutional. Second, the same Congress that wrote the Fourteenth Amendment and was responsible for its enforcement had segregated schools in the District of Columbia for nearly 100 years, implying that segregation was constitutional. He continued: “Harlan in his dissent in *Plessy* does not refer to schools.” That the one justice who had condemned railroad segregation in 1896 had implied that school segregation was acceptable was “significant.” Vinson found it hard to “get away from that construction by those who wrote the amendments and those who followed.” Vinson also worried that
the “complete abolition of public schools in some areas” was a “serious” possibility if the Court invalidated segregation. Though others “said we should not consider this,” Vinson thought “we can’t close our eyes to [the] problem.” He also thought it “would be better” if Congress acted. To maintain confidentiality and preserve fluidity, justices decided not to take even a tentative vote at conference. Yet several kept informal tallies, and all but one recorded Vinson as probably voting to reaffirm *Plessy.*

As senior associate justice, Hugo Black spoke next. He was the only justice from the Deep South—Alabama—and had briefly belonged to the Ku Klux Klan in the mid-1920s. Black predicted “violence if [the] court holds segregation unlawful” and warned that “states would probably take evasive measures while purporting to obey.” He warned that South Carolina “might abolish [its] public school system.” Black worried that if they invalidated school segregation, district courts “would then be in the firing line for enforcement through injunctions and contempt.” He did not believe in “law by injunction” (perhaps because injunctions had undermined labor union organizing earlier in the century, and Black was a strong union supporter). Yet Black believed the intention of segregation laws was “to discriminate because of color,” whereas the “basic purpose” of the Fourteenth Amendment was “protection of the negro against discrimination.” He was inclined to conclude that “segregation per se is bad *unless* the long line of decisions bars that construction of the amendment.” Black “would vote[] to end segregation,” but expressed doubt about colleagues: “If equal and separate prevails, [he would] give weight to findings in each state.”

Stanley Reed, like Vinson, was from Kentucky. Of all the justices, he was the most supportive of segregation, in terms of both policy and constitutionality. Reed took a “different view” from Black, declaring that “state legislatures have informed views on this matter,” “Negroes have not thoroughly assimilated,” and states “are authorized to make up their minds.” “[A] reasonable body of opinion
in the various states [was] for segregation,” which was “for [the] benefit of both [races].” After noting “constant progress in this field and in the advancement of the interests of the negroes,” Reed opined that “states should be left to work out the problem for themselves.” Because the Constitution’s meaning was “not fixed,” Reed asked when “the changes [are] to be made?” He answered: when the “body of people think [segregation is] unconstitutional.” He could not “say [that] time [has] come,” when 17 states still segregated schools. Reed predicted that “[s]egregation in the border states will disappear in 15 or 20 years.” But in the Deep South, “separate but equal schools must be allowed.” He thought that “10 years would make [the schools] really equal” in Virginia and urged colleagues “to allow time for equalizing.” Until then, he “would uphold separate and equal.” Reed’s statement is unambiguous: *Plessy* was good law and should be reaffirmed.

Felix Frankfurter was an Austrian Jew, who immigrated to the United States as a child. He taught law at Harvard for a quarter century before Roosevelt appointed him to the Court in 1939. Frankfurter and Black had feuded before over the meaning of the Fourteenth Amendment—specifically, whether it “incorporated” the Bill of Rights, making those guarantees applicable to the states (rather than simply to Congress, as intended at the Founding). Reminiscent of that dispute, Frankfurter now wondered how Black could “know the purpose of the 14th amendment.” Frankfurter had “read all of its history and he can’t say it meant to abolish segregation.” He also wanted “to know why what has gone before is wrong.” He was reluctant to admit that “this court has long misread the Constitution.” Moreover, “he can’t say it’s unconstitutional to treat a negro differently than a white.” Yet Frankfurter also discussed the remedy the Court might issue if it invalidated segregation: “These are equity suits. They involve imagination in shaping decrees. He would ask counsel on reargument to address themselves to problems of enforcement.” Frankfurter appears not to have made up his mind, conceding that he “can’t finish on [the] merits and would reargue all [the cases].”
Frankfurter had no similar doubts regarding the District of Columbia case, which “raise[d] very different questions.” To permit school segregation in the nation’s capital was “intolerable,” and Frankfurter was prepared “to vote today that [it] violates [the] due process clause.” Paradoxically, Frankfurter was quicker to bar segregation where the legal argument against it was weaker. The Fourteenth Amendment binds states, not Congress, and the many slaveowners who endorsed the Fifth Amendment, which does constrain Congress, presumably would not have condemned segregation in public schools, had such schools existed when the amendment was ratified in 1791. Frankfurter found compelling the moral, not the legal, argument against segregation in the nation’s capital. In the end, he favored “put[ting] all the cases down for re-argument,” which he insisted was not “delaying tactics,” but a “further maturing process.” Even the D.C. case should be reargued, to allow the Eisenhower administration time to fulfill its promise to end racial segregation through administrative action, which Frankfurter thought would produce “enormous . . . social gains” over judicial intervention.

William O. Douglas grew up in Washington State, where few black people lived, then traveled east for law school at Columbia University, after which he became a law professor, first at Columbia and then at Yale. In 1936 Roosevelt appointed him to the Securities and Exchange Commission, a position affording few opportunities to ponder race issues. As a justice, Douglas often had little trouble resolving legal problems that vexed his colleagues, and segregation was no exception. “Segregation is an easy problem,” Douglas stated, and the answer was “very simple.” He explained:

No classifications on the basis of race can be made. [The] 14th amendment prohibits racial classifications. So does [the] due process clause of the 5th [amendment]. A negro can’t be put by the state in one room because he’s black and another put in the other room because he’s white. The answer is simple though the application of it may present great difficulties.
Nobody could have doubted where Douglas stood on *Brown*.

Robert Jackson was raised in upstate New York, another area with few blacks and no school segregation. Jackson admitted his upbringing afforded him “little personal experience or firsthand knowledge by which to test many of the arguments advanced in these cases.” He was “not conscious of the [race] problem” until he moved to Washington, D.C., in the 1930s to join the New Deal. Jackson’s conference statement began bluntly:

> Nothing in the text that says this is unconstitutional. [There is] nothing in the opinions of the courts that says it’s unconstitutional. Nothing in the history of the 14th amendment [says it’s unconstitutional]. On [the] basis of precedent he would have to say segregation is ok.

Jackson ridiculed the NAACP’s brief as “sociology,” not law. He noted that New York mandated school segregation in the 1860s (when the Fourteenth Amendment was passed) and still in the 1890s (when *Plessy* was decided). Jackson thought “it will be bad for the negroes to be put into white schools” and doubted whether one can “cure this [race] situation by putting children [of different races] together.” He would not “say it is unconstitutional to practice segregation tomorrow.” Yet he predicted that “segregation is nearing an end. We should perhaps give them time to get rid of it and he would go along on that basis. There are equitable remedies that can be shaped to the needs.” What these final words meant is unclear, but apparently Jackson could imagine joining a decision invalidating segregation or threatening to do so under certain conditions. Jackson also wanted to invite the House and Senate Judiciary Committees to participate in reargument, because “if stirred up . . . [.] they might abolish [segregation].” Still, the thrust of his remarks suggests doubt as to the legal basis for invalidating segregation.⁶

Harold Burton was the sole Republican justice in 1952, though he had been appointed by Democrat Harry Truman. Burton had been senator from Ohio, and before that mayor of Cleveland,
in Ohio’s Western Reserve, known for its long-standing racial egalitarianism. Burton spoke briefly and to the point: “Sipuel [and Sweatt] crossed the threshold of these cases. Education is more than buildings and faculties. It’s a habit of mind.”\(^1\) Burton continued: “With [the] 14th amendment, states do not have the choice. Segregation violates equal protection. [The] total effect is that separate education is not sufficient for today’s problems. [It is] not reasonable to educate separately for a joint life.” Though Burton “would give plenty of time in this decree,” he plainly favored barring segregation in public education.

Tom Clark was from Texas, in the Peripheral South. Few blacks lived in West Texas, where whites’ commitment to segregation was thin. East Texas, though, resembled the Deep South; many counties had majority or near-majority black populations, and most whites were deeply invested in Jim Crow. Clark declared that the “result must be the same in all the cases,” probably evincing the typical sensitivity of southern whites to perceived anti-southern prejudice. He meant that if the Court invalidated segregation in South Carolina and Virginia, it must do so in Delaware and Kansas. Clark observed that “the problem [in Texas] is as acute as anywhere. Texas also has the Mexican problem. [A] Mexican boy of 15 is in a class with a negro girl of 12. Some negro girls get in trouble” (read pregnant). After this brief digression into Texas social history, Clark got to the point:

If we can delay action it will help. [The] opinion should give lower courts the right to withhold relief in light of troubles. He would go along with that. Otherwise he would say we

\(^1\) *Sipuel v. Board of Regents* was a 1948 decision ruling that Oklahoma must either create a separate black law school or else admit a black applicant to the all-white University of Oklahoma School of Law. *Sweatt v. Painter* was a 1950 decision ordering the University of Texas School of Law to admit a black man because the separate black law school recently established by the state could not possibly be equal with regard to intangible aspects of legal education, such as prestige of the institution and stature of its alumni. *Sweatt* was widely interpreted as interring segregation in graduate and professional education.
had led the states on to think segregation is OK and we should let them work it out. Clark’s statement is ambiguous. His willingness to “go along” with an opinion affording local courts discretion to withhold relief indicates a possible vote against segregation. Yet his concern that the Court “had led the states on” and thus perhaps should “let them work it out” suggests an opposite vote. Clark, like Frankfurter and Jackson, probably was undecided.

Sherman Minton was from Indiana, a northern state with southern racial views. He and Truman had been Senate cronies—apparently an important criterion for Truman’s Court appointments. Like Burton, Minton was brief and to the point: “[A] body of law has laid down [the] separate but equal doctrine. That however has been whittled away in these cases [referring to Sweatt and McLaurin]. Classification on the basis of race does not add up. It’s invidious and can’t be maintained.” With regard to the District of Columbia case, Minton also observed: “Congress has authorized segregation but it’s not legal. Our decree will cause trouble but the race carries trouble with it. The negro is oppressed and has been in bondage for years after slavery was abolished. Segregation is per se illegal.” Minton left no doubt he was voting to end school segregation.

This is approximately what the justices said, as they first collectively considered the School Segregation Cases. Figuring out how these statements would have translated into votes requires speculation, as justices decided, contrary to usual practice, not to vote after speaking. Absent a formal tally, commentators have disagreed as to how justices would have voted in December 1952. My view is that four—Black, Douglas, Burton, and Minton—thought school segregation plainly unconstitutional. But Court majorities require five, and no other justice was equally certain. Two—Vinson and

\footnote{McLaurin v. Oklahoma, decided the same day as Sweatt, ordered the University of Oklahoma graduate education school to cease segregating—in classrooms, library, and cafeteria—the black man it had admitted pursuant to federal court order.}
Reed–probably leaned toward reaffirming *Plessy*. The other three–Frankfurter, Jackson, and Clark–apparently were ambivalent.

Before trying to explain how a 4-3-2 split became a 9-0 ruling against segregation, I want to look more closely at each justice and speculate why he held the views he did. Black’s ready condemnation of segregation was perhaps the most extraordinary. In 1952 he was the only justice from the Deep South, and he had been a Klan member. Black appreciated better than his colleagues how intensely resistant white southerners would be to judicial invalidation of segregation. The costs of that resistance also would be more personal for Black, who had immediate family in Alabama who would feel repercussions of his vote.

One cannot know why Black concluded that school segregation was unconstitutional. He often claimed to be a textual literalist, but a constitutional injunction not to deny “equal protection of the laws” does not plainly forbid separate-but-equal. Nor does the legislative history of the Fourteenth Amendment. Thus legal sources to which Black usually claimed allegiance seem to have better supported an opposite result. Accordingly, if he is to be taken at his word, Black’s personal views, not his legal interpretation, must explain his vote. But why did Black personally condemn segregation when few white Alabamians of his age did so? Speculating why people hold certain views is risky. Maybe Black was just idiosyncratic; he certainly had a contrarian personality. Another possibility is that Black was so chastened upon his appointment in 1937 by public criticism of his former Klan membership that he dedicated his judicial career to rebutting it. Soon after joining the Court, Black hired a Catholic secretary and a Jewish law clerk, apparently to dispel suspicions of religious prejudice flowing from his Klan affiliation. Not long thereafter, he wrote the landmark opinion in *Chambers v. Florida* (1940), reversing a black man’s conviction because his confession was coerced and celebrating the Court’s role as savior of oppressed minorities. Perhaps Black was like John
Marshall Harlan, the former Kentucky slaveowner who seems to have partially dedicated his judicial career to gainsaying Radical Republican criticism of his appointment by resisting the Court’s post-Reconstruction retreat from racial equality.\(^7\)

Douglas’s vote may be the easiest to explain. He was less committed than other justices to maintaining a distinction between law and judges’ values, which is why Douglas frequently found to be easy issues that troubled his colleagues. For him, segregation’s immorality was the beginning and end of the legal inquiry. If it was wrong, then it was unconstitutional. Douglas had evinced no special racial sensitivity in his pre-Court years, but he was a quintessential northern liberal. Prior to World War II, such people generally were more interested in economic issues than racial ones. Afterward, racial egalitarianism became a defining characteristic of theirs. By 1952, segregation’s immorality was no longer debatable for someone of Douglas’s political ilk.\(^8\)

Burton and Minton’s anti-segregation votes are harder to explain. Neither was as liberal as Douglas. Their personal histories regarding race are thin. The little surviving evidence suggests that they shared neither Reed’s support for segregation nor Frankfurter’s passion for racial equality. On civil liberties issues generally, they were the most conservative justices, nearly always siding with the government and celebrating judicial restraint.\(^9\)

Why would Burton and Minton, generally averse to civil liberties claims, have been so receptive to the civil rights claim in Brown? Perhaps the answer lies in a consideration emphasized in briefs, oral argument, and newspaper reaction, but never mentioned at conference: the Cold War imperative for racial change. Burton and Minton were fierce judicial Cold Warriors. Their enthusiasm for judicial restraint was most evident in cases challenging government loyalty and security programs, where they almost never found a constitutional violation. In Brown the Cold War imperative put them in the unusual position of siding with individual claimants (and the federal government) against state
legislatures. The Justice Department’s brief invoked the Cold War imperative as justification for invalidating school segregation: “Racial discrimination furnishes grist for the Communist propaganda mills.” His law clerk recalled Reed observing that he was hearing much on this subject and it was causing him to think (though he thought it should be irrelevant). After Brown, supporters boasted that America’s leadership of the free world “now rests on a firmer basis” and that American democracy had been “vindicat[ed] . . . in the eyes of the world.” Perhaps Burton and Minton, ever heedful of national security, concluded that barring segregation was service to that cause.¹⁰

Frankfurter and Jackson may have been the most conflicted over Brown, which posed for them a clash between law and politics. Both justices abhorred segregation, but were committed to maintaining the distinction between law and judges’ personal values. Traditional legal sources to which they looked for guidance—text, original intent, precedent, and custom—pointed more toward reaffirming than overruling Plessy. Thus, as Jackson conceded, invalidating segregation could be defended only in “political” terms. Brown required these justices to choose between their aversions to segregation and to political decision-making by judges. We shall further explore that conflict below.

Two justices, Vinson and Reed, were leaning toward reaffirming Plessy. Both came from Kentucky, which legally mandated school segregation. Reed endorsed segregation as social policy. He refused to attend a Court party in 1947 because black messengers were invited, and he was appalled that “a nigra” might sit down beside his wife at a restaurant after the Court in 1952 desegregated public accommodations in the District of Columbia under an old civil rights statute. Less is known about Vinson’s racial views, though he probably was more ambivalent about segregation than northern justices such as Burton and Minton. Thus, though these Kentuckians were equally committed Cold Warriors, their support for (or lesser aversion to) segregation may explain why they were less influenced by the Cold War imperative. They were also less committed generally to individual rights
protection than Black or Douglas. School segregation was not a vexing constitutional problem for
them, as their general inclination was to defer to legislatures, traditional legal sources supported
segregation, and the policy was congenial, or at least not adverse, to their personal preferences. With
law and politics aligned, Vinson and Reed could readily reaffirm *Plessy*.¹¹

In December 1952 only four justices were clearly prepared to invalidate school segregation.
Two were inclined to sustain it, and three appeared undecided. Justices’ informal headcounts confirm
deep divisions. In a memorandum to the files penned the day *Brown* was decided, Douglas observed
that

> [i]n the original conference, there were only four who voted that segregation in the public
> schools was unconstitutional. Those four were Black, Burton, Minton and myself. Vinson was
> of the opinion that the *Plessy* case was right and that segregation was constitutional. Reed
> followed the view of Vinson, and Clark was inclined that way.

Frankfurter and Jackson, according to Douglas, “viewed the problem with great alarm and thought that
the Court should not decide the question if it was possible to avoid it,” though both believed that
“segregation in the public schools was probably constitutional.” Frankfurter distinguished between
school segregation in the District of Columbia, which he thought violated the due process clause, and
in the states, where he thought “history was against the claim of unconstitutionality.” In Douglas’s
estimation, in 1952 “the vote would [have been] five to four in favor of the constitutionality of
segregation in the public schools in the States with Frankfurter indicating he would join the four of us
when it came to the District of Columbia case.” Douglas’s dislike of Frankfurter may have colored his
perception of the latter’s likely vote, but his interpretation is consistent with the conference notes.¹²

Other justices counting heads reached roughly similar conclusions. Frankfurter noted in a letter
to Reed just days after *Brown* that he had “no doubt” that a vote in December 1952 would have
invalidated segregation five to four. The dissenters would have been Vinson, Reed, Jackson, and Clark, but not himself, and the majority would have written “several opinions.” On another occasion, Frankfurter bragged that he had filibustered the decision “for fear that the case would be decided the other way under Vinson.” Reed reported to his law clerk after the initial conference that Vinson probably would join him in dissent, as would at least one other justice (Jackson or Clark). Burton and Jackson calculated between two and four dissenters had the decision been made in 1952-1953. These similar headcounts confirm deep divisions. Possibly, a bare majority existed to reaffirm *Plessy.*

Worried about the “catastrophic” impact of a divided decision, Frankfurter suggested having the cases reargued on the pretense that justices required further briefing on issues such as the original understanding of the Fourteenth Amendment and the remedial options available should they invalidate segregation. Justices were less interested in answers than in securing additional time to resolve their differences. Five–Black, Frankfurter, Jackson, Burton, and Minton–voted for reargument, and on June 8, 1953 the cases were rescheduled for the next term.

The principal difficulty with this interpretation emphasizing deep divisions and the possibility that no majority yet existed for overruling *Plessy* is that the Court unanimously invalidated school segregation the next term. If justices were so conflicted in December 1952, how could they have achieved unanimity in May 1954? Perhaps my account treats the conference notes too literally. One commentator suggests, by contrast, that justices were simply “talking through their concerns about what they knew they were going to do.” Frankfurter and Jackson, on this view, were desperately seeking an acceptable path “to the decision that they wanted to reach.” Justices’ own headcounts are dismissed as “seriously overstated.” This interpretation, to its credit, more easily explains *Brown*’s unanimity. Its principal problems are its strained reading of the conference notes and its dismissal of justices’ own headcounts.
Brown’s unanimity does not disprove that deep divisions initially existed among justices. Once a majority existed to invalidate segregation, potential dissenters faced strong pressures to conform. Yet in December 1952 that majority had not yet materialized; only four justices had firmly indicated willingness to overturn Plessy. Then Vinson suddenly died in September 1953. Frankfurter recorded his death as “the first indication I have ever had that there is a God.” Eisenhower replaced Vinson with Earl Warren, California’s governor, to whom he felt politically indebted from the 1952 Republican convention. Eisenhower did not appoint Warren to influence Brown’s outcome. Apparently he briefly considered appointing John W. Davis, South Carolina’s lawyer defending segregation.16

Brown was reargued in December 1953. Warren opened the conference by proposing another informal discussion without voting. On the merits, he declared that the “separate but equal doctrine rests on [the] basic premise that the Negro race is inferior. That is [the] only way to sustain Plessy.” Yet the “argument of Negro counsel proves they are not inferior.” He continued: “we can’t set one group apart from the rest of us and say they are not entitled to [the] same treatment as all others. 13th, 14th and 15th Amendments were intended to make equal those who once were slaves.” Acknowledging that this view “causes trouble perhaps,” Warren could not “see how segregation can be justified in this day and age.” Recognizing that the “time element is important in the deep south,” Warren concluded that “we must act but we should do it in a tolerant way.” Anyone counting heads–and all justices were–would have recognized immediately that the outcome was no longer in doubt. Warren, together with the four who already had indicated support for overruling Plessy, made a majority. Many scholars appreciate Warren’s role in securing unanimity in Brown, but few recognize the possibility that he also may have been instrumental to the outcome.17

With the result settled, two factors pushed toward unanimity. First, justices appreciated that white southerners would receive Brown belligerently and perhaps violently. Resisters would exploit
any hint of internal Court dissension. Justices disagreeing with the outcome felt pressure to suppress their convictions for the institution’s good. Warren and others persuaded Reed not to dissent, even though he was convinced *Brown* was wrong. Three days after the decision, Frankfurter wrote to Reed, praising him for resolving the “hard struggle . . . involved in the conscience of your mind” in a manner conducive to the nation’s “great good.” Jackson left his hospital bed, where he was recovering from a heart attack, to be on the bench when *Brown* was announced, confirming the importance justices attached to manifesting unanimity.¹⁸

A second factor also may have fostered unanimity. Recall that ambivalent justices such as Frankfurter and Jackson experienced *Brown* as a conflict between law and politics. They loathed segregation, but doubted whether it was unconstitutional. After December 1953 they were irrelevant to the outcome, whereas a year earlier they had controlled it. Perhaps they could have endured a disjunction between personal and constitutional predilections if it affected the outcome, but not for the sake of a dissent. If a majority was committed to invalidating segregation, they would acquiesce, suppressing legal doubts.

Though speculative, this interpretation draws support from the internal history of *Terry v. Adams* (1953), decided the same term *Brown* was first argued. The issue was whether the exclusion of blacks by the Jaybird Democratic Association of Fort Bend, Texas—a political club consisting of all whites in the county—qualified as “state action” under the Fourteenth or Fifteenth Amendments. Justices initially voted five to four to reject the constitutional challenge, expressing doubt as to “where the state comes in.” Even after Frankfurter immediately switched sides, a closely divided decision seemed imminent. Vinson, Reed, Minton, and Jackson planned to dissent, and the latter drafted an opinion criticizing the majority for sacrificing “sound principle[s] of interpretation.” Yet when *Terry* came down, only Minton dissented. Apparently the other three, once deprived of control over the outcome,
were unwilling to subordinate political preferences to their legal principles. Similar considerations may explain Brown’s unanimity.19

Brown was hard for justices who approached legal decision-making as Frankfurter and Jackson did, because for them it posed a conflict between law and politics.3 The sources of constitutional interpretation they usually invoked—text, original understanding, precedent, custom—indicated that school segregation was permissible. The dearth of support in conventional legal sources partially explains the NAACP’s reliance on controversial social science evidence, which led Jackson to observe contemptuously that “Marshall’s brief starts and ends with sociology.” In contrast, these justices’ personal values condemned segregation as “Hitler’s creed.” Their quandary was how to reconcile their legal and moral views.20

Frankfurter’s self-identity as a judge required separating his personal views from the law. He preached that judges must decide cases on “the compulsions of governing legal principles,” not “the idiosyncracies of a merely personal judgment.” In a memorandum regarding the first flag-salute case, Frankfurter noted that “[n]o duty of judges is more important nor more difficult to discharge than that of guarding against reading their personal and debatable opinions into the case.” In another case he declined to invalidate a death sentence, notwithstanding his personal inclinations, because of “the disciplined thinking of a lifetime regarding the duty of this Court.” Frankfurter scorned a former colleague, Frank Murphy—“Dear God,” he called him—for his commitment to doing right regardless of law. Frankfurter was so averse to judges reading personal values into the Constitution that he once

3 I emphasize that my claim is not that Brown cannot be defended in legal terms, only that it cannot be so defended given Frankfurter and Jackson’s particular understanding of permissible legal sources. I am trying to show that Brown was a product of judicial values and sociopolitical context. I am not arguing that this makes Brown an illegitimate judicial decision. The question of whether Brown was rightly decided is one of normative constitutional theory and is beyond the scope of this essay.
favored treating the due process clause “as raising ‘political questions’ . . . unfitted for the adjudicatory process,” because so “vague” and “open to subjective interpretation.”

Frankfurter undoubtedly abhorred racial segregation. More than any other justice, his personal behavior evinced egalitarian commitments. He served on the NAACP’s advisory board in the 1930s and in 1948 hired the Court’s first black law clerk, William Coleman. Yet Frankfurter insisted, in a memorandum written while Brown was pending, that his personal views were of limited relevance to the constitutional question:

However passionately any of us may hold egalitarian views, however fiercely any of us may believe that such a policy of segregation as undoubtedly expresses the tenacious conviction of Southern States is both unjust and shortsighted, he travels outside his judicial authority if for this private reason alone he declares unconstitutional the policy of segregation. The Court could invalidate segregation only if it was legally as well as morally objectionable.

Yet Frankfurter had difficulty finding a convincing legal argument to invalidate segregation. His law clerk, Alexander Bickel, spent a summer reading the Fourteenth Amendment’s legislative history, and reported to Frankfurter: “it is impossible to conclude that the 39th Congress intended that segregation be abolished; impossible also to conclude that they foresaw it might be, under the language they were adopting.” Frankfurter was no doctrinaire originalist; he believed that constitutional concepts change meaning over time. But judges were not free simply to write their moral views into the Constitution. In the early 1950s, 21 states and the District of Columbia still had mandatory or optional school segregation. Thus Frankfurter hardly could maintain that “evolving standards of social decency” condemned segregation. Precedent strongly supported it. Of 44 state appellate and federal court challenges to school segregation between 1865 and 1935, not a single one had succeeded. Ordinarily, Frankfurter celebrated stare decisis (the legal doctrine favoring adherence to precedent),
calling it “the most influential factor in giving a society coherence and continuity.” He recently had reiterated that, though stare decisis had less force in constitutional law than elsewhere, he still “pause[d] long before overruling a prior line of constitutional adjudication.” Frankfurter conceded at conference that, based on legislative history and precedent, “Plessy is right.”

*Brown* presented a similar problem for Jackson. He, too, found segregation anathema. In a 1950 letter, Jackson, who had left the Court for a year to prosecute Nazis at Nuremberg, wrote to a law-professor friend: “You and I have seen the terrible consequences of racial hatred in Germany. We can have no sympathy with racial conceits which underlie segregation policies.” Yet, like Frankfurter, Jackson thought judges must separate personal views from law, and he disfavored frequent overruling of precedent.

Jackson revealed his struggles in a draft concurring opinion, which began: “Decision of these cases would be simple if our personal opinion that school segregation is morally, economically or politically indefensible made it legally so.” But as Jackson believed that judges must subordinate personal preferences to law, this consideration was irrelevant. When he turned to whether “existing law condemn[s] segregation,” he had difficulty answering “yes”:

Layman as well as lawyer must query how it is that the Constitution this morning forbids what for three-quarters of a century it has tolerated or approved. He must further speculate as to how this reversal of its meaning by the branch of the Government supposed not to make new law but only to declare existing law and which has exactly the same constitutional materials that so far as the states are concerned have existed since 1868 and in the case of the District of Columbia since 1791. Can we honestly say that the states which have maintained segregated schools have

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4 Whether he intended to publish the opinion is unclear; a heart attack in March 1954 probably disabled him from doing so, even had he been so inclined.
not, until today, been justified in understanding their practice to be constitutional?\textsuperscript{25} Jackson’s analysis began with the text. As the due process clause of the Fifth Amendment had been interpreted to permit (indeed to protect) slavery, how could the identical Fourteenth Amendment provision bar segregation? Jackson concluded that “there is no explicit prohibition of segregated schools and it can only be supplied by interpretation.” Regarding legislative history, Jackson observed that among the Fourteenth Amendment’s supporters “may be found a few who hoped that it would bring about complete social equality and early assimilation of the liberated Negro into an amalgamated population. But I am unable to find any indication that their support was decision, and certainly their view had no support from the great Emancipator himself.” He summed up the legislative history: “It is hard to find an indication that any influential body of the movement that carried the Civil War Amendments had reached the point of thinking about either segregation or education of the Negro as a current problem, and harder still to find that the amendments were designed to be a solution.”\textsuperscript{26}

Turning from words to deeds, Jackson could “find nothing to show that the Congress which submitted these Amendments understood or intended to prohibit the practice here in question.” The same Congress that passed the Fourteenth Amendment and every one since had supported school segregation in the District of Columbia. In the late 1860s, Congress required southern states to ratify the Fourteenth Amendment to regain congressional representation, but never intimated that school segregation violated the conditions of readmission. Jackson found the behavior of states ratifying the amendment “equally impossible to reconcile with any understanding that the Amendment would prohibit segregation in schools.” Eleven northern and border states ratifying the amendment had segregated schools, as did all the reconstructed southern states. As to precedent, northern state courts, as well as a Supreme Court dominated by northerners, had concluded that the Fourteenth Amendment did not prohibit segregation: “Almost a century of decisional law rendered by judges, many of whom
risked their lives for the cause that produced these Amendments, is almost unanimous in the view that the Amendment tolerated segregation by state action.” Having canvassed the legal sources he considered most relevant—text, original intent, and precedent—Jackson concluded:

Convenient as it would be to reach an opposite conclusion, I simply cannot find in the conventional material of constitutional interpretation any justification for saying that in maintaining segregated schools any state or the District of Columbia can be judicially decreed, up to the date of this decision, to have violated the Fourteenth Amendment.27

Jackson’s opinion candidly admitted his difficulty in legally justifying a judicial ban on school segregation—a bit too candidly, in the estimation of his law clerk, E. Barrett Prettyman. His response to Jackson’s draft noted that the nation must believe Brown was “honestly arrived at, confidently espoused, and basically sound.” If the country could “be made to feel . . . that it is a decision based upon law,” then segregation “should die in relatively short order, no matter how many legal skirmishes ensue. On the other hand, if the country feels that a bunch of liberals in Washington has finally foisted off their social views on the public, it will not only tolerate but aid circumvention of the decision.” Prettyman thought that Jackson’s opinion should begin, not with doubts and fears, but with a clear statement of his legal position. Yet Jackson’s rationale for invalidating segregation occupied just two pages near the end of a 23-page opinion and read like “almost an afterthought.” Prettyman advised that Jackson not “write as if you were ashamed to reach [this result].” He nicely captured Jackson’s dilemma: the justice was, in a sense, “ashamed” of the result he reached. Jackson admitted to colleagues his difficulty in “mak[ing] a judicial basis for a congenial political conclusion.” Unable to “justify the abolition of segregation as a judicial act,” he agreed to “go along with it” as “a political decision.” Frankfurter did too, but he was less candid about it.28

Jackson hesitated to invalidate segregation for another reason as well. He had become
skeptical of judicial supremacy, not only because it was inconsistent with democracy, but also because courts were bad at it. Jackson worried that unenforceable judicial decrees bred public cynicism about courts. In a posthumously published book, he wrote: “When the Court has gone too far, it has provoked reactions which have set back the cause it was designed to advance, and has sometimes called down upon itself severe rebuke.” In 1954 Jackson wondered if the Court was up to the task of reordering southern race relations. His draft opinion asked why separate-but-equal has “remained a dead letter as to its equality aspect?” His answer was that it had been “declared and supported heartily only by the judicial department which has no power to enforce its own decrees.” Blacks had to sue to enforce equality. But “[t]his was costly, it was time consuming and it was impossible for a disadvantaged people to accomplish on any broad scale.” A judicial ban on segregation would be even harder to implement. Litigants would quickly discover “that devices of delay are numerous and often successful,” especially as compliance required coercing “not merely individuals but the public itself.” Because a ruling against one school district would not bind another, every instance of recalcitrance would necessitate separate litigation. Individuals would bear the burden, as the Justice Department was unlikely to sue, and even if it wished to, Congress probably would not appropriate funds. Jackson preferred legislative to judicial action, not from “a mere desire to pass responsibility to others,” but because it went “to the effectiveness of the remedy and to the use to be made of the judicial process over the next generation.”

Other justices shared Jackson's concern about invalidating a practice apparently sanctioned by traditional sources of constitutional interpretation. Clark conceded that “he always [had] thought that the 14th amendment covered the matter and outlawed segregation. But the history shows different.” Vinson, like Jackson, observed that the same congressmen passing the Fourteenth Amendment approved segregation in District of Columbia schools. Several justices worried about overruling an unbroken
line of precedent dating back to the 1860s. Clark thought the Court had “led the states on to think segregation is o.k.,” and even Black confessed that perhaps “the long line of decisions bars [the anti-segregation] construction of the amendment.”

That the nine justices sitting in 1952—even those less committed than Frankfurter and Jackson to separating law from politics—would be uneasy about invalidating segregation is unsurprising. All were appointed by Presidents Roosevelt and Truman, on the assumption that they supported, as Jackson put it, “the doctrine on which the Roosevelt fight against the old court was based–in part, that it had expanded the Fourteenth Amendment to take an unjustified judicial control over social and economic affairs.” Or, as Black stated, Roosevelt had appointed him because “I was against using due process to force the views of judges on the country.” For most of their professional lives, these men had criticized untethered judicial activism as undemocratic—the invalidation of the popular will by unelected officeholders imposing their social and economic biases. This is how all nine understood the *Lochner* era, when the Court invalidated minimum-wage, maximum-hour, and protective-union legislation on a thin constitutional basis. The question in *Brown*, as Jackson’s law clerk William H. Rehnquist noted, was whether invalidating segregation would eliminate any distinction between this Court and the *Lochner*-era one, except for “the kinds of litigants it favors and the kinds of special claims it protects.”

Thus, several justices wondered if the Court was the right institution to forbid segregation. Several expressed views similar to Vinson’s—if segregation was to be condemned, “it would be better if [Congress] would act.” Even Black confessed that “[a]t first blush I would have said that it was up to Congress.” Jackson had observed in 1950 that he “would support the constitutionality of almost any Congressional Act that prohibited segregation in education.” Now he cautioned that

[however desirable it may be to abolish educational segregation, we cannot, with a proper]
sense of responsibility, ignore the question whether the use of judicial office to initiate law reforms that cannot get enough national public support to put them through Congress, is our own constitutional function. Certainly, policy decisions by the least democratic and the least representative of our branches of government are hard to justify.

“[If we have to decide the question,” Jackson lamented, “then representative government has failed.”

In the end, even the most conflicted justices voted to invalidate segregation. How were they able to overcome their ambivalence? All judicial decision-making involves elements of law and politics. Legal factors–text, original understanding, precedent, custom–range along an axis from determinacy to indeterminacy. Political considerations–judges’ personal values, social mores, external political pressure–array along a continuum from indifference to intense preference. When the law is clear, judges generally will follow it, unless they have very strong preferences to the contrary. When the law is relatively indeterminate, judges have no choice but to consult their values and broader social mores. In *Brown* the law–as understood by Frankfurter and Jackson–was reasonably clear: Segregation was constitutional. For justices to reject a result this clearly indicated by legal sources suggests very strong contrary preferences. Had they been more ambivalent about segregation’s morality, they might have followed the legal sources.

Why were these justices so repulsed by segregation when national opinion was divided? One possibility is fortuity: integrationists just happened to dominate the Court in 1954. Had there been five Stanley Reeds, *Plessy* would have been reaffirmed. A more satisfying explanation emphasizes systematic differences between justices and ordinary Americans. Two prominent ones are level of education and economic status. Justices are very well-educated, having attended college and law school–Jackson was a rare exception–and often the most elite ones. They are also relatively wealthy. On many policy issues that become constitutional disputes, opinion correlates heavily with
socioeconomic status, with elites holding more liberal views (though on issues of economic redistribution the opposite is true). Early in the twenty-first century, these issues include gay rights, abortion, and school prayer. In 1954 racial segregation was such an issue: 73% of college graduates approved of Brown, but only 45% of high school dropouts. Racial attitudes and practices were changing dramatically in postwar America. As members of the cultural elite, justices were among the first to be influenced.33

Justices deliberating on Brown expressed astonishment at recent changes in racial attitudes and practices. Jackson treated them as constitutional justification for eliminating segregation. In his draft opinion, he wrote that segregation “has outlived whatever justification it may have had.” Jackson noted that “[c]ertainly in the 1860's and probably throughout the Nineteenth Century the Negro population as a whole was a different people than today. Lately freed from bondage, they had little opportunity as yet to show their capacity for education or even self-support and management.” However, he continued, “Negro progress under segregation has been spectacular and, tested by the pace of history, his rise is one of the swiftest and most dramatic advances in the annals of man.” This advance “has enabled him to outgrow the system and to overcome the presumptions on which it was based.” Black progress was sufficient for Jackson to conclude that race “no longer affords a reasonable basis for a classification for educational purposes.”34

Other justices made similar observations. Frankfurter noted “the great changes in the relations between white and colored people since the first World War” and remarked that “the pace of progress has surprised even those most eager in its promotion.” Burton recorded the encouraging trend toward desegregation in restaurants and the armed forces, and Minton detected “a different world today.” Southern justices were no less cognizant of change (though they were more inclined to treat it as justification for staying their hand). Clark noted “much progress” in voting and education. Even Reed
recorded the “constant progress in this field [public schooling] and in the advancement of the interests of the negros,” and he observed that “segregation is gradually disappearing.”

Law clerks’ attitudes may be the strongest evidence of this culturally elite bias favoring desegregation. With polls revealing a nation split down the middle, justices’ law clerks almost unanimously favored invalidating segregation, notwithstanding any legal difficulties. Of the 15 to 20 young men clerking during the 1952 Term, only William H. Rehnquist seems to have favored reaffirming *Plessy*. Even those clerking for southern justices, many of whom had grown up with segregation, favored overturning it. Reed reported that he stopped discussing the issue with his clerks because they were so adamant that *Plessy* be overruled. Apparently, by the 1950s, most highly educated, relatively affluent men in their twenties—even from the South—had difficulty sympathizing with segregation.

Justices did not possess their clerks’ anti-segregation youth bias, but they did share the socioeconomic bias. Could Reed, who thought segregation constitutionally permissible and morally defensible, have been persuaded to join *Brown* had his culturally elite status not diminished the intensity of his segregationist sentiment? Reed conceded that “of course” there was no “inferior race,” though perhaps blacks had been “handicapped by lack of opportunity.” It speaks volumes that an upper-crust Kentuckian who had spent much of his adult life in the nation’s capital would have said such a thing. Most white southerners—less well-educated, less affluent, and less exposed to the cultural elite—would have demurred.

Justices’ culturally elite biases increased the likelihood of their invalidating segregation before national opinion had turned against it. Yet the potential attitude gap between justices and the public is limited; they are part of the larger culture and inhabit the same historical moment. As little as 10 years before *Brown*, racial attitudes probably had not changed enough for even a culturally elite
institution such as the Court to condemn segregation. The NAACP was wise not to push school desegregation challenges before 1950, as justices probably would have rejected them. Frankfurter later noted that he would have voted to sustain school segregation in the 1940s, because “public opinion had not then crystallized against it.”

By the early 1950s, dramatic political, economic, social, and ideological forces affecting race relations had made judicial invalidation of segregation conceivable. Slightly more than half the nation supported Brown from the day it was decided. Thus, Brown is not an example of the Court resisting majoritarian sentiment, but rather of its converting an emerging national consensus into a constitutional command. By 1954, the long-term trend against Jim Crow was clear. Justices observed that segregation was “gradually disappearing” and was “marked for early extinction.” They understood they were working with, not against, the current of history.

Given long-term trends in race relations and the Court’s traditional constitutional role, perhaps justices’ eventual invalidation of school segregation was inevitable. Jackson predicted that “[w]hatever we might say today, within a generation [segregation] will be outlawed by decision of this Court because of the forces of mortality and replacement, which operate upon it.” If Reed was right that segregation would disappear in border states within 15 or 20 years without judicial intervention, the propensity of constitutional law to suppress isolated practices may have ensured an eventual ruling against segregation. A subsequent generation of justices, finding segregation even more abhorrent, would have been sorely tempted to apply an ascendant national norm against segregation to shrinking numbers of holdout states.

But Brown was not inevitable in 1954, when 17 states and the District of Columbia segregated schools, and four more states permitted local communities to adopt segregation at their discretion. Brown did not simply bring into line a few renegade states. Reed, who conceded the Constitution’s
meaning was “not fixed,” thought justices could invalidate an established practice only when the “body of people” had deemed it unconstitutional, which one could not plausibly say about school segregation in 1954. Lower courts were not blazing new trails on the issue, as they often do prior to the high court’s momentous constitutional rulings. Prior to Brown, only a single California federal judge had repudiated voluminous precedent sanctioning separate-but-equal. As we have seen, significant legal hurdles confronted justices personally inclined to invalidate segregation. The Court easily might have written an opinion echoing John W. Davis’s oral argument: “somewhere, sometime to every principle comes a moment of repose when it has been so often announced, so confidently relied upon, so long continued, that it passes the limits of judicial discretion and disturbance.”

Moreover, the probable consequences of invalidating segregation weighed heavily on justices. The Court had never done anything like this before. Frankfurter observed that, although individuals brought these cases, justices effectively were being asked “to transform state-wide school systems in nearly a score of States.” He cautioned that a “declaration of unconstitutionality is not a wand by which these transformations can be accomplished.” Jackson similarly noted that individual lawsuits were “a weak reed to rely on in initiating a change in the social system of a large part of the United States.” Justices worried that unenforceable orders might “bring the court into contempt and the judicial process into discredit.” Moreover, invalidating segregation probably would produce violence and school closures. Vinson thought that “[w]e can’t close our eyes to [the] problem in various parts of [the] country . . . When you force the complete abolition of public schools in some areas then it is most serious.”

Several southern states were undertaking crash equalization programs promising rapid redress of educational inequalities. Some justices were tempted to see if southern statesmen, such as their friend and former colleague Jimmie Byrnes, recently elected governor of South Carolina, could deliver
on such promises. Vinson observed that in Clarendon County, South Carolina, “you have equal facilities. [It] took some time to make them equal.” Reed pleaded to stay their hand, as “10 years would make [black schools] really equal.” Many southern white moderates likewise urged the Court to give equalization a chance, while warning that invalidating school segregation would jeopardize southern racial progress.43

Justices were not oblivious to these arguments against invalidating segregation. In December 1952 no secure majority existed for overruling Plessy. Brown was not inevitable in 1954. The NAACP’s Roy Wilkins was wise to prepare two different press releases as he awaited the ruling. The Association could not be certain it would win its case.44
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5. I have consulted and am quoting from conference notes of Burton, Clark, Douglas, and Jackson. The notes are broadly similar, though I am interspersing quotes from each. The conference notes are not transcriptions. I am quoting from the notes, but one should not assume they perfectly


26. Ibid., 5-7.

27. Ibid., 7-10.

28. EBP (E. Barrett Prettyman) to Jackson, undated, pp.1, 3, Box 184, Jackson Papers; Burton conference notes, Segregation Cases, Dec. 12, 1953, Box 244, Burton Papers; Kluger, Simple Justice, 603-04; Tushnet, Marshall, 211-14.


