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Brown at 50

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Brown at 50

Michael J. Klarman

Abstract

Brown at 50: This essay will appear in the Virginia Law Review's symposium issue commemorating the 50th anniversary of Brown v. Board of Education. It canvasses three issues: (1) why was Brown a hard case for the justices?; (2) how were the justices able to overcome their legal doubts about invalidating school segregation to achieve a unanimous decision invalidating that practice?; (3) what were the consequences of Brown? (and, more specifically, how did Brown radicalize political opinion in the South, thus creating a climate ripe for violence, and how did the brutalization of peaceful black protestors by white law enforcement officers, when broadcast on national television, transform national opinion on race, leading directly to the enactment of landmark civil rights legislation?)

Apr.5, 2004

Brown at 50

Michael J. Klarman[*]

Brown v. Board of Education[1] is probably the most famous decision in the history of the United States Supreme Court. As we celebrate *Brown*'s fiftieth anniversary, it is worth pondering why the justices found the case so difficult and what its implications were for the modern civil rights movement.

Most people today would be surprised to learn that *Brown* was a hard case for the justices. If state-mandated segregation of public schools is not unconstitutional, what is? The fact that the ruling in *Brown* was unanimous, moreover, suggests that the case was an easy one. Yet appearances can be deceptive. In fact, the justices were at first deeply divided how to resolve *Brown*. Indeed, several of them were never fully convinced that they had found a sound legal basis for declaring segregation unconstitutional.[2]

In a memorandum to the files that he dictated the day *Brown* was decided, Justice William O. Douglas observed,

> In the original conference [in December 1952], 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

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[1] James Monroe Distinguished Professor of Law and Professor of History, University of Virginia.

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

[3] For a more complete discussion of the justices' internal deliberations in *Brown*, see Michael J. Klarman, From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality 292-312 (2004).

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inclined that way.[4]

Justices 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." Ultimately, however, both believed that "segregation in the public schools was probably constitutional."

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." Other justices who were counting heads reached roughly similar conclusions. In a letter written to Justice Reed just days after *Brown* was decided, Felix Frankfurter noted that he had "no doubt" that a vote taken in December 1952 would have invalidated segregation by five to four.[5] The dissenters would have been Vinson, Reed, Jackson, and Clark, and the majority would have written "several opinions."

Brown was hard for many of the justices because it posed a conflict between their legal views and their personal values. The sources of constitutional interpretation to which they ordinarily looked for guidance–text, original understanding, precedent, and custom–indicated that school segregation was permissible. By contrast, most of the justices privately condemned segregation, which Justice Black called "Hitler's creed."[6] Their quandary was how to reconcile their legal and moral views.

Frankfurter's preferred approach to adjudication required that he separate his personal views from the law. He preached that judges must decide cases based upon "the compulsions of

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[4] Douglas, memorandum for the file, Segregation Cases, 17 May 1954, Box 1149, Douglas Papers, Library of Congress.

[5] Frankfurter to Reed, 20 May 1954, Reed Papers, University of Kentucky.

[6] Del Dickson, ed., The Supreme Court in Conference (1940-1985): The Private Discussions Behind Nearly 300 Supreme Court Decisions 639 (2001) (reproducing discussion in *McLaurin v. Oklahoma State Regents*, Apr. 8, 1950).

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governing legal principles,"[7] not "the idiosyncrasies of a merely personal judgment."[8] In a memorandum he wrote in 1940, 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."[9]

Yet Frankfurter abhorred racial segregation, and his personal behavior clearly demonstrated his egalitarian commitments. In the 1930s he had served on the National Legal Committee of the National Association for the Advancement of Colored People (NAACP), and in 1948 he had hired the Court's first black law clerk, William Coleman.[10] Nonetheless, he insisted that his personal views were of limited relevance to the legal question of whether segregation was constitutional: "However passionately any of us may hold egalitarian views, however fiercely any of us may believe that such a policy of segregation . . . is both unjust and shortsighted[, h]e travels outside his judicial authority if for this private reason alone he declares [it] unconstitutional."[11] The Court could invalidate the practice, Frankfurter believed, only if it was legally as well as morally objectionable.

Yet Frankfurter had difficulty finding a compelling legal argument for striking down segregation. His law clerk, Alexander Bickel, spent a summer reading the legislative history of

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[7] Quoted in Melvin I. Urofsky, Division and Discord: The Supreme Court Under Stone and Vinson, 1941-1953, at 130 (1997).

[8] Adamson v. California, 332 U.S. 46, 68 (1947) (Frankfurter, J., concurring).

[9] Urofsky, supra note __, at 109 n.112. This memo was written in conjunction with the first flag-salute case,

[10] Melvin I. Urofsky, Felix Frankfurter: Judicial Restraint and Individual Liberties 128-29 (1991): Urofsky, supra note __, at 260.

[11] Frankfurter, memorandum (first draft), undated, 1, Frankfurter Papers, microfilm edition, part 2, reel 4, frame 378 (University Publications of America 1986).

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the Fourteenth Amendment, and he reported to Frankfurter that "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."[12] To be sure, Frankfurter believed that the meaning of constitutional concepts can change over time,[13] but as he and his colleagues deliberated, public schools in twenty-one states and the District of Columbia were still segregated. He could thus hardly maintain that evolving social standards condemned the practice. Furthermore, judicial precedent, which Frankfurter called "the most influential factor in giving a society coherence and continuity,"[14] strongly supported it. Of forty-four challenges to school segregation adjudicated by state appellate and lower federal courts between 1865 and 1935, not one had succeeded.[15] Indeed, on the basis of legislative history and precedent, Frankfurter had to concede that "*Plessy* is right."[16]

Brown presented a similar dilemma for Robert H. Jackson, who also found segregation anathema. In a 1950 letter, Jackson, who had left the Court during the 1945-1946 term to prosecute Nazis at Nuremberg, wrote to a friend: "You and I have seen the terrible consequences of racial hatred in Germany. We can have no sympathy with racial conceits which underlie

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[12] Alexander M. Bickel to Frankfurter, 22 Aug. 1953, Frankfurter Papers, part 2, reel 4, frames 212-14.

[13] Urofsky (Supreme Court Under Stone and Vinson), supra note __, at 217-18, 222.

[14] Mary Frances Berry, Stability, Security, and Continuity: Mr. Justice Burton and Decision Making in the Supreme Court 1945-1958, at 142 (1978).

[15] Note, Constitutionality of Educational Segregation, 17 Geo. Wash. L. Rev. 208, 214 n. 20 (1949).

[16] Douglas conference notes, Briggs v. Elliott, 12 Dec. 1953, case file: Segregation Cases, Box 1149, Douglas Papers.

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segregation policies."[17] Yet, like Frankfurter, Jackson thought that judges were obliged to separate their personal views from the law, and he was loathe to overrule precedent.

Jackson revealed his internal struggles in a draft concurring opinion that 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."[18] But because Jackson believed that judges must subordinate their personal preferences to the law, this consideration was irrelevant. When he turned to the question of whether "existing law condemn[s] segregation," he had difficulty answering in the affirmative:

> 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 [we can justify] 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 . . . . 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.[19]

Jackson hesitated to invalidate segregation for another reason as well. He had become skeptical of judicial supremacy, not only because he thought it was inconsistent with democracy, but also because he feared that it was a practical impossibility. Jackson worried that

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[17] Jackson to Charles Fairman, 13 March 1950, Fairman file, Box 12, Jackson Papers.

[18] Jackson draft concurrence, School Segregation Cases, 15 March 1954, p.1, case file: segregation cases, Box 184, Jackson Papers.

[19] Id. at 5, 10.

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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."[20] As the justices deliberated in *Brown*, Jackson wondered if the Court was up to the task of transforming southern race relations. Litigants would quickly discover "that devices of delay are numerous and often successful."[21] Enforcement would require coercing "not merely individuals but the public itself." Because a ruling against one school district would not bind any other, every instance of recalcitrance would necessitate separate litigation. Individual blacks would bear this burden; the Justice Department was unlikely to sue, and even if it wished to, Congress probably would not appropriate the necessary funds.

That the nine justices who initially considered *Brown* would be uneasy about invalidating segregation is unsurprising. All of them had been 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."[22] For most of their professional lives, these men had criticized untethered judicial activism as undemocratic–the invalidation of the popular will by unelected officeholders who were inscribing their social and economic biases onto the Constitution. This is how all nine of them

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[20] Robert H. Jackson, The Supreme Court in the American System of Government 80 (1955).

[21] Jackson draft concurrence, School Segregation Cases, 7 Dec. 1953, pp. 8-10, case file: segregation cases, Box 184, Jackson Papers. See also Gregory S. Chernack, The Clash of Two Worlds: Justice Robert H. Jackson, Institutional Pragmatism, and *Brown*, 72 Temple L. Rev. 51, 53-54, 59-63, 73-75, 88-89 (1999).

[22] Jackson to Fairman, supra note __.

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understood the *Lochner*[23] era, the period between 1905 and 1937, when the Court had invalidated protective labor legislation on a thin constitutional basis. The question in *Brown*, as Jackson's law clerk William H. Rehnquist noted, was whether invalidating school segregation would eliminate any distinction between this Court and its predecessor, except for "the kinds of litigants it favors and the kinds of special claims it protects."[24]

Thus, several justices wondered whether 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."[25] Jackson cautioned that

> [h]owever 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.[26]

"[I]f we have to decide the question," he lamented, "then representative government has failed."[27]

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[23] Lochner v. New York, 198 U.S. 45 (1905).

[24] WHR (William H. Rehnquist), "A Random Thought on the Segregation Cases," Box 184, Jackson Papers.

[25] Burton conference notes, Segregation Cases, 13 Dec. 1952, Box 244, Burton Papers, Library of Congress.

[26] Jackson to Fairman, supra note __.

[27] Douglas conference notes, *Briggs v. Elliott*, 12 Dec. 1953, case file: Segregation Cases, Box 1149, Douglas Papers.

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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 extralegal, or "political" considerations, such as the judges' personal values, social mores, and external political pressure.[28] But when the law–as reflected in text, original understanding, precedent, and custom–is clear, judges will generally follow it. In 1954 the law–as understood by most of the justices–was reasonably clear: Segregation was constitutional. For the justices to reject a result so clearly indicated by the conventional legal sources suggests that they had very strong personal preferences to the contrary.

And so they did. Although the Court had unanimously and casually endorsed public school segregation as recently as 1927,[29] by the early 1950s, the views of most of the justices reflected the dramatic popular changes in racial attitudes and practices that had resulted from World War II.[30] The ideology of the war was antifascist and prodemocratic, and the contribution of African-American soldiers was undeniable. Upon their return to the South, thousands of black veterans tried to vote, many expressing the view of one such veteran that "after having been overseas fighting for democracy, I thought that when we got back here we should enjoy a little of it."[31] Thousands more joined the NAACP, and many became civil rights litigants. Others helped launch a postwar social movement for racial justice.

Two other developments in the 1940s also fueled African-American progress. Over the

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[28] For elaboration of this view of how judges decide cases, see Klarman, supra note __, at 4-6, 446-54.

[29] Gong Lum v. Rice, 275 U.S. 78 (1927).

[30] This and the following three paragraphs are based on Klarman, supra note __, at 173-93 (citing relevant literature).

[31] Quoted in Robert J. Norrell, Reaping the Whirlwind: The Civil Rights Movement in Tuskegee 60-61 (1985).

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course of the decade, more than one and a half million southern blacks, pushed by changes in southern agriculture and pulled by wartime industrial demand, migrated to northern cities. This mass relocation–from a region in which blacks were nearly universally disfranchised to one in which they could vote nearly without restriction–greatly enhanced their political power; indeed, they became a key swing constituency in the North. Other blacks migrated from farms to cities within the South, facilitating the creation of a black middle class that had the inclination, capacity, and opportunity to engage in coordinate social protest.

The onset of the Cold War in the late 1940s created another impetus for racial reform. In the ideological contest with communism, American democracy was on trial, and southern white supremacy was its greatest vulnerability. As the Justice Department's brief in *Brown* argued, "Racial discrimination furnishes grist for the Communist propaganda mills."[32] After *Brown*, supporters of the decision boasted that America's leadership of the free world "now rests on a firmer basis"[33] and that American democracy had been "vindicat[ed] . . . in the eyes of the world."[34]

By the early 1950s such forces had produced concrete racial reforms. In 1947, Jackie Robinson desegregated major league baseball. In 1948, Harry S Truman issued executive orders desegregating the federal military and civil service. Dramatic changes in racial practices were occurring even in the South. Black voter registration there increased from 3 percent in 1940 to

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[32] Brief for the United States as Amici Curiae, *Brown v. Board of Education*, 6, in Philip B. Kurland & Gerhard Casper, eds., 49 Landmark Briefs and Arguments of the Supreme Court of the United States 121 (**year??**).

[33] Quoted in Mark V. Tushnet, Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936-1961, at 172-73 (1994).

[34] *Chicago Defender*, 22 May 1954, p.5.

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20 percent in 1950.[35] In the most regressive states, Mississippi and Alabama, black voter registration increased tenfold in the decade following World War II, and in Louisiana it increased more than twentyfold. Dozens of urban police forces in the South, including some in Mississippi, hired their first black officers. Minor league baseball teams, even in such places as Montgomery and Birmingham, Alabama, signed their first black players. Most southern states, including Louisiana, peacefully desegregated their graduate and professional schools under court order. Blacks began serving again on southern juries. In Louisiana and in most states outside of the Deep South, the first blacks since Reconstruction were elected to urban political offices, and the walls of segregation were occasionally breached in public facilities and accommodations.

As they deliberated over *Brown*, the justices expressed astonishment at the extent of the recent changes. Minton detected "a different world today" with regard to race.[36] 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."[37] Jackson may have gone furthest, citing black advancement as a constitutional justification for eliminating segregation. In his draft opinion he wrote that segregation "has outlived whatever justification it may have had . . . . 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."[38] Blacks had thus "overcome the presumptions" on which the

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[35] David J. Garrow, Protest at Selma: Martin Luther King, Jr. and the Voting Rights Act of 1965, at 7 tbl. 1-1, 11 tbl. 1-2 (1978).

[36] Burton conference notes, School Segregation Cases, 12 Dec. 1953, Box 244, Burton Papers.

[37] Frankfurter memorandum, undated, p.2, Frankfurter papers, microfilm edition, part 2, reel 4, frame 379.

[38] Jackson draft concurrence, supra note __, at 1, 19-21.

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system was based" and race "no longer affords a reasonable basis" for educational classifications. It was these sorts of changes that made *Brown* possible. Frankfurter later conceded that he would have voted to uphold public school segregation in the 1940s because "public opinion had not then crystallized against it."[39] The justices in *Brown* did not think that they were creating a movement for racial reform; they understood that they were working with, not against, historical forces.

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If *Brown* did not create the civil rights movement that swept the nation in the 1950s and 1960s, what were its contributions to that movement?[40] There were several. *Brown* dramatically increased the salience of the segregation issue, forcing many people to take a position for the first time. The decision was also hugely symbolic to African Americans, many of whom regarded it as the greatest victory for their race since the Emancipation Proclamation. One black leader called *Brown* "a majestic break in the dark clouds,"[41] and another later recalled that blacks "literally got out and danced in the streets."[42] *Brown* also inspired southern blacks to file petitions and lawsuits challenging school segregation, even in areas of the Deep South, where such bold tactics would otherwise have been inconceivable.

But *Brown* may have mattered most in a way that has not been sufficiently appreciated.

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[39] Quoted in Douglas memorandum, 25 Jan. 1960, *reproduced in* Melvin I. Urofsky, ed., The Douglas Letters: Selections from the Private Papers of Justice William O. Douglas 169 (1987).

[40] The connection between Brown and the civil rights movement is explored in greater detail in Klarman, supra note __, at 363-442.

[41] *Chicago Defender*, 22 May 1954, p.5.

[42] Quoted in Aldon D. Morris, The Origins of the Civil Rights Movement: Black Communities Organizing for Change 81 (1984).

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By the early 1960s, a powerful direct-action protest movement–sit-ins, freedom rides, and street demonstrations–had exploded in the South. While *Brown*'s role in sparking such activity has been much debated, several things are clear. When law enforcement officers responded to these demonstrations with restraint, media attention quickly waned and the protests failed to achieve their objectives. That is how Sheriff Laurie Pritchett minimized the effect of mass demonstrations in Albany, Georgia, in 1961-1962; Mississippi officials defused the Freedom Rides in a similar manner in the summer of 1961. However, when southern sheriffs used beatings, police dogs, and fire hoses to suppress protestors, media attention escalated, and northerners reacted with horror and outrage. Brutal assaults on peaceful demonstrators by southern law enforcement officers transformed northern opinion and enabled the passage of landmark civil rights legislation.

Brown contributed to this violence by ensuring that when direct action protests came to the South, politicians such as Bull Connor and George Wallace were there to meet them. It did so by inflaming racial tensions and reversing what had been steady black progress in the region. Before *Brown*, most white southerners thought the NAACP "at worst was a bunch of Republicans,"[43] but afterwards the organization "became an object of consuming hatred."[44] With the threat of school desegregation lurking in the background, whites in the Deep South suddenly found black voting intolerable, and dramatic postwar expansions of black suffrage in Mississippi, Alabama, and Louisiana were halted and then reversed. *Brown* likewise retarded university desegregation, which had been proceeding fairly smoothly after *Sweatt v. Painter* (1950),[45] and the nascent integration of minor league baseball and college athletics.

In the wake of *Brown*, white southerners made clear–in both word and deed–that they

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[43] Roy Wilkins to W. Lester Banks, 20 Aug. 1957, NAACP, part 20, reel 12, frame 982.

[44] Benjamin Muse, Ten Years of Prelude: The Story of Integration since the Supreme Court's 1954 Decision 39-40 (1964).

[45] 339 U.S. 629 (1950).

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were willing to go to violent lengths to maintain white supremacy and resist desegregation. After years of quiescence, the Ku Klux Klan reappeared in such states as South Carolina, Florida, and Alabama; a Klan leader reported that *Brown* created "a situation loaded with dynamite" and "really gave us a push."[46] Now that the justices had "abolished the Mason-Dixon line," Klansmen vowed "to establish the Smith and Wesson line."[47] Even citizens' councils, organizations committed to preserving segregation while ostensibly eschewing the violent tactics of the Klan, took a militant stance. A Mississippi council asserted that "there is a point beyond which even the most judicious restraint becomes cowardice."[48] A Dallas minister told a large citizens' council rally that if public officials would not block integration, plenty of people were prepared "to shed blood if necessary to stop this work of Satan."[49] A handbill circulated at a similar rally in Montgomery declared that "[w]hen in the course of human events it becomes necessary to abolish the Negro race, proper methods should be used," including guns and knives.[50]

Three murders in Mississippi in 1955 showed that the vitriolic response to *Brown* was not

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[46] N. K. Perlow, "KKK Leader Warns: 'We Mean Business,'" *Police Gazette*, Aug. 1956, 7, NAACP Papers, part 20, reel 13, frame 444.

[47] Stan Opotowsky, "Dixie Dynamite: The Inside Story of the White Citizens' Councils" (reprinted from *New York Post*, 6-20 Jan. 1957), p.15, NAACP Papers, part 20, reel 13, frame 682.

[48] *Southern School News*, Feb. 1963, p.17.

[49] *Southern School News*, Aug. 1957, p.7.

[50] Handbill circulated at Montgomery citizens' council meeting, 10 Feb. 1957, NAACP Papers, part 20, reel 5, frame 126.

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merely rhetorical.[51] Although Mississippi blacks exercising their right to vote in the late 1940s had risked harassment and beatings, the stakes were raised when two blacks were killed for voting-related activity in 1955. And although the number of reported lynchings in Mississippi had dropped to zero in the years before *Brown*, fourteen-year-old Emmet Till was also murdered in Mississippi that year for allegedly whistling at a white woman. One white Mississippian declared that "[t]here's open season on the Negroes now. They've got no protection, and any peckerwood who wants can go out and shoot himself one]."[52] The NAACP published a pamphlet that year entitled, "M is for Mississippi and Murder."[53]

Till's funeral in Chicago attracted thousands of mourners, and a photograph of his mutilated body in the magazine *Jet* seared the conscience of northerners. Segregating black school children was one thing, lynching them quite another. And to some observers, at least, the cause of the tragic events was clear. As the Yazoo City (Mississippi) *Herald* declared, Till's blood was on the hands of the Supreme Court justices who had decided Brown.[54] Yet the *Herald* might more accurately have blamed Till's muder and the South's stunning retrogression on southern politicians, whose response to *Brown* involved a resort to extremism and highly inflammatory language. In the mid-1950s, political contests in southern states assumed a

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[51] For this paragraph generally, see John Dittmer, Local People: The Struggle for Civil Rights in Mississippi 53-58 (1994); James C. Cobb, The Most Southern Place on Earth: The Mississippi Delta and the Roots of Regional Identity 214-22 (1992); Charles M. Payne, I've Got the Light of Freedom: The Organizing Tradition and the Mississippi Freedom Struggle 36-40 (1995); Stephen J. Whitfield, A Death in the Delta: The Story of Emmett Till 15-42 (1988).

[52] Quoted in Dittmer, supra note __, at 53-58 (**check precise page).**

[53] NAACP, "M is for Mississippi and Murder," NAACP Papers, part 20, reel 2, frames 656-58.

[54] Id.

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common pattern: Candidates sought to show that they were the most "blatantly and uncompromisingly prepared to cling to segregation at all costs."[55] As "moderation" became a term of derision, the political center collapsed, leaving only "those who want to maintain the Southern way of life or those who want to mix the races."[56] Moderate critics of massive resistance were labeled "double crossers,"[57] "sugar-coated integrationists,"[58] "cowards,"[59] "traitors," and "burglars . . . [who] want to rob us of our priceless heritage." Previously moderate lawmakers either joined the segregationist bandwagon or were unceremoniously retired from service.

Most southern politicians prudently avoided explicit exhortations to violence, and many affirmatively discouraged it. Still, their extremist rhetoric sounded very like a call to arms and probably encouraged the use of force. Governor Marvin Griffin of Georgia condemned violence but insisted that "no true Southerner feels morally obliged to recognize the legality" of *Brown*, which he called an "act of tryanny," and proclaimed that the South "stands ready to battle side-by-side for its sacred rights, . . . but not with guns."[60] Congressman James Davis of Georgia

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[55] Muse, supra note __, at 168.

[56] *Montgomery Advertiser*, 12 May, 1957, *quoted in* Weldon James, "The South's Own Civil War: Battle for the Schools," in Don Shoemaker, ed., With All Deliberate Speed: Segregation-Desegregation in Southern Schools 15, 23 (1957).

[57] *Southern School News*, Nov. 1954, p.15 (quoting Representative Tuck of Virginia).

[58] *Southern School News*, July 1956, p.3 (quoting Governor Marvin Griffin of Georgia).

[59] This and the following two quotes are from *Southern School News*, Oct. 1959, p.3 (quoting Governor Ross Barnett of Mississippi).

[60] *Southern School News*, Nov. 1954, p.10; June 1956, p.3. (**Please check to see if these two Griffin quotes come from two different stories or just one.)**

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insisted that "[t]here is no place for violence or lawless acts"–but only after calling *Brown* "a monumental fraud which is shocking, outrageous and reprehensible," warning against "meekly accept[ing] this brazen usurpation of power," and denying any obligation "to bow the neck to this new form of tyranny."[61] Such lip service was wholly beyond some southern politicians, such as the Alabama legislator who declared that whites must leave the state, "stay here and be humiliated, or take up our shotguns."[62]

In the end, whether such political demagoguery actually produced violence mattered less than the carefully cultivated perception that it did so. The NAACP constantly asserted such a linkage–by, for example, blaming southern politicians for fostering a climate conducive to the lynching of a black man, Mack Parker, near Poplarville, Mississippi, in 1959.[63] James Meredith, the first black man to attend Ole Miss, attributed the assassination of the NAACP's Mississippi field secretary, Medgar Evers, to "governors of the Southern states and their defiant and provocative actions."[64] One Tennessee lawyer blamed violence related to school desegregation on congressmen who had signed the Southern Manifesto, which assailed *Brown* as a "clear abuse of judicial power" and pledged all "lawful means" of resistance[65]: "What the hell do you expect

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[61] Speech of Rep. James C. Davis of Georgia, 31 March 1956, in Extension of Remarks of Rep. John Bell Williams, *Congressional Record*, 23 Apr. 1956, NAACP Papers, part 20, reel 13, frames 346, 347, 351. **Law Review: If you want to try to find this in the Congressional Record and then cite directly to that, I have no objection. I'm also content to leave as is with reference to NAACP Papers.**

[62] Quoted in NAACP press release, 1 March 1956, part 20, reel 13, frame 168.

[63] *Southern School News,* June 1959, p.16.

[64] *Southern School News*, Aug. 1963, p.20.

[65] The Southern Manifesto is reproduced in *Southern School News*, Apr. 1956, pp. 1, **??** (**Law Review, please fill in appropriate page**).

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these people to do when they have 90 some odd congressmen from the South signing a piece of paper that says you're a southern hero if you defy the Supreme Court?"[66] After a temple was bombed in Atlanta in 1958, Mayor William Hartsfield declared that "[w]hether they like it or not, every rabble-rousing politician is the godfather of the cross-burners and the dynamiters who are giving the South a bad name."[67]

The link between extremist politicians and violence is certainly plausible, but the causal connection between particular public officials and the brutality that inspired civil rights legislation is downright compelling. Two of the most prominent examples are T. Eugene ("Bull") Connor, the police commissioner of Birmingham, and George Wallace, the governor of Alabama. The violence they at best condoned and at worst actively fomented proved critical to transforming national opinion on race and the segregation issue.

Connor had first been elected to the Birmingham City Commission in 1937, when he pledged to crush the communist/integrationist threat posed by the unionization efforts of the Congress of Industrial Organizations.[68] By 1950, however, civic leaders had come to regard Connor a liability because of his extremism and frequently brutal treatment of blacks, and they orchestrated his public humiliation through an illicit sexual encounter. Connor retired from politics in 1953, and signs of a racial detente in Birmingham–including the establishment of the first hospital for blacks, the desegregation of elevators in downtown office buildings, and serious efforts to integrate the police force–quickly followed.

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[66] Quoted in J.W. Peltason, Fifty-Eight Lonely Men: Southern Federal Judges and School Desegregation 138 (1961).

[67] Quoted in Robert E. Bundy to Executives of Voluntary Affiliate Organizations, Circular re: Recent Bombing Incidents, 20 Oct. 1958, part 20, reel 6, frame 723.

[68] For this paragraph, see Glenn T. Eskew, But for Birmingham: The Local and National Movements in the Civil Rights Struggle 91-92, 104-05 (1997): William A. Nunnelley, Bull Connor 4, 30, 34, 36-37, 40-44, 67 (1991).

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After *Brown*, however, the city's racial progress ground to a halt.[69] An interracial committee disbanded in 1956, consultation between the races ceased, and Connor resurrected his political career. In 1957 he regained his city commission seat, defeating an incumbent he attacked as weak on segregation. In the late 1950s, the Klan perpetrated a wave of bombings and brutality, and the police, under Connor's control, declined to interfere. Standing for reelection in 1961, Connor offered the KKK fifteen minutes of "open season" on the Freedom Riders, as they rolled into town. After horrific beatings had been administered to media representatives as well as demonstrators, the *Birmingham News* wondered, "Where were the police?"[70] City voters, who had handed Connor a landslide victory just two weeks earlier, were probably less curious.

In 1963 the Southern Christian Leadership Conference (SCLC), after the failed demonstrations in Albany, Georgia, sought a city with a police chief unlikely to duplicate Laurie Pritchett's restraint.[71] They selected Birmingham, in part because of Connor's treatment of the Freedom Riders two years earlier. Martin Luther King, Jr.'s lieutenant, Wyatt Walker, later

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[69] For this paragraph, see Nunnelley, supra note __, at 4, 51-60, 67, 74-75, 78, 98-101, 107-09; Andrew Michael Manis, *A Fire You Can't Put Out: The Civil Rights Life of Birmingham's Reverend Fred Shuttlesworth* 84, 86, 137, 161, 170-73, 265, 267 (1999); Eskew, supra note __, at 118, 153, 157, 160, 165-66, 175-76; J. Mills Thornton, "Municipal Politics and the Course of the Movement," in Armstead L. Robinson & Patricia Sullivan, eds., *New Directions in Civil Rights Studies* 48-49 (1991).

[70] Quoted in *Southern School News*, June 1963, p.6.

[71] For this paragraph and the following two, see David J. Garrow, Bearing the Cross: Martin Luther King, Jr., and the Southern Christian Leadership Conference 227-28, 231-64 (1988); David J. Garrow, Protest at Selma: Martin Luther King, Jr., and the Voting Rights Act of 1965, at 138-41, 166-68 (1978); Martin Luther King, Jr., Why We Can't Wait 65-66, 69, 79, 114 (1964); Manis, supra note __, at 331-32, 345, 348-49, 365-66, 369-72; Eskew, supra note __, at 3-7, 17, 217-99.

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explained: "We knew that when we came to Birmingham that if Bull Connor was still in control, he would do something to benefit our movement."[72]

The strategy worked brilliantly. Connor eventually unleashed police dogs and fire hoses on the unresisting demonstrators, many of whom were children. Television and newspapers featured images of breathtaking savagery, including one that President John F. Kennedy reported made him sick. Editorials condemned the violence as a national disgrace. Citizens voiced their "sense of unutterable outrage and shame"[73] and demanded that politicians take "action to immediately put to an end the barbarism and savagery in Birmingham."[74] Within ten weeks, spinoff demonstrations had spread to more than one hundred cities.

Televised brutality against peaceful civil rights demonstrators in Birmingham dramatically altered northern opinion on race, and it led directly to the passage of the 1964 Civil Rights Act. Opinion polls revealed that the percentage of Americans who deemed civil rights the nation's most urgent issue rose from 4 percent before Birmingham to 52 percent after.[75] Members of Congress denounced the Birmingham violence and, in the same breath, introduced measures to end federal aid to segregated schools. Kennedy overhauled his earlier civil rights proposals, taking a far stronger stand on black suffrage, desegregation, and racial discrimination in general. Only after the police dogs and fire hoses of Birmingham did he announce on national television that civil rights was a "moral issue as old as the scriptures and as clear as the

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[72] Quoted in Garrow (Bearing the Cross), supra note __, at 227-28.

[73] Rose V. Russell to Pres. Kennedy, 8 May 1963, NAACP Papers, part 20, reel 4, frame 307

[74]; Nubar Esaian to Pres. Kennedy, 8 May 1963, NAACP Papers, part 20, reel 4, frames 313-15.

[75] George H. Gallup, The Gallup Poll: Public Opinion 1937-1971, vol. 3, 1769 (1972).

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American Constitution."[76]

Like Bull Connor, Alabama's governor, George Wallace, was also an unwitting agent of racial progress. Perhaps more than any other individual, Wallace personified the effect of*Brown* on southern politics. Early in his postwar political career, Wallace had been criticized as being "soft" on segregation. In the mid-1950s, however, sensing the changing political winds, he broke with the racially moderate governor, James Folsom, and cultivated conflict with federal authorities over racial issues in his position as Barbour County circuit judge.[77]

But he had not gone far enough. In 1958, Wallace's principal opponent in the Alabama governor's race was Attorney General John Patterson, who bragged of shutting down NAACP operations in the state–and who received the Klan's endorsement. Wallace became the candidate of moderation in comparison, and Patterson won easily, leaving Wallace to ruminate that "they out-niggered me that time, but they will never do it again."[78] He made good on that vow in 1962, winning on a campaign promise of defying federal integration orders. In his inaugural address, he declare, "In the name of the greatest people that have ever trod this earth, I draw the line in the dust and toss the gauntlet before the feet of tyranny and I say segregation now, segregation tomorrow, segregation forever."[79]

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[76] Quoted in *Southern School News*, July 1963, p.16. **Law Review: if the full quotation doesn't appear here, let me know and I'll replace this with a secondary source. Alternatively, we could try to cite the New York Times on June 12, 1963, the day after Kennedy's speech to the nation.**

[77] For this paragraph and the next, see Dan T. Carter, The Politics of Rage: George Wallace, The Origins of the New Conservatism, and the Transformation of American Politics 76, 82, 84-87, 90-96 (1995): Marshall Frady, Wallace 97-98, 106-08, 116, 121-31 (1968).

[78] *Southern School News*, June 1962, p.8.

[79] *Southern School News*, Feb. 1963, pp. 10 -11.

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Like most southern politicians, Wallace publicly condemned violence.[80] Yet his actions from 1963 to 1965 encouraged the brutality that helped transform national opinion on race. During the Birmingham demonstrations, Wallace praised Connor's forcefulness and dispatched several hundred state troopers who readily joined the fray. In the summer of 1963, Wallace fulfilled a campaign pledge by temporarily blocking the entrance to the University of Alabama.[81] That September, Wallace used state troops to block the court-ordered desegregation of public schools in Birmingham, Mobile, and Tuskegee. He also encouraged extremist groups to wage "a boisterous campaign" against desegregation, and he defended rioters, whom he insisted were "not thugs–they are good working people who get mad when they see something like this happen." [82]

Threatened with contempt citations by all five Alabama district judges, Wallace eventually relented. The schools desegregated, but within a week tragedy had struck. Birmingham Klansmen, possibly inspired by such gubernatorial proclamations as "I can't fight federal bayonets with my bare hands,"[83] dynamited the Sixteenth Street Baptist Church, killing four black schoolgirls. Within hours of the bombing on September 15, 1963, two other black teenagers had been killed, one by white hoodlums and the other by police. It was the largest death toll of the civil rights era, and Wallace's role did not go unnoticed. Martin Luther King, Jr., publicly blamed the Alabama governor for "creat[ing] the climate that made it possible for someone to plant that bomb."[84] President Kennedy, noting "a deep sense of outrage and grief,"

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[80] For this paragraph and the next, see Carter, supra note __, at 110-83.

[81] *Southern School News*, June 1963, pp. 1, 5, 6.

[82] Quoted in Carter, supra note __, at 174. **Law Review: I believe both of these quotes are from Carter, but if you can't find one of them there, let me know and I'll find it.**

[83] Quoted in id.

[84] *Southern School News*, Oct. 1963, p.1. **Law Review: The King quotation might be**

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thought it "regrettable that public disparagement of law and order has encouraged violence which has fallen on the innocent."[85] Wallace may not have sought the violence, but his provocative rhetoric probably contributed to it, and he certainly took no measures to prevent it.

Most of the nation was appalled by the murder of innocent schoolchildren. One week after the bombing, tens of thousands of Americans participated in memorial services and marches. Northern whites wrote to the NAACP to join, to condemn, and to apologize. A white lawyer from Los Angeles wrote that "[t]oday I am joining the NAACP; partly, I think, as a kind of apology for being caucasian."[86] Another northerner condemned whites who were complicit in the bombing as "the worst barbarians" and she was "ashamed to think that I bear their color skin."[87] The bombing, she went on, had "certainly changed my attitude," which had been "somewhat lukewarm" on civil rights. A white man from New Rochelle, New York wrote: "How shall I start? Perhaps to say that I am white, sorry, ashamed, and guilty. . . . Those who have said that all whites who, through hatred, intolerance, or just inaction are guilty are right."[88] The NAACP urged its members to "flood Congress with letters in support of necessary civil rights legislation to curb such outrages,"[89] and many of them did.

Despite such growing outrage, Wallace remained enormously popular with his constituents, and he continued to rail against the "shocking" pronouncements of federal "judicial

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[85] Id. **Law Review: same point about Kennedy quote.**

[86] Donald B. Brown to Roy Wilkins, 18 Sept. 1963, NAACP Papers, part 20, reel 3, frame 941.

[87] Elouise May to NAACP, 16 Sept. 1963, NAACP Papers, part 20, reel 3, frame 947.

[88] Robert E. Feir to Roy Wilkins, 23 Sept. 1963, NAACP Papers, part 20, reel 3, frame 959.

[89] NAACP press release, 21 Sept. 1963, NAACP Papers, part 20, reel 3, frame 986.

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tyrant[s]" and to urge local authorities to resist desegregation.[90] His persistence helped ensure that Alabama would once again provide the setting for events that would shock moderate Americans into action. Early in 1965, the SCLC brought its voter registration campaign to Selma, Alabama, in search of another Birmingham-style victory.[91] King and his colleagues were drawn to the site partly by a law enforcement officer of Bull Connor-like proclivities; Dallas County Sheriff Jim Clark had a temper that "could be counted on to provide vivid proof of the violent sentiments that formed white supremacy's core."[92]

Clark did indeed prove unable to restrain himself, and the result was another resounding success. The violence culminated in Bloody Sunday, March 7, 1965, when county and state law enforcement officers viciously assaulted marchers as they crossed the Edmund Pettus Bridge on their way to Montgomery. Governor Wallace had promised that the march would be broken up by "whatever measures are necessary,"[93] and Colonel Al Lingo, Wallace's chief law enforcement lieutenant, insisted that the governor himself had given the order to attack. That evening, ABC television interrupted its broadcast of *Judgment at Nuremberg* for a lengthy and vivid report of peaceful demonstrators being assailed by stampeding horses, flailing clubs, and tear gas. Two

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[90] *Southern School News*, Jan. 1964, pp. 1, 12.

[91] For this paragraph and the next, see Garrow (*Protest at Selma*), supra note __, at 2-3, 32-34, 42-45, 60-61, 73-80, 135, 146-49, 159 table 4-1, 223, 230-31; Stephen L. Longenecker, Selma's Peacemaker: Ralph Smeltzer and Civil Rights Mediation 23-24, 36, 112-13, 123-24, 127, 129-30, 139-42, 162-64, 174-77 (1987); Adam Fairclough, To Redeem the Soul of America: The Southern Christian Leadership Conference and Martin Luther King, Jr. 229-43 (1987); Carter, supra note __, at 246-49.

[92] Quoted in Thornton, supra note __, at 60.

[93] Quoted in Longnecker, supra note __, at 176. **Law Review: please check to make sure this is quoting Wallace rather than Longnecker.**

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white volunteers from the North were among killed in the events surrounding Selma.

The nation was repulsed by the ghastly televised scenes. *Time* reported that "[r]arely in history has public opinion reacted so spontaneously and with such fury."[94] President Johnson "deplored the brutality."[95] Huge sympathy demonstrations took place across the country. Americans demanded remedial action from their congressmen, scores of whom condemned the "deplorable" violence and the "shameful display" in Selma and now endorsed voting rights legislation.[96] On March 15, 1965, President Johnson proposed such legislation in a televised speech before a joint session of Congress. Seventy million Americans watched as the president beseeched them to "overcome this crippling legacy of bigotry and injustice" and declared his faith that "we shall overcome."[97]

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[94] *Time*, 19 March 1965, pp. 23-28. **Law Review: My notes don't make clear which precise page the quotation is on.**

[95] **Law Review: I think the Johnson quote is either in the Time Magazine article cited in the previous note or in Time, 26 March 1965, pp. 19-23. I'd appreciate it if you would check for this.**

[96] Congressional Record, 4984-89, 5014-15 (15 Mar. 1965). **Law Review: The quotations should be on these pages, though you might want to change the cites to the precise pages of the quotes. Also I believe the bluebook has something to say about how to cite this; I wasn't as attentive to the correct form as I might have been. For example, we probably should note in parentheticals which congressmen were responsible for these statements.**

[97] Lyndon Johnson, "Special Message to the Congress: The American Promise (15 March 1965), in Public Papers of the Presidents of the United States: Lyndon B. Johnson, 1965, vol. 1, pp. 281, 284 (Washington, D.C. 1966).

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Before the violent outbreaks of the 1960s, most white northerners had agreed with *Brown* in the abstract, but they were disinclined to push for its enforcement. Indeed, many agreed with President Eisenhower that the NAACP should rein in its demands for immediate desegregation.[98] But televised scenes of officially sanctioned brutality against peaceful black demonstrators by white law enforcement officers in the South horrified the vast majority of Americans; it brought an end to the apathy and led directly to the passage of landmark civil rights legislation. *Brown* was less directly responsible than is commonly supposed for putting those demonstrators on the street, but it was more directly responsible for their violent reception. *Brown* fanned the flames of southern fanaticism and propelled extremist, vitriolic politicians into positions of power. Those politicians in turn ensured a situation ripe for the violence that northerners found unconscionable. By helping lay bare the violence at the core of white supremacy, *Brown* accelerated its demise.

[98] See Klarman, supra note __, at 365-66.

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