

WHAT IF CHIEF JUSTICE FRED VINSON HAD NOT DIED OF A HEART ATTACK IN 1953?: IMPLICATIONS FOR *BROWN* AND BEYOND

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INTRODUCTION

Early in the morning of September 8, 1953, a blood clot began to block the coronary artery of a sixty-three-year-old man sleeping in a Washington hotel room. Within an hour, Fred M. Vinson, Chief Justice of the U.S. Supreme Court, was dead.¹ The United States Supreme Court, before which *Brown v. Board of Education*² was pending, suddenly found itself without a leader. When President Dwight Eisenhower appointed Governor Earl Warren of California to replace Vinson, a new era in Supreme Court history, the so-called “Warren Court,” began.³ In May 1954, Chief Justice Warren announced the Court’s unanimous decision in *Brown*, invalidating segregation in public schools.⁴

But what if Chief Justice Vinson’s heart attack had never happened? Some historians have suggested that the Court would not have issued a unanimous decision in *Brown* and might even have upheld segregation if Vinson had lived.⁵ To what extent did American constitutional history pivot on a blood clot slowly cutting off the oxygen to Fred Vinson’s heart on that early September morning?

It is easy to denigrate historical counterfactuals. After all, historians study what happened, not what did not. But historical inquiry is in large part a study of causation: how and why events happened in the way they did. Every causal explanation of history necessarily contains an implicit counterfactual. A claim that the Federal Reserve’s tight monetary policy exacerbated the Great Depression necessarily implies that a looser policy would have had a different effect.

Counterfactuals are also important because they highlight the contingency of so many historical events. In 1120, the famous “White Ship” set sail from Barfleur, in Normandy, heading to England.⁶ On board was William Adelin, the

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1. JAMES E. ST. CLAIR & LINDA C. GUGIN, CHIEF JUSTICE FRED M. VINSON OF KENTUCKY: A POLITICAL BIOGRAPHY 336 (2002).

2. 347 U.S. 483 (1954).

3. Warren’s nomination is described in JIM NEWTON, JUSTICE FOR ALL: EARL WARREN AND THE NATION HE MADE 1-11 (2006).

4. *Brown*, 347 U.S. at 493.

5. See *infra* notes 14-15 and accompanying text.

6. C. WARREN HOLLISTER, HENRY I 276-77 (Amanda Clark Frost ed., 2001).

only legitimate son of King Henry I of England.⁷ Due to the drunkenness of the passengers and crew, the ship sank, drowning William Adelin and leaving England without a male heir.⁸ Upon Henry I's death in 1135, England entered a disruptive period known as the "Anarchy," in which Henry's daughter Matilda and his nephew Stephen competed for the English throne.⁹ But if the White Ship had safely reached its destination, William Adelin would have succeeded Henry as King William III. Matilda's son Henry II, the greatest builder of the English common law, would have languished in obscurity. But there is even more to it than that. Stephen, the nephew, was supposed to sail on the White Ship.¹⁰ At the last minute he failed to board due to a bout of diarrhea.¹¹ As historian Warren Hollister observed, Stephen's "diarrhea probably determined the history of England during the nineteen years between 1135 and 1154."¹² I enjoy telling this story to my legal history students, pointing out that this is an excellent example of how history can turn (in this case, literally) on truly random s---

Contemporaries had little doubt of the significance of Vinson's death. Justice Felix Frankfurter told a clerk that Vinson's death was the first indication he had ever had of the existence of God.¹³ But precisely how did Vinson's death matter? Historians have focused primarily on his role in *Brown*, and have frequently argued that Vinson would not have led the Court to a unanimous decision.¹⁴ Others have suggested that Vinson might even have voted to retain segregated schools.¹⁵ A dissent on this point from the Chief Justice would have

7. *Id.* at 278.

8. *Id.* at 277 & n.175.

9. *Id.* at 477-79.

10. *Id.* at 277.

11. *Id.*

12. *Id.*

13. RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 659 (rev. ed. 2004). Frankfurter's contempt for Vinson was rarely far from the surface. After Vinson's death, he released a one-sentence statement: "Chief Justice Vinson's death comes as a great shock to me." NEWTON, *supra* note 3, at 3. The relationship between the two men was strained, bitter, and deeply antagonistic. For an overview of their conflicts, see ST. CLAIR & GUGIN, *supra* note 1, at 174-79.

14. See, e.g., MICHAL R. BELKNAP, *THE VINSON COURT: JUSTICES, RULINGS, AND LEGACY* 164 (2004) ("[W]hat [Earl Warren] did—and what Vinson could not do—was mass the Court and get everyone to sign onto a single opinion.").

15. See, e.g., *id.* at 43 (suggesting that Vinson could have gone either way in *Brown*); NOAH FELDMAN, *SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES* 397 (2010) ("Indeed, had Vinson not died, his most significant contribution to the history of the Court might well have been leading a bloc that stood in the way of consensus on the issue of desegregation."); MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 300 (2004) ("Vinson . . . could readily reaffirm *Plessy*."); KLUGER, *supra* note 13, at 592 ("Fred Vinson . . . was almost certainly not ready to support the abolition of segregation."); Irving F. Lefberg, *Chief Justice Vinson and the Politics of Desegregation*, 24 EMORY L.J. 243, 285 (1975) ("[T]he best a Vinson led Court could have

provided immense support to opponents of integration.

Fred Vinson has not fared well in the hands of historians. He is typically depicted as a bumbling card-playing crony of Harry Truman, unsuited intellectually for the work of the Court, and a weak leader with almost reactionary instincts in key civil liberties cases. As William Wiecek has observed, the “ever-maligned” Vinson has generally been portrayed as a “nincompoop” and is “unanimously regarded as the least successful Chief Justice” in American history.¹⁶ One historian writes, “[a]ll the Roosevelt appointees to the Court except his fellow Kentuckian, Reed, looked down on Vinson as the possessor of a second-rate mind, and in contrast to the Roosevelt quartet, the Chief glowed dimly indeed.”¹⁷ This theme of general stupidity is echoed by others. Dennis Hutchinson writes, “Vinson lacked both the taste for the complex work of the Court and the fine-tuned analytical skills to lead some of the ablest and most self-confident men ever to sit on the Court . . .”¹⁸ Del Dickson is even more dismissive, claiming “Vinson lacked the intellect, legal reputation, administrative competence, political skills, or personality necessary to hold the Court together.”¹⁹

Vinson’s dismal ratings from historians are somewhat surprising in light of the promise that he brought to the job. On paper, he was superbly qualified, having served in high positions in all three branches of the federal government. He had been a congressman, a judge of the Court of Appeals for the District of Columbia Circuit, a high-level administrator for Franklin Roosevelt, and Secretary of the U.S. Department of the Treasury under Harry Truman.²⁰ Vinson had thrived under difficult circumstances and had earned the respect of highly demanding superiors. He seemed eminently suited to the job of leading, and hopefully unifying, an often bitterly divided Supreme Court. Indeed, only William Howard Taft and Charles Evans Hughes brought more wide-ranging experience to the Chief Justiceship.²¹

accomplished in 1954 is a six-three desegregation opinion with the Chief Justice in dissent . . . It is more probable than that a Vinson led Court, in search of unanimity, would have assembled an ambiguous compromise . . . in which *Plessy* emerged barely scathed.”).

16. 12 WILLIAM M. WIECEK, *THE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE BIRTH OF THE MODERN CONSTITUTION, THE UNITED STATES SUPREME COURT, 1941-1953*, at 409-10 (Stanley N. Katz ed., 2006).

17. KLUGER, *supra* note 13, at 587.

18. DENNIS J. HUTCHINSON, *THE MAN WHO ONCE WAS WHIZZER WHITE: A PORTRAIT OF JUSTICE BYRON R. WHITE* 200 (1998) [hereinafter HUTCHINSON, BYRON R. WHITE].

19. *THE SUPREME COURT IN CONFERENCE (1940-1985): THE PRIVATE DISCUSSIONS BEHIND NEARLY 300 SUPREME COURT DECISIONS* 100 (Del Dickson ed., 2001).

20. MELVIN I. UROFSKY, *DIVISION AND DISCORD: THE SUPREME COURT UNDER STONE AND VINSON, 1941-1953*, at 148-49 (1997). For an overview of Vinson’s life, see ST. CLAIR & GUGIN, *supra* note 1; WIECEK, *supra* note 16, at 421-29.

21. See MICHAEL BENSON, WILLIAM H. TAFT (2005); *Charles Evans Hughes, 1930-1941*, SUPREME COURT HIST. SOC’Y, <http://www.supremecourthistory.org/history-of-the-court/chief-justices/charles-evans-hughes-1930-1941/> (last visited Oct. 4, 2011).

This Symposium Essay contends that Vinson's untimely death deprived him of the historical stature to which he otherwise would have been entitled. Fred Vinson, if he had lived, would have authored a unanimous opinion of the Court in *Brown* invalidating segregation in public schools. To be sure, there is evidence pointing the other way, but the evidence in favor at least meets the preponderance of the evidence standard used in civil suits; Vinson's authorship of a unanimous opinion is somewhat more likely than not. Authorship of *Brown* would have given Vinson instant historical immortality, guaranteeing his place among the nation's most significant Chief Justices.

If Vinson had lived, there would have been no "Warren Court," or at least no such Court under Warren's leadership. Earl Warren would likely have been appointed to the open seat created by the death of Justice Robert Jackson in 1954, and subsequent appointments would most likely have created a majority of Justices devoted to the core principles of the "Warren Court." But the "Warren Court" innovations would not have borne the imprimatur of the Chief Justice. Vinson's most likely successors were John Marshall Harlan, under President Eisenhower, or Byron White, under President Kennedy, both of whom were significantly less enthusiastic about "Warren Court" decisions than was Earl Warren himself.

In some ways, these conclusions are not as dramatic in their implications as other historical counterfactuals. When I started this project, I fully expected to conclude that Vinson's survival would have resulted in a non-unanimous opinion in *Brown*. A Symposium on historical counterfactuals is not greatly enhanced by an example of the irrelevance of a particular Justice's death. My research, however, drove me inescapably to the conclusion that Vinson would have authored a unanimous opinion. Vinson's death, traditionally accorded enormous significance, turns out to be less significant than typically assumed. By exploring what would have happened if Vinson had lived, we can gain a better appreciation of the forces at work in *Brown*, and, perhaps, take a small step toward the partial rehabilitation of a Chief Justice currently consigned to the historical rubbish heap.

I. FRED VINSON AND THE VINSON COURT

No one would mistake Fred Vinson for a liberal.²² He almost always voted against free speech claims and the rights of criminal defendants.²³ His plurality opinion upholding the prosecution of Communists in *Dennis v. United States*,²⁴ for example, is now viewed as "an embarrassment, or worse."²⁵ As one historian puts it, his decisions earned him a "well-deserved reputation as a menace to civil

22. See, e.g., Lefberg, *supra* note 15, at 246-50 (documenting Vinson's generally conservative record).

23. KLUGER, *supra* note 13, at 587.

24. 341 U.S. 494 (1951).

25. GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME 410 (2004).

liberties.”²⁶

Nor would anyone mistake Fred Vinson for a leader capable of bringing unity to a contentious Court. Richard Kluger suggests that the Vinson Court “was perhaps the most severely fractured Court in history—testament, on the face of it, to Vinson’s failure as Chief Justice.”²⁷ In his last term, the Vinson Court achieved unanimity in a record low nineteen percent of cases.²⁸ The Justices filed large numbers of concurring opinions, often leaving the Court without a majority opinion.²⁹

Race cases, however, were a significant exception to the Vinson Court’s overall record of disunity. In many of these cases, it was as if an entirely different Court—and an entirely different Chief Justice—had emerged. There were no dissents and no concurring opinions. Rather, in a steady, unflashy way, Vinson authored unanimous opinions striking down segregationist practices under the Equal Protection Clause.

Vinson’s first major encounter with racial issues was in *Shelley v. Kraemer*,³⁰ which involved state enforcement of racially restrictive real estate covenants. Missouri courts had enjoined a black family from purchasing real estate subject to such a covenant.³¹ The case raised difficult issues about state action. The Fourteenth Amendment generally prohibits discriminatory state conduct, not discriminatory private conduct. If judicial enforcement of a privately created covenant was unconstitutional, were all private contracts now subject to constitutional restrictions? Precedent overwhelmingly supported state enforcement; the nineteen state supreme courts that had considered the issue all held that enforcement did not violate the Constitution.³² Even Thurgood Marshall was skeptical that the Supreme Court would decide this case in favor of the black purchasers and was convinced that the case had been brought prematurely.³³

Vinson, however, authored a unanimous opinion prohibiting state courts from enforcing the covenant through injunctive relief. For Vinson, state action was obvious: “It is clear that but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint.”³⁴ Vinson forcefully dismissed the argument that similar covenants might have been enforced against white people, stating, “[e]qual protection of the laws is not achieved through indiscriminate imposition of inequalities.”³⁵ Vinson also emphasized the

26. BELKNAP, *supra* note 14, at 42.

27. KLUGER, *supra* note 13, at 587.

28. ST. CLAIR & GUGIN, *supra* note 1, at 184.

29. *Id.* at 184-85.

30. 334 U.S. 1 (1948).

31. *Id.* at 6.

32. KLARMAN, *supra* note 15, at 213.

33. *See* KLUGER, *supra* note 13, at 248.

34. *Shelley*, 334 U.S. at 19.

35. *Id.* at 22.

historical context of the Fourteenth Amendment:

Whatever else the framers sought to achieve, it is clear that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States based on considerations of race or color.³⁶

Vinson's opinion, although rhetorically understated, was relentless in its argumentation and it secured the concurrence of a unanimous Court (with three Justices recused). Although it might have offered a more subtle analysis of the issue's full complexities, the opinion was, as Philip Kurland has noted, a "truly revolutionary opinion of the Vinson Court."³⁷ Even the most liberal Justices commended Vinson. Justice William Douglas wrote that Vinson's opinion was a "grand job[]" and Justice Frank Murphy wrote that "with time" *Shelley* would make Vinson "immortal."³⁸

That same year, the Court issued a brief per curiam opinion in *Sipuel v. Board of Regents*.³⁹ Oklahoma had denied a black applicant admission to the University of Oklahoma Law School. The Court held that Oklahoma had violated the Equal Protection Clause and that the applicant was "entitled to secure legal education afforded by a state institution."⁴⁰ *Sipuel* did not explicitly prohibit Oklahoma from offering this education in a segregated law school, but the Vinson Court's next case did just that.

In 1950, Vinson wrote the Court's unanimous opinion in *Sweatt v. Painter*,⁴¹ ordering the admission of a black applicant, Heman Sweatt, to the University of Texas Law School. In response to lower court decisions, the state had created a separate law school for blacks that supposedly satisfied *Plessy*'s separate but equal requirement.⁴² Vinson's opinion focused specifically on graduate education, rather than on segregation more generally. He noted, "[b]roader issues have been urged for our consideration, but we adhere to the principle of deciding constitutional questions only in the context of the particular case before the Court."⁴³

To Vinson, it was clear that the black law school was not equal to the white law school, and it never would be. In quantitative terms, the "number of the faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library, [and] availability of law review and similar activities,"

36. *Id.* at 23.

37. PHILIP B. KURLAND, *POLITICS, THE CONSTITUTION, AND THE WARREN COURT* 89 (1970).

38. MARK V. TUSHNET, *MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961*, at 95 (1994).

39. 332 U.S. 631 (1948).

40. *Id.* at 632.

41. 339 U.S. 629 (1950).

42. *Id.* at 633-34.

43. *Id.* at 631.

the white law school was obviously superior.⁴⁴ But Vinson went further, emphasizing that intangible qualities were even more important. The white law school possessed “to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school.”⁴⁵ These included “reputation of the faculty, . . . position and influence of the alumni, standing in the community, [and] traditions and prestige.”⁴⁶ In addition to these intangible qualities, Vinson noted the crucial social aspects of education. Legal education, he maintained, “cannot be effective in isolation from the individuals and institutions with which the law interacts.”⁴⁷ At the black law school, Sweatt would be excluded from interacting with eighty-five percent of the Texas population, including the “lawyers, witnesses, jurors, judges, and other officials with whom petitioner will inevitably be dealing when he becomes a member of the Texas Bar.”⁴⁸

Sweatt’s focus on these intangible qualities made it virtually impossible for states to offer segregated instruction at the graduate level. Justice Tom Clark had first emphasized these intangible factors in a memorandum to the other Justices.⁴⁹ Clark did not see the need to overrule *Plessy* directly in *Sweatt*, but he had little difficulty with weakening it dramatically. As Clark wrote to his fellow Justices, “If some say this undermines *Plessy* then let it fall as have many Nineteenth Century oracles.”⁵⁰ Indeed, in later years, Justice Clark stated in an interview, “We implicitly overruled *Plessy* . . . in *Sweatt* and *Painter*.”⁵¹ NAACP lawyers at the time agreed. Robert Carter felt that *Sweatt* left *Plessy* “moribund.”⁵² Thurgood Marshall believed the “complete destruction of all enforced segregation is now in sight.”⁵³ Most other commentators believed that *Sweatt* undermined “segregation in elementary and secondary schools.”⁵⁴

44. *Id.* at 633-34.

45. *Id.* at 634.

46. *Id.*

47. *Id.*

48. *Id.*

49. Memorandum on *Sweatt* and *McLaurin* from Mr. Justice Clark to the Conference (Apr. 7, 1950), reprinted in Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958*, 68 GEO L.J. 1, 89-90 (1979).

50. *Id.* at 90.

51. GARY M. LAVERGNE, BEFORE BROWN: HEMAN MARION SWEATT, THURGOOD MARSHALL, AND THE LONG ROAD TO JUSTICE 255 (2010) (quoting Interview by Joe Frantz with Justice Tom Clark, United States Supreme Court (Oct. 7, 1969), available at <http://www.lbjlib.utexas.edu/Johnson/archives.hom/oralhistory.hom/Clark-T/Clark-T.pdf>).

52. *Id.* at 258 (quoting ROBERT L. CARTER, A MATTER OF LAW: A MEMOIR OF STRUGGLE IN THE CAUSE OF EQUAL RIGHTS 92 (2005)).

53. *Id.* (quoting Thurgood Marshall, The Supreme Court as Protector of Civil Rights: Equal Protection of the Laws, reprinted in THURGOOD MARSHALL: HIS SPEECHES, WRITINGS, ARGUMENTS, OPINIONS, AND REMINISCENCES 124 (Mark V. Tushnet ed., 2001)).

54. TUSHNET, *supra* note 38, at 147.

McLaurin v. Oklahoma State Regents for Higher Education,⁵⁵ decided the same day as *Sweatt*, presented the issue of segregation *within* a graduate school. Oklahoma had admitted a black student, George McLaurin, to a graduate program in education, but it physically separated him from other students.

[H]e was required to sit apart at a designated desk in an anteroom adjoining the classroom; to sit at a designated desk on the mezzanine floor of the library, but not to use the desks in the regular reading room; and to sit at a designated table and to eat at a different time from the other students in the school cafeteria.⁵⁶

Vinson authored the Court's unanimous opinion invalidating Oklahoma's actions.⁵⁷ The restrictions, Vinson declared, "handicapped [McLaurin] in his pursuit of effective graduate instruction."⁵⁸ They "impair and inhibit his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession."⁵⁹ Moreover, the restrictions thwarted one of the primary goals of education: to prepare trained leaders for an increasingly complex society.⁶⁰ McLaurin's future students would "necessarily suffer to the extent that his training is unequal to that of his classmates."⁶¹ Vinson also rejected the State's contention that students might shun McLaurin even if the restrictions were removed: "There is a vast difference—a Constitutional difference—between restrictions imposed by the state which prohibit the intellectual commingling of students, and the refusal of individuals to commingle where the state presents no such bar."⁶² This principle, although ostensibly confined to graduate education, had obvious implications for segregation at the elementary and secondary level.

Vinson's views in *Sweatt* and *McLaurin* had evolved over time. Conference notes of the Justices indicate that Vinson was initially inclined to affirm the lower court in *Sweatt*.⁶³ Similarly, Vinson, along with Justices Burton and Reed, initially "voted to affirm summarily" the district court's ruling against McLaurin.⁶⁴ Vinson was obviously open to argument and debate in race cases and was not locked into rigid positions. His expression of a tentative view on an issue in conference is not a particularly strong indicator of his final vote.

In *Sweatt* and *McLaurin*, Vinson also proved that he was capable of quickly gathering assent for a unanimous opinion. As Dennis Hutchinson points out,

55. 339 U.S. 637 (1950).

56. *Id.* at 640.

57. *Id.* at 638, 642.

58. *Id.* at 641.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *See* WIECEK, *supra* note 16, at 690.

64. JAN PALMER, *THE VINSON COURT ERA: THE SUPREME COURT'S CONFERENCE VOTES; DATA AND ANALYSIS* 3, 264 (1990).

“Despite the wide theoretical divisions in Conference, Vinson received indications of agreement in both opinions from all but one Justice within two days.”⁶⁵ “Vinson’s willingness to accommodate” even minor suggestions from his fellow Justices smoothed the path to unanimity.⁶⁶

Certain common themes emerge from Vinson’s race opinions. For the most part, they are written in plain, direct language, with little legalese. They focus on common sense and practicality, rather than on technicalities and fine theoretical distinctions. Above all, they emphasize the crucial socializing role of education. In both *Sweatt* and *McLaurin*, Vinson had emphasized that racial commingling was an essential component of graduate education.⁶⁷ The opinions are also relatively narrowly written, resolving the particular issues in front of them and not reaching out to prohibit all racial classifications more generally. These characteristics—plain language, practicality, resolution of a narrow issue, and an emphasis on the social aspects of education—are, of course, hallmarks of Chief Justice Warren’s opinion in *Brown*.

There is one significant exception to Vinson’s general record in race cases—his solo dissent in *Barrows v. Jackson*,⁶⁸ his last opinion as a Justice. In *Barrows*, the Court addressed a question left open by *Shelley*: Could a state enforce a damages provision in a racially restrictive real estate covenant?⁶⁹ Six Justices held that *Shelley* barred such suits.⁷⁰ Even though the suit was between two white litigants, enforcement of damages provisions would clearly harm the interests of black purchasers of real estate and would undermine *Shelley*’s prohibition on injunctive relief.⁷¹

For Vinson, the issue turned on standing. As he put it, “[t]he plain, admitted fact that there is no identifiable non-Caucasian before this Court who will be denied any right to buy, occupy or otherwise enjoy the properties involved in this lawsuit, or any other particular properties, is decisive to me.”⁷² Vinson relied on the traditional doctrine “that the Court refrain from deciding a constitutional issue until it has a party before it who has standing to raise the issue.”⁷³ The majority essentially agreed with Vinson that traditional standing principles would not have permitted a white litigant to raise the interests of black purchasers not before the Court.⁷⁴ The majority felt, however, that the “peculiar” and “unique” facts of the case justified an exception to traditional standing doctrine.⁷⁵

It is possible to view Vinson’s dissent as a harbinger of his eventual vote in

65. Hutchinson, *supra* note 49, at 25.

66. *Id.* at 27.

67. See *supra* notes 46-47, 57-60 and accompanying text.

68. 346 U.S. 249, 260-69 (1953) (Vinson, C.J., dissenting).

69. *Id.* at 251 (majority opinion).

70. *Id.* at 260.

71. *Id.* at 254.

72. *Id.* at 262 (Vinson, C.J., dissenting).

73. *Id.* at 264.

74. *Id.* at 257 (majority opinion).

75. *Id.*

Brown. After all, Vinson proved that he was willing to issue a solo dissent in a race case. Moreover, his language near the end of the opinion could be read as a comment on the pending *Brown* litigation: “Since we must rest our decision on the Constitution alone, we must set aside predilections on social policy and adhere to the settled rules which restrict the exercise of our power of judicial review—remembering that the only restraint upon this power is our own sense of self-restraint.”⁷⁶

On the other hand, Vinson’s view is consistent with his repeated emphasis in earlier cases on the Equal Protection Clause as a guarantor of individual rights. In *Shelley*, Vinson had stated, “[t]he rights created by . . . the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights.”⁷⁷ In *Sweatt*, he noted, “[i]t is fundamental that these cases concern rights which are personal and present.”⁷⁸ Similarly, in *McLaurin*, Vinson stated that the restrictions deprived McLaurin “of his personal and present right to the equal protection of the laws.”⁷⁹ That Vinson found “personal and present” rights absent in *Barrows* is not especially surprising, nor does it suggest much of anything about his potential approach to *Brown*, where the rights asserted were just as personal and present as those Vinson had recognized in *Sweatt* and *McLaurin*.⁸⁰

II. THE PROCEEDINGS IN *BROWN* UNTIL VINSON’S DEATH

There were five separate cases in *Brown*, from Kansas, Virginia, South

76. *Id.* at 269 (Vinson, C.J., dissenting).

77. *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948).

78. *Sweatt v. Painter*, 339 U.S. 629, 635 (1950).

79. *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637, 642 (1950).

80. Indeed, in the initial *Brown* conference, Vinson specifically invoked the earlier decisions’ references to personal rights. See Conference Notes of Mr. Justice Clark on the *Segregation Cases* (Dec. 13, 1952), in *Hutchinson*, *supra* note 49, at 91 [hereinafter Clark Notes].

In *Bob-Lo Excursion Co. v. Michigan*, 333 U.S. 28 (1948), the Supreme Court considered the applicability of a Michigan civil rights statute to a company that operated an amusement park on a small Canadian island near Detroit. *Id.* at 29. The company had refused to admit a black passenger to its ferry which transported patrons from Detroit to the island. *Id.* at 31. A majority of the Court held that application of the Michigan civil rights statute to this conduct did not infringe on the federal interest in foreign commerce, given that, for practical purposes, the island amounted to an adjunct of Detroit. *Id.* at 35-36. Justice Jackson, joined by Chief Justice Vinson, dissented.

Vinson almost certainly viewed the case through the lens of federalism rather than race. Jackson’s dissent argued that states lacked all power to regulate foreign commerce and that the majority’s opinion offered no discernible principle to govern the scope of state power. *Id.* at 44-45 (Jackson, J., dissenting). Under the Jackson/Vinson view, a Michigan statute requiring segregation would have been equally unconstitutional as applied to the operations of the amusement park. Vinson’s position in *Bob-Lo* is thus largely explicable by his consistent support of federal power over the states and is not especially probative with respect to his ultimate vote in *Brown*, where the Equal Protection Clause was directly at issue.

Carolina, Delaware, and the District of Columbia, all consolidated for purposes of appeal to the United States Supreme Court.⁸¹ They were initially argued on December 9, 1952, and the Justices met in conference to discuss the cases on December 13, 1952.⁸² “At Vinson’s suggestion,” the Justices did not take an official vote on the case, but rather discussed their views in a more general manner.⁸³ The Justices’ notes of the discussions at this conference are the only surviving direct evidence of Vinson’s views on *Brown*.

As Chief Justice, Vinson opened the conference discussion. He began with the District of Columbia case. He noted that there was a “[b]ody of law back of us on separate but equal”⁸⁴ and “Congress did not pass a statute deterring [and] ordering no segregation.”⁸⁵ He found it “[h]ard to get away” from the apparent acceptance of segregation in the District by the drafters of the Fourteenth Amendment and from its “long established” practice.⁸⁶ Vinson pointedly noted, however, that he did not “think much of idea that it is for Congress [and] not for us to act.”⁸⁷ He expressed some doubt about whether Congress could ban segregation in the states.⁸⁸

Turning to the state cases, Vinson expressed his concern that southern states might respond to a desegregation order by abolishing all public education.⁸⁹ It was important, he seemed to suggest, that any potential desegregation order allow sufficient time for implementation.⁹⁰ Justice Burton recorded Vinson as then stating, “[c]ourage is needed . . . also wisdom.”⁹¹ Justice Clark recorded the phrase as, “Boldness is essential but wisdom indispensable.”⁹²

At the end of his notes of Vinson’s comments, Justice Burton noted “Aff?”⁹³ Burton thus thought that Vinson might be a possible vote to affirm, but his position was far from clear. The question mark would have been unnecessary if Vinson had articulated a firm pro-segregation position.

Burton’s uncertainty over Vinson’s views is reflected in subsequent analyses by the Justices themselves and by historians. After Vinson’s death, Burton wrote in his diary that he thought Vinson would have upheld segregation,⁹⁴ a view also

81. WIECEK, *supra* note 16, at 694-95.

82. *Id.* at 695, 697.

83. Mark Tushnet & Katya Lezin, *What Really Happened in Brown v. Board of Education*, 91 COLUM. L. REV. 1867, 1902 (1991).

84. KLUGER, *supra* note 13, at 592 (quoting Jackson notes).

85. *Id.* (quoting Burton notes).

86. *Id.* (quoting Burton and Jackson notes).

87. *Id.* at 593 (quoting Burton notes).

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* (quoting Burton notes) (second alteration in original).

92. Clark Notes, *supra* note 80, at 91.

93. KLUGER, *supra* note 13, at 593 (emphasis omitted).

94. *Id.*

expressed by Justice Reed in conversation with a law clerk.⁹⁵ Richard Kluger, author of *Simple Justice*, which remains the leading study of the *Brown* case, agrees, stating, “Fred Vinson . . . was almost certainly not ready to support the abolition of segregation.”⁹⁶

On the other hand, Justice Clark, probably Vinson’s “closest colleague on the Court,” believed Vinson would have voted against segregation.⁹⁷ Similarly, a careful analysis by Mark Tushnet and Katya Lezin of the Justices’ conference notes suggests Vinson’s alleged pro-segregation views have been significantly overstated.⁹⁸ As they point out:

Nowhere in his statement did Vinson commit himself either to reaffirming the “separate but equal” doctrine or to overruling *Plessy*, but on balance the tone of his comments suggests that he would go along with a decision by a majority of the Court to hold segregation unconstitutional, as he had gone along in the university cases despite his initial inclination the other way.⁹⁹

Moreover, if Vinson sought to protect segregation, his “boldness is essential” comment is inexplicable.¹⁰⁰ He was, however, deeply concerned about the practical applications of desegregation orders, thus his admonishment that wisdom is “indispensable.” These concerns were not trivial, and were shared by even strong opponents of segregation such as Justice Black.¹⁰¹ Vinson would not have supported an order requiring immediate desegregation of all public schools in the South.

The other Justices then spoke in order of seniority. Justices Black, Douglas, Burton, and Minton clearly stated that segregation was unconstitutional.¹⁰² Justice Frankfurter was prepared to invalidate segregation in the District of Columbia, but proposed re-argument on the issue of the states, perhaps as a delaying tactic.¹⁰³ Justice Jackson stated that he was willing to invalidate segregation, provided that the Court present the decision as primarily political rather than legal and that it allow ample time for implementation.¹⁰⁴ Justice Clark argued for delay, and indicated that he could “go along” with an approach that did not require immediate integration.¹⁰⁵ Only Justice Reed spoke clearly in

95. *Id.*

96. *Id.* at 592.

97. *Id.* at 593.

98. Tushnet & Lezin, *supra* note 83, at 1870-72, 1903-04.

99. *Id.* at 1903-04.

100. *Id.* at 1904.

101. *Id.*

102. KLUGER, *supra* note 13, at 596, 605-06, 613, 617.

103. *Id.* at 603-04, 617. On Frankfurter’s delaying strategy, see WIECEK, *supra* note 16, at 695; Tushnet & Lezin, *supra* note 83, at 1918-20.

104. KLUGER, *supra* note 13, at 609-11.

105. Tushnet & Lezin, *supra* note 83, at 1905 (quoting Douglas notes).

favor of upholding segregation, at least for the time being.¹⁰⁶

Since no formal vote was taken at the conference, it is impossible to know how the Justices would have voted had they been forced to take a clear position. In a May 17, 1954 memo to the file, Justice Douglas claimed that at the original conference, only Black, Burton, Minton, and Douglas “voted that segregation in the public schools was unconstitutional.”¹⁰⁷ This is accurate in the sense that these were the only Justices who made their anti-segregation views unmistakably clear. Douglas further claimed that “Vinson and Reed thought that ‘the *Plessy* case was right,’ and Clark ‘inclined that way.’”¹⁰⁸ This is perhaps accurate with respect to Reed, but seems less credible with respect to Vinson and Clark. Finally, Douglas claimed that “Frankfurter and Jackson ‘expressed the view that segregation in the public schools was probably constitutional.’”¹⁰⁹ This statement reflects Douglas’s intense antipathy to Frankfurter and his desire to mar him in the historical record. As Mark Tushnet and Katya Lezin remind us, Douglas’s memorandum must be understood in the context “that Douglas and Frankfurter were nearly at each other’s throats during this period.”¹¹⁰ Indeed, at one point Douglas had referred to the Jewish Frankfurter as “Der Fuehrer.”¹¹¹ Douglas’s memorandum suggests a Court more conflicted than it actually was. Tushnet’s and Lezin’s analysis seems more plausible: “By the end of the conference discussion, it would seem that all except Justice Reed had indicated a willingness to ‘go along’ with a desegregation decision that allowed for gradual compliance”¹¹²

Ultimately, the Court embraced the delaying strategy, and ordered the cases re-argued in the following term.¹¹³ The Court ordered the parties to address five questions, largely drafted by Justice Frankfurter.¹¹⁴ By the time the cases were re-argued, Chief Justice Vinson was dead,¹¹⁵ and Chief Justice Earl Warren was sitting in his seat.¹¹⁶

But what if Vinson had survived?

106. KLUGER, *supra* note 13, at 598-99.

107. Tushnet & Lezin, *supra* note 83, at 1881 (quoting Memorandum of Justice William Douglas for the File *In re Segregation Cases* (May 17, 1954)).

108. *Id.*

109. *Id.* (quoting Memorandum of Justice William Douglas for the File *In re Segregation Cases* (May 17, 1954)).

110. *Id.*; see also UROFSKY, *supra* note 20, at 259 (stating, “Douglas’s memo is not completely reliable . . .”).

111. FELDMAN, *supra* note 15, at 306 (quoting SIDNEY FINE, FRANK MURPHY: THE WASHINGTON YEARS 254 (1984)).

112. Tushnet & Lezin, *supra* note 83, at 1907.

113. KLUGER, *supra* note 13, at 618.

114. *Id.* at 618-19.

115. *Id.* at 659.

116. *Id.* at 668.

III. *BROWN* UNDER CHIEF JUSTICE VINSON

The re-argument of the case under Chief Justice Vinson would have likely focused heavily on the issue of remedy, as did the actual re-argument under Chief Justice Warren.¹¹⁷ This focus indicated that the Court knew where it was likely to end up, but was concerned about practical issues of implementation. At the Court's subsequent conference, Vinson would again lead off the discussion. He most likely would have indicated support for desegregation, provided that a narrow opinion could be written. He would not have been as enthusiastic about this conclusion as Chief Justice Warren, but he would have ultimately voted the same way. Five significant factors would shape Vinson's vote.

First, Vinson almost always sided with the positions supported by the federal government. As historians have noted, Vinson was "an almost unquestioning supporter of federal policies"¹¹⁸ and he "nearly always favored the power of the federal government over that of the states."¹¹⁹ In previous race cases, the federal government had taken a clear position on segregation. The Department of Justice had filed an amicus brief in *Shelley*, citing the findings of President Truman's Committee on Civil Rights.¹²⁰ This was the "first time the Department had put its full weight behind an amicus brief in a civil rights case."¹²¹ The Department went even further in *McLaurin* and *Sweatt*, filing briefs urging that *Plessy* be overturned.¹²² And in *Brown*, both the Truman and Eisenhower Justice Departments submitted briefs supporting desegregation.¹²³ For Vinson to side against the stated preferences of the federal government, from both Democratic and Republican administrations, would have been decidedly out-of-character.

Second, the federal government's briefs in the race cases stressed a theme that had particular resonance for Vinson—anti-Communism. The Justice Department's brief in *Shelley* had noted the embarrassments that segregation posed to the conduct of American foreign policy.¹²⁴ The Truman Administration's brief in *Brown* claimed, "[r]acial discrimination furnishes grist for the Communist propaganda mills, and it raises doubts even among friendly nations as to the intensity of our devotion to the democratic faith."¹²⁵ The Department quoted Secretary of State Dean Acheson's observation that "Soviet spokesmen regularly exploit this situation in propaganda against the United States"¹²⁶ Acheson, the Department noted, had concluded that "racial

117. Hutchinson, *supra* note 49, at 38.

118. UROFSKY, *supra* note 20, at 149.

119. *Id.* at 150.

120. Hutchinson, *supra* note 49, at 13.

121. *Id.*

122. UROFSKY, *supra* note 20, at 255.

123. See TUSHNET, *supra* note 38, at 201-02.

124. Hutchinson, *supra* note 49, at 13.

125. TUSHNET, *supra* note 38, at 173 (quoting Brief for the United States as Amicus Curiae at 6, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)).

126. Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 111

discrimination in the United States remains a source of constant embarrassment to this Government in the day-to-day conduct of its foreign relations; and it jeopardizes the effective maintenance of our moral leadership of the free and democratic nations of the world.”¹²⁷ The federal government’s position was clear—segregation undermined America’s struggle against global Communism.¹²⁸

Such pleas would have reached a receptive ear with Fred Vinson, perhaps the most dedicated anti-Communist ever to sit on the Supreme Court. In *Youngstown*,¹²⁹ Vinson had painted a dire picture of the threat posed by Communism, noting, “these are extraordinary times. A world not yet recovered from the devastation of World War II has been forced to face the threat of another and more terrifying global conflict.”¹³⁰ Communism presented a “threat of aggression on a global scale.”¹³¹ He ominously pointed to the size of the Soviet military and warned that the “survival of the Republic itself may be at stake.”¹³² Vinson’s plurality opinion in *Dennis v. United States* described the American Communist Party as a “highly organized conspiracy, with rigidly disciplined members subject to call when the leaders . . . felt that the time had come for action.”¹³³ This party structure, “coupled with the inflammable nature of world conditions, similar uprisings in other countries, and the touch-and-go nature of our relations with countries with whom petitioners were in the very least ideologically attuned” convinced Vinson that the conviction of Communist Party leaders was justified.¹³⁴ Vinson approvingly cited lower court findings that the

Communist Party is a highly disciplined organization, adept at infiltration into strategic positions, use of aliases, and double-meaning language; that the Party is rigidly controlled; that Communists, unlike other political parties, tolerate no dissension from the policy laid down by the guiding forces, but that the approved program is slavishly followed by the members of the Party¹³⁵

Vinson, in short, was terrified of Communists, both at home and abroad.

In *Brown*, the federal government had repeatedly told the Court that a decision upholding segregation would immensely strengthen the forces of global

(1988).

127. *Id.* at 111-12.

128. On the relation between segregation and the Cold War, see generally MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* (2000).

129. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

130. *Id.* at 668 (Vinson, C.J., dissenting).

131. *Id.* at 669.

132. *Id.* at 682.

133. *Dennis v. United States*, 341 U.S. 494, 510-11 (1951) (opinion of Vinson, C.J.).

134. *Id.* at 511.

135. *Id.* at 498.

Communism.¹³⁶ Vinson would have paid careful attention to this argument. His first instinct would be to dodge and delay the issue, but he would eventually be forced to a decision. A vote to uphold segregation would hand a massive propaganda victory to the forces of global Communism, something Vinson would do almost anything to avoid.

Third, Vinson had tremendous respect for his friend Harry Truman, the President who had appointed him to the Chief Justiceship.¹³⁷ In the 1948 election year, Truman had made civil rights a major issue, endorsing a civil rights program broader “than any president had ever dreamed of proposing, by orders of magnitude” and ordering the desegregation of the armed forces.¹³⁸ Truman did this knowing it would alienate Southern Democrats, who nominated their own presidential candidate, Strom Thurmond of South Carolina. Vinson would have known that Truman’s legacy would rest in large part on his position on civil rights. Would he, as Truman’s Chief Justice, really want to be known as the author of an opinion re-affirming *Plessy v. Ferguson*?¹³⁹ This, too, seems unlikely.¹⁴⁰

Fourth, Vinson’s initial concerns about the historical support for a desegregation order would have likely been assuaged by a comprehensive memorandum prepared by Alexander Bickel, a law clerk to Justice Frankfurter. Drawing on an exhaustive analysis of historical sources, Bickel concluded that the framers of the Fourteenth Amendment had simply not focused on the issue of segregated schools.¹⁴¹ Although the Amendment probably was not explicitly intended to abolish segregation, a judicial ruling invalidating the practice was not completely inconsistent with the historical sources, either.¹⁴² If Vinson could be convinced that history did not require re-affirmation of *Plessy*, his path to school desegregation would be much easier.

Finally, there was the doctrinal logic exerted by Vinson’s earlier decisions, especially *Sweatt* and *McLaurin*. Although these opinions were narrowly written and could technically be distinguished, they had obvious implications for educational segregation more broadly. In the *Sweatt* conference, Vinson had asked, “How can you have [a] constitutional provision *as to graduate* but *not as*

136. See *supra* notes 124-28 and accompanying text.

137. See, e.g., Lefberg, *supra* note 15, at 291-93 (documenting the close friendship between the two men and noting that Vinson was Truman’s choice to succeed him as President).

138. WIECEK, *supra* note 16, at 660.

139. Cf. KLUGER, *supra* note 13, at 269-70 (“[Truman] had staked the Presidency on [civil rights] and he had won It was not unthinkable that the politically attuned Justices he had selected felt they owed him their allegiance on racial questions.”).

140. In 1975, Irving F. Lefberg argued that Vinson’s decisions in *Shelley*, *Sweatt*, and *McLaurin* can be explained primarily by his loyalty to Harry Truman and to his fierce anti-Communism. See generally Lefberg, *supra* note 15. Curiously, Lefberg claims that Vinson would have dissented in *Brown*, without once considering that these same factors would have been equally applicable in that case. *Id.* at 285.

141. KLUGER, *supra* note 13, at 656-58.

142. *Id.* at 658.

to elementary [schools]?”¹⁴³

Vinson’s support for desegregation, however, would not be unqualified. For Vinson, an opinion invalidating school segregation would need to meet two critical tests. First, the opinion would have to be relatively narrow, focusing on segregation in public schools, rather than on racial classifications more broadly. An opinion that also invalidated prohibitions on interracial marriage, for example, would have been a complete non-starter for Vinson. Second, the opinion would have to be conservative with respect to remedy, to assuage Vinson’s concerns about the practical implications of a desegregation order. It could not order immediate integration of all public schools, but must allow ample time for a smooth, orderly transition. Both of these features—a narrow opinion focusing on school segregation and a conservative approach to remedy—are, of course, significant features of the *Brown* opinion ultimately authored by Chief Justice Warren.

The other Justices would then have spoken in order of seniority. Justices Black, Douglas, Burton, and Minton would reiterate their support for desegregation.¹⁴⁴ Justice Reed would argue that segregation was constitutional, since it was based not on “inferiority but on racial differences” and had ample historical support.¹⁴⁵ Nonetheless, Reed conceded that the Constitution was “dynamic” and that *Plessy* “might not be correct now.”¹⁴⁶ Justice Frankfurter would note that the historical evidence was unclear, but he would not take a strong stand in favor of segregation.¹⁴⁷ Justice Jackson’s position remained tortured. He was willing to strike down school segregation, provided the decision was viewed as “political” rather than “judicial.”¹⁴⁸ He would later develop these thoughts into a lengthy draft concurring opinion.¹⁴⁹ Justice Clark indicated that he would vote to abolish segregation, but cautioned that the remedy must be “carefully worked out.”¹⁵⁰

The conference discussion would thus indicate a clear majority in favor of desegregation. As Chief Justice, Vinson would have to assign the opinion. Almost certainly, he would have assigned it to himself. In a case of this magnitude, the imprimatur of the Chief Justice was critical. *Sweatt* and *McLaurin*, for example, had been transferred from Black to Vinson so they

143. Hutchinson, *supra* note 49, at 23 (quoting Clark, J., Conference Notes [Apr. 8, 1950], TCC (UT)) (alteration in original).

144. Black was absent from the actual second *Brown* conference, due to a family illness. TUSHNET, *supra* note 38, at 210. If Vinson had not died, the conference might have been earlier. Regardless, Black’s position on the issue was clear.

145. *Id.* at 211 (quoting Burton notes and Douglas notes).

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 211-14.

150. *Id.* at 210 (quoting Burton notes). Clark was a rare dissenter between 1949 and 1953, and he generally voted with Vinson. See BELKNAP, *supra* note 14, at 82.

would carry the prestige of the Chief Justice.¹⁵¹ Moreover, by assigning the *Brown* opinion to himself, Vinson could ensure that it stayed within relatively narrow bounds.

Vinson's primary task was to write an opinion that could gain unanimity. One of his "most strongly held convictions was the importance of unanimity to the institutional integrity of the Court."¹⁵² Although his overall record in that respect was abysmal, Vinson had led the Court to unanimity in prior race cases. And *Brown*, more than any other case in Vinson's tenure, demanded unanimity. By writing a narrow opinion that was not accusatory toward the South and which was modest with respect to remedy, Vinson could probably gain the support of most of the Justices.

The two biggest threats were a potential concurrence from Justice Jackson and a dissent from Justice Reed. Both possibilities would be disastrous. If Reed dissented, supporters of segregation could point to an honest division of opinion on a difficult constitutional issue. The Jackson concurrence, if anything, might have been even worse. For Jackson, a northerner, to claim that the Court's decision was justified by politics and not by law would fatally undermine the Court's claim to be speaking in a judicial voice. His concurrence would be exhibit one for the argument that the Justices were little more than politicians in robes.¹⁵³

Jackson went so far as to draft a lengthy concurring opinion that expressed significant reservations about the propriety of invalidating school segregation.¹⁵⁴ It is hard to know, though, just how serious Jackson was about this opinion. Although he showed it to Chief Justice Warren, he did not circulate it to the other Justices.¹⁵⁵ Jackson's law clerk, E. Barrett Prettyman, found much to dislike in the draft and in a forceful memorandum strongly discouraged Jackson from issuing it.¹⁵⁶ Moreover, on March 30, 1954, Jackson suffered a serious heart attack that left him hospitalized for weeks.¹⁵⁷ These circumstances no doubt weakened any resolve Jackson may have had for a separate concurring opinion.

Jackson's failure to issue his concurrence was not a direct result of Chief Justice Warren and would have likely occurred under Vinson as well. First, there is no direct evidence that Warren played a role in persuading Jackson to shelve his opinion. Second, Prettyman's objections and Jackson's heart attack were independent constraints, irrespective of who filled the Chief Justice's seat. Finally, even if Jackson had circulated his concurrence to the full Court, he would have encountered stiff resistance, not only from Vinson, but from other Justices

151. PALMER, *supra* note 64, at 134.

152. ST. CLAIR & GUGIN, *supra* note 1, at 327.

153. In 1950, Jackson had written a long letter to law professor Charles Fairman, expressing his doubts about whether the Fourteenth Amendment was intended to abolish segregation. The letter is printed in WIECEK, *supra* note 16, at 713-15.

154. See KLUGER, *supra* note 13, at 691-94.

155. Tushnet & Lezin, *supra* note 83, at 1918.

156. See TUSHNET, *supra* note 38, at 213.

157. KLUGER, *supra* note 13, at 699.

as well, who would have immediately recognized the damage the concurrence might do. Justice Frankfurter, perhaps the most sympathetic to Jackson's perspective, was nonetheless committed to unanimity and would have strongly discouraged the opinion. Overwhelming opposition from the other Justices would likely have persuaded Jackson to abandon the concurrence, as he ultimately did under far less pressure.

Vinson would also have been likely to prevent the Reed dissent, as Warren was able to do. Several factors, independent of either Warren or Vinson, made Justice Reed's position less inflexible than it might have been. First, Reed was not a die-hard opponent of racial equality. With the exception of *Shelley v. Kraemer*, from which he was recused, Reed had joined all of Vinson's unanimous opinions in race cases, and in 1944 had authored the Court's 8-1 decision invalidating the white primary.¹⁵⁸ Second, Reed, like Vinson, was a strong supporter of the positions of the federal government. Richard Kluger argues, "Reed increasingly cast his vote in behalf of the powers and policies of the federal government, which he believed the legitimate if not divinely inspired repository of the public good."¹⁵⁹ In *Brown*, the federal government had made its position unmistakably clear. Third, Reed did not believe that the meaning of the Fourteenth Amendment was inexorably fixed in 1868; he conceded that interpretations of the amendment could change as conditions changed.¹⁶⁰ He probably realized that segregation would eventually be abolished, but he doubted that the country was ready for that conclusion in 1954.

All of these factors would have played into Reed's decision-making when confronted with the prospect of issuing a solo dissent. He knew that the decision would generate immense controversy in the South, and that this controversy would only increase if the decision lacked unanimity.¹⁶¹ Earl Warren told him, "Stan, you're all by yourself in this now. . . . You've got to decide whether it's really the best thing for the country."¹⁶² Reed eventually agreed, provided that the decision did not require the immediate end of segregation.¹⁶³ As he explained in a note to Felix Frankfurter, "[w]hile there were many considerations that pointed to a dissent they did not add up to a balance against the Court's opinion."¹⁶⁴ As the Court's long line of race cases indicated, "the factors looking toward fair treatment for Negroes are more important than the weight of history."¹⁶⁵ As he would later note, "There was an air of inevitability about it

158. *Smith v. Allwright*, 321 U.S. 649 (1944); see also Morgan D.S. Prickett, *Stanley Forman Reed: Perspectives on a Judicial Epitaph*, 8 HASTINGS. CONST. L.Q. 343, 362 n.93 (1981) (documenting Reed's votes in race cases).

159. KLUGER, *supra* note 13, at 241.

160. See *supra* note 144 and accompanying text.

161. See KLUGER, *supra* note 13, at 702.

162. *Id.*

163. See *id.*

164. Hutchinson, *supra* note 49, at 43.

165. *Id.*

all.”¹⁶⁶

Fred Vinson would likely have had a similarly persuasive effect on Reed. Like Warren, Vinson placed a high value on a unanimous opinion. Like Warren, Vinson would have ensured that the opinion did not order immediate desegregation. Unlike Warren, who was a relative stranger to Reed, Vinson would have drawn on deep reservoirs of friendship and companionship with his fellow Kentuckian. Vinson had been a guest at Reed’s swearing-in ceremony in 1938.¹⁶⁷ When Vinson was first appointed to the Chief Justiceship, there were some occasional tense moments between the two,¹⁶⁸ but by 1950 Vinson and Reed “had developed both a close working relationship and a strong friendship.”¹⁶⁹ Reed was the principal speaker at a 1951 dedication of a plaque marking Vinson’s birthplace in Kentucky,¹⁷⁰ and Vinson regularly assigned Reed opinions in important cases.¹⁷¹ Vinson was easily as well-positioned, and in many ways better positioned, than Warren to persuade Reed to drop his dissent. Given that Reed did so for Warren, he would have likely done the same for Vinson.

On balance, it thus seems more likely than not that Vinson would have ultimately mustered a unanimous opinion in *Brown*. Felix Frankfurter insisted that unanimity “could not possibly have come to pass with Vinson,”¹⁷² but this statement needs to be understood in the context of Frankfurter’s vituperative hatred of Vinson. Moreover, Frankfurter himself claimed that although Earl Warren “had a share in the outcome, . . . the notion that he begot the unanimous Court is nonsense.”¹⁷³ As Frankfurter saw it, the forces pushing for unanimity significantly pre-dated Warren’s arrival. Dennis Hutchinson, who has conducted the most extensive study of unanimity in the desegregation cases, agrees, noting, “[o]ne of the persistent myths about the Warren Court is that Earl Warren was responsible for achieving unanimity in the *Segregation Cases* in 1954.”¹⁷⁴ Rather, unanimity was “the ultimate step in a gradual process that had begun” in 1950.¹⁷⁵ Hutchinson suggests, “[i]f Vinson could have overcome his concern with the timing and scope of relief in *Brown* . . . , it is probable . . . that Vinson—not Warren—could have authored the unanimous decisions in 1954.”¹⁷⁶

166. JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY* 65 (2001).

167. JOHN D. FASSETT, *NEW DEAL JUSTICE: THE LIFE OF STANLEY REED OF KENTUCKY* 207 (1994).

168. *See id.* at 415-18.

169. *Id.* at 488.

170. *Id.* at 508-09.

171. *See id.* at 527-28.

172. Hutchinson, *supra* note 49, at 35 (quoting Letter from Frankfurter, J., to Hon. Learned Hand (July 21, 1954), File 1249, Box 65, FF (LC)).

173. *Id.*

174. *Id.* at 86.

175. *Id.*

176. *Id.* at 87; *see also* UROFSKY, *supra* note 20, at 262 (“[I]t might well have been . . . that

Indeed, from the perspective of 1953, there would have been no particular reason to suspect that Warren would be any more likely to craft a unanimous opinion than Vinson. Fred Vinson had been Chief Justice for seven years¹⁷⁷ and had written unanimous opinions in significant race cases, all on the side of desegregation.¹⁷⁸ Earl Warren was a career politician who had just joined the Court and who had no prior judicial experience.¹⁷⁹ Although he had signed a law abolishing segregated schools in California¹⁸⁰ and supported a state Fair Employment Practices Commission and nondiscriminatory housing requirements,¹⁸¹ Warren had also been a member of a “Native Sons” group that had urged the preservation of California as a “White Man’s Paradise,”¹⁸² and he had vigorously supported the internment of Japanese-Americans during World War II (and would never publicly apologize for the internment during his lifetime).¹⁸³ Just eleven years earlier he had supported “a constitutional amendment to exclude all ‘persons of Japanese ancestry’ from [American] citizenship.”¹⁸⁴ In 1953, the smart bet for desegregation may well have been Vinson.

The *Brown* decision, however, was not completely foreordained. There is a significant counterfactual leading to a non-unanimous opinion in *Brown*, but it does not turn on Fred Vinson. There was, in fact, a Supreme Court Justice who might have dissented from *Brown*—former Justice Jimmy Byrnes of South Carolina. Byrnes was nominated to the Court in 1941 by President Roosevelt, but resigned from the Court just one year later to take another job in the administration.¹⁸⁵ At the time of the *Brown* litigation, he was serving as governor of South Carolina.¹⁸⁶ A South Carolina school district was one of the defendants in *Brown*, and Byrnes helped shape the district’s defense.¹⁸⁷ Byrnes initiated an aggressive equalization program in an attempt to prevent a desegregation

Vinson and not his successor could have written the unanimous opinion in *Brown*.”); Philip B. Kurland, *Earl Warren, the “Warren Court,” and the Warren Myths*, 67 MICH. L. REV. 353, 356 (1968) (suggesting that a unanimous opinion in *Brown* would have happened “even with Fred Vinson still occupying the office of Chief Justice”).

177. See UROFSKY, *supra* note 20, at 147-48.

178. See, e.g., *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637 (1950); *Sweatt v. Painter*, 339 U.S. 629 (1950).

179. See generally Kurland, *supra* note 176, at 354-55 (describing Warren’s political background).

180. NEWTON, *supra* note 3, at 205.

181. *Id.* at 231.

182. *Id.* at 74.

183. See *id.* at 128-41.

184. *Id.* at 75.

185. John W. Johnson, *Byrnes, James Francis*, in THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 113, 113 (Kermit L. Hall et al. eds., 1992).

186. See *id.*

187. See KLUGER, *supra* note 13, at 334-35.

decision.¹⁸⁸ He also announced that if the federal courts ordered desegregation, he would seek the elimination of public education in South Carolina.¹⁸⁹

If Byrnes had remained on the Court, he would almost certainly have dissented in *Brown*. Although it is conceivable that Byrnes, like Reed, might have been persuaded to drop a dissent, this seems unlikely given Byrnes's much stronger commitment to segregation. Most likely, Byrnes would have issued a forceful dissent in *Brown*, a *cri de coeur* to his fellow southerners that would have done immeasurable damage to the forces of integration. By persuading Byrnes to abandon his Supreme Court seat in 1942, Franklin Roosevelt inadvertently smoothed the path to a unanimous opinion in *Brown*.

Nor should my argument that Vinson would have authored a unanimous opinion in any way detract from the accolades given to Earl Warren for his handling of *Brown*. There were a number of ways a Chief Justice of lesser competence could have mishandled *Brown*, by voting in favor of segregation, for example, or by writing a strident opinion that would not achieve consensus, or by alienating Justice Reed into publishing his dissent. Earl Warren did none of those things. Warren deserves credit for what he accomplished, just as Vinson, had he lived, would have deserved credit as well.

IV. THE SUBSEQUENT HISTORY OF THE SUPREME COURT

Vinson's untimely death had implications for constitutional history far beyond the *Brown* decision. This Part explores appointments to the Court if Vinson had survived.

The first vacancy after Vinson's was the seat of Robert Jackson, who died in the fall of 1954.¹⁹⁰ President Eisenhower appointed John Marshall Harlan II to replace Jackson.¹⁹¹ This seat, however, would have likely gone to Earl Warren. In an early 1953 phone conversation, Eisenhower declined to offer Warren a Cabinet position, but promised to appoint Warren to the first vacancy on the Court.¹⁹² As Warren recalled, Eisenhower offered this promise as his "personal commitment."¹⁹³ To prepare for this vacancy, Warren was offered the position of Solicitor General of the United States, a position he accepted before announcing that he would not run again for governor of California.¹⁹⁴

After Chief Justice Vinson's death, Warren insisted on holding Eisenhower to his promise.¹⁹⁵ Eisenhower initially balked, contending that his promise applied only to a vacancy for Associate Justice and not for Chief Justice, but he

188. *Id.*

189. *Id.* at 334.

190. *Id.* at 718.

191. *Id.*

192. NEWTON, *supra* note 3, at 7.

193. *Id.*

194. *Id.*

195. *Id.* at 8-9.

ultimately relented and Warren received the appointment.¹⁹⁶ Warren's candidacy may have received an assist from Vice-President Richard Nixon, who desperately wanted Warren out of California Republican politics.¹⁹⁷

These same factors would all have been at play in 1954 for the Jackson vacancy. Warren would have again sought to hold Eisenhower to his promise, but now as Solicitor General of the United States, Warren would have even more credibility for the job. In addition, he could argue that his relinquishment of the California governorship for the Solicitor Generalship was a significant sacrifice that Eisenhower was obligated to reward.¹⁹⁸ Moreover, Nixon would have feared that a disgruntled Warren might have returned to California politics. It was far safer for him to be politically retired onto the Supreme Court. Warren would thus join the Court one year later than he actually did, but not as Chief Justice. It is likely that his tenure as an Associate Justice would have been far less significant than it was as Chief. His qualities were perfectly suited to the job of Chief Justice. As an Associate Justice, he would have likely been a bit of a journeyman, a genial man with plenty of common sense and experience, but overshadowed by men like Black, Frankfurter, and Douglas.¹⁹⁹

The second vacancy occurred in 1956, with the retirement of Justice Sherman Minton.²⁰⁰ Eisenhower intended to replace Minton, a Catholic, with another Catholic Justice.²⁰¹ With an eye to the upcoming presidential election, he sought a nominee that would push all the right political buttons.²⁰² He asked his attorney general to find a "conservative Catholic Democrat with judicial experience—preferably a state court judge."²⁰³ Eisenhower also wanted a relatively young judge.²⁰⁴ These criteria cast a pretty narrow net; almost certainly this seat would go, as it did, to William Brennan of New Jersey.²⁰⁵

The third vacancy occurred in 1957, with the retirement of Stanley Reed.²⁰⁶ Although Eisenhower appointed the mediocre Charles Whittaker to replace Reed,²⁰⁷ a far better appointment would have been available: John Marshall

196. *Id.*

197. HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO BUSH II 200-01 (5th ed. 2008).

198. On the relative demotion of the Solicitor General job, see NEWTON, *supra* note 3, at 7.

199. *Cf.* UROFSKY, *supra* note 20, at 150-51 ("For all of Earl Warren's many fine attributes, no one has ever claimed that he contributed a great deal to jurisprudential thought.").

200. ABRAHAM, *supra* note 197, at 207.

201. *Id.* at 208.

202. *See id.*

203. NEWTON, *supra* note 3, at 343.

204. *See* SETH STERN & STEPHEN WERMIEL, JUSTICE BRENNAN: LIBERAL CHAMPION 78 (2010).

205. *Id.* (noting that Brennan "was the only Catholic [state] appellate judge under the age of sixty").

206. ABRAHAM, *supra* note 197, at 211.

207. *Id.*

Harlan. Because Eisenhower appointed Harlan to replace Jackson,²⁰⁸ it seems highly likely that Harlan would now be tapped for the Reed seat.

It is around this point that one must consider the eventual death or retirement of Vinson. Actuarial tables suggest that a white male who was sixty years old in 1950, as Vinson was, could have expected to live until age seventy-five.²⁰⁹ Vinson's early death, however, suggests a weakened health that makes the attainment of age seventy-five unlikely. He could have died at any time, of course, but for purposes of this Essay, I will discuss two plausible scenarios: One, Vinson dies or retires in 1958 at age sixty-eight, during Eisenhower's final term. Two, somewhat less likely, Vinson hangs on until 1961 to age seventy-one, and retires once a fellow Democrat, John F. Kennedy, is in the White House.

A. *The 1958 Scenario*

In 1958, Eisenhower would have been confronted with two vacancies, the seats of Chief Justice Vinson and Associate Justice Harold Burton. Eisenhower's first decision would be whether to reach outside the Court for a new Chief Justice or to promote someone from within. He would have been unlikely to promote any of the Roosevelt or Truman appointees, so Black, Frankfurter, Douglas, and Clark would be off the list. Similarly, Eisenhower probably would not have nominated William Brennan, a Catholic Democrat; those attributes had been useful to Eisenhower in an election year, but would not have been viewed as positives for the Chief Justiceship. That would leave the two other Eisenhower Associate Justices: Earl Warren and John Marshall Harlan. The Warren possibility is especially intriguing, because it suggests that the "Warren Court" might still have emerged even if Vinson had not died in 1953. But Eisenhower was never especially close to Warren,²¹⁰ and having discharged his promise to him, would see little reason to elevate Warren further. The obvious choice for Chief Justice was therefore John Marshall Harlan. Potter Stewart would then be nominated to fill the Burton seat. Eisenhower would nominate a third man to replace Harlan in the Associate Justiceship—call him "Mr. X." Thus in 1958, the composition of the Supreme Court looks like this, in order of seniority: Chief Justice John Marshall Harlan, Justice Black, Justice Frankfurter, Justice Douglas, Justice Clark, Justice Warren, Justice Brennan, Justice Stewart, and Justice "X."

If we assume that John F. Kennedy was still elected President in 1960, then 1962 becomes of supreme importance. In that year, both Charles Whittaker and Felix Frankfurter retired, and Kennedy appointed Byron White and Arthur Goldberg, respectively, to replace them.²¹¹ But under the 1958 scenario, Kennedy gets only one vacancy, the Frankfurter seat,²¹² because Whittaker is not

208. See *supra* note 191 and accompanying text.

209. *Life Expectancy by Age, 1850-2004*, INFOPLEASE.COM (2007), <http://www.infoplease.com/ipa/A0005140.html>.

210. See NEWTON, *supra* note 3, at 7 (noting that "[t]hey did not know each other well").

211. ABRAHAM, *supra* note 197, at 217-20.

212. *Id.* at 219.

on the Court. Since White was ultimately chosen for the Whittaker seat, perhaps he would have received the Frankfurter seat. On the other hand, a White appointment would have left the Court without a Jewish member, and Kennedy may have felt some compulsion to maintain a “Jewish seat” on the Court. On balance, religion probably would have tipped the analysis in Goldberg’s favor for the Frankfurter seat.²¹³

If Kennedy had picked Goldberg, the core majority of the Warren Court—Black, Douglas, Warren, Brennan, and Goldberg—would have been in place in 1962, when the “Warren Court” really began in earnest.²¹⁴ The major decisions of the 1960s would still have happened—but with one highly significant difference. It would not be known as the “Warren Court.” The “Harlan Court” would be notable for major rulings that repeatedly provoked the dissent of the Chief Justice. Harlan dissented, for example, from *Mapp v. Ohio*,²¹⁵ *Brady v. Maryland*,²¹⁶ *Reynolds v. Sims*,²¹⁷ and *Katzenbach v. Morgan*.²¹⁸ Repeated dissent from the Chief Justice may well have made opposition to the “Warren Court” even more intense.

If Kennedy had picked White, however, constitutional history would have changed significantly. In that case, the core Warren Court Justices would never have had their five votes. Instead, there would have been a moderate/conservative bloc of Harlan, Clark, Stewart, “X,” and White. This bloc would have prevailed, for example, in *Miranda v. Arizona*²¹⁹ and *Escobedo v. Illinois*.²²⁰

B. The 1961 Scenario

If Fred Vinson died or retired in 1961, President John F. Kennedy would have selected his successor. Kennedy would have had the option of either promoting a sitting Justice or going outside the Court.

The internal candidates all had fundamental flaws. Black, Frankfurter, and Warren were too old. Douglas was too eccentric. Harlan and Stewart were too conservative. Brennan would have been a tempting pick; as a Democrat nominated by Eisenhower, he had bi-partisan appeal. Kennedy’s own Catholicism, however, had been a campaign issue in 1960,²²¹ and Kennedy would

213. See NEWTON, *supra* note 3, at 393 (stating that Kennedy wanted a Jewish nominee to replace Frankfurter).

214. *Id.* (noting that Goldberg’s nomination provided the liberal bloc with a consistent fifth vote).

215. 367 U.S. 643, 672 (1961) (Harlan, J., dissenting).

216. 373 U.S. 83, 92 (1963) (Harlan, J., dissenting).

217. 377 U.S. 533, 589 (1964) (Harlan, J., dissenting).

218. 384 U.S. 641, 659 (1966) (Harlan, J., dissenting).

219. 384 U.S. 436, 504 (1966) (Harlan, J., dissenting).

220. 378 U.S. 478, 492-99 (1964) (dissenting opinions of Justices Harlan, Stewart, and White).

221. See MICHAEL O’BRIEN, JOHN F. KENNEDY: A BIOGRAPHY 411-22 (2005) for a general

have been unlikely to draw renewed attention to religion by elevating a fellow Catholic to the Chief Justiceship. Clark, although the most plausible of the Democratic appointees, was widely reviled as a mediocrity, precisely the type of person with whom Kennedy would have been unimpressed.²²² It is therefore unlikely that Kennedy would have elevated an internal candidate.

On the external side, the clear candidate for a Vinson vacancy would have been Byron White. White had been Kennedy's top pick for the Whittaker vacancy; as a White House lawyer recalled, Kennedy "had one name in mind from day one."²²³ As a younger man, White perfectly represented the vigor of the Kennedy Administration and would be in a position to serve for decades. The most significant downsides would be his inexperience as a judge and his relative inexperience with federal law more generally (by this point he would have had only a few months on the job as Deputy Attorney General).²²⁴ But White's fame as a football hero and his undisputed intellect and scholarly credentials would have likely overcome this objection. Moreover, White had previously served as a law clerk to Chief Justice Vinson, making his elevation to Vinson's seat especially appropriate.²²⁵ Arthur Goldberg would probably have been considered also, but for the Vinson vacancy, religion would probably work against Goldberg. Kennedy, as the first Roman Catholic President, would not want to push religious buttons by nominating the first Jewish Chief Justice. Goldberg would, however, be appointed in 1962 to fill the Frankfurter seat.

Under the 1961 scenario, the Supreme Court consists of the following members, in order of seniority, in 1962: Chief Justice White, Justice Black, Justice Douglas, Justice Clark, Justice Warren, Justice Brennan, Justice Harlan, Justice Stewart, Justice Goldberg. Again, as in the 1958 scenario, the core Warren Court Justices—Black, Douglas, Brennan, Warren, and Goldberg—are present here as well. But it would be the White Court, not the Warren Court. And although White joined more Warren Court decisions than did Harlan, he still would have dissented frequently. Indeed, one of the chapters in Dennis Hutchinson's biography of White is entitled, "The Warren Court: White, J., Dissenting."²²⁶ Hutchinson notes that "White's writing has often been elliptical, even opaque, earning the just complaint of colleague, journalist, and scholar alike."²²⁷ White was not a leader on the Court, and it is most unlikely that he would have been perceived as a strong or successful Chief Justice. But perhaps with the addition of the Nixon appointees, White would have led more majorities, presiding over what we know as the Burger Court.

discussion of the impact of Kennedy's Catholicism on his political career.

222. See WIECEK, *supra* note 16, at 432-33. Wiecek notes that historians now generally rate Clark "more favorably than his contemporary critics did." *Id.* at 433.

223. HUTCHINSON, BYRON R. WHITE, *supra* note 18, at 311.

224. See *id.* at 262 (noting that White was tapped for the position of Deputy Attorney General in December 1960).

225. On White's clerkship with Vinson, see *id.* at 194-220.

226. *Id.* at 335.

227. *Id.* at 7.

V. THE VINSON LEGACY

Under the counterfactual presented in this Essay, Fred Vinson's star shines quite a bit more brightly. If Vinson had authored the unanimous opinion in *Brown*, it would be almost impossible to dismiss him as a "nincompoop" and a failure. Instead, he would be remembered as the author of one of the most significant Supreme Court decisions ever issued. Moreover, *Brown* would be seen not as the opening salvo of the Warren Court, but as the logical culmination of Vinson's decisions in a line of unanimous race cases. Predecessor cases like *Sweatt* would receive increased attention.

Vinson's survival also would have guaranteed successors who were no more successful than he. Earl Warren was so significant a Chief Justice that almost anyone who preceded him would look small in comparison. Warren's shadow has contributed greatly to the historical eclipse of Fred Vinson. But if Vinson had instead been succeeded by a Harlan or a White, presiding over a fractured Court and frequently dissenting from the Court's rulings, Vinson's Chief Justiceship would suffer little in comparison. Indeed, his inability to command majorities would seem less of a failing and more like the typical lot of a mid-twentieth century Chief Justice. With *Brown* behind him, Vinson might even be seen as the most significant Chief Justice of the twentieth century.

He came so close. Just as the curtains were about to open on the grandest historical stage yet presented in Vinson's life, he was plucked from the wings and replaced with an understudy, who took the role and commandingly made it his own. Perhaps Vinson might still have stumbled in the bright spotlight. But it is more likely that he would have risen to the occasion, calmly and deliberately walked to center stage, and in his slow, Kentucky drawl, told the nation that school segregation must go.