

## BROWN AT 50

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**B***BROWN v. Board of Education*<sup>1</sup> 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 civil rights movement.

### I. WHY *BROWN* WAS HARD

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 over how to resolve *Brown*. Indeed, several of them were never fully convinced that they had found a sound legal basis for declaring segregation unconstitutional.<sup>2</sup>

In a memorandum to the files that he dictated the day that *Brown* was decided, Justice 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 inclined that way.<sup>3</sup>

Justices Frankfurter and Jackson, according to Douglas, "viewed the problem with great alarm and thought that the Court should

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<sup>1</sup> 347 U.S. 483 (1954).

<sup>2</sup> 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).

<sup>3</sup> Justice William O. Douglas, Memorandum for the File at 1, *In re School Segregation Cases* (Library of Congress, William O. Douglas Papers, Box 1149, case file: Segregation Cases).

not decide the question if it was possible to avoid it.”<sup>4</sup> Ultimately, however, both believed that “segregation in the public schools was probably constitutional.”<sup>5</sup>

In Justice Douglas’s estimation, in 1952 “the vote would [have been] five to four in favor of the constitutionality of segregation in the public schools.”<sup>6</sup> Other Justices who were counting heads reached roughly similar conclusions. In a letter written to Justice Reed just days after *Brown* was decided, Justice Frankfurter noted that he had “no doubt” that a vote taken in December 1952 would have invalidated segregation by five to four.<sup>7</sup> The dissenters would have been Chief Justice Vinson and Justices Reed, Jackson, and Clark, and the majority would have written “several opinions.”<sup>8</sup>

*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—all indicated that school segregation was permissible. By contrast, most of the Justices privately condemned segregation, which Justice Black referred to as “Hitler’s creed.”<sup>9</sup> Their quandary was how to reconcile these opposing legal and moral views.

Justice Frankfurter’s preferred approach to adjudication required separation of his personal views from the law. He preached that judges must decide cases based upon “the compulsions of governing legal principles,”<sup>10</sup> not “the idiosyncrasies of a merely personal judgment.”<sup>11</sup> In a memorandum he wrote in 1940, Frankfurter noted that “[n]o duty of judges is more important nor more diffi-

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<sup>4</sup> Id.

<sup>5</sup> Id.

<sup>6</sup> Id.

<sup>7</sup> Letter from Justice Felix Frankfurter to Justice Stanley Reed (May 20, 1954) (University of Kentucky, Reed Papers).

<sup>8</sup> Id.

<sup>9</sup> The Supreme Court in Conference (1940–1985): The Private Discussions Behind Nearly 300 Supreme Court Decisions 639 (Del Dickson ed., 2001) (reproducing the April 8, 1950 discussion in *McLaurin v. Oklahoma State Regents for Higher Education*, 339 U.S. 637 (1950)).

<sup>10</sup> Melvin I. Urofsky, *Division and Discord: The Supreme Court Under Stone and Vinson, 1941–1953*, at 130 (1997) [hereinafter Urofsky, *Division and Discord*].

<sup>11</sup> *Adamson v. California*, 332 U.S. 46, 68 (1947) (Frankfurter, J., concurring).

cult to discharge than that of guarding against reading their personal and debatable opinions into the case.”<sup>12</sup>

Yet Justice 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.<sup>13</sup> 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.”<sup>14</sup> The Court could invalidate segregation, Frankfurter believed, only if it was legally as well as morally objectionable.

Yet Justice 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 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.”<sup>15</sup> To be sure, Frankfurter believed that the meaning of constitutional concepts can change over time,<sup>16</sup> 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

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<sup>12</sup> Urofsky, *Division and Discord*, supra note 10, at 109 n.112. This memo was written in conjunction with the first flag-salute case, *Minersville School District v. Gobitis*, 310 U.S. 586 (1940).

<sup>13</sup> Urofsky, *Division and Discord*, supra note 10, at 260; Melvin I. Urofsky, *Felix Frankfurter: Judicial Restraint and Individual Liberties* 128–29 (1991).

<sup>14</sup> Memorandum from Felix Frankfurter, first draft (undated), *microformed on Frankfurter Papers*, pt. 2, reel 4, frame 378 (Univ. Publ’ns of Am.).

<sup>15</sup> Letter from Alexander M. Bickel to Justice Felix Frankfurter (Aug. 22, 1953), *microformed on Frankfurter Papers*, pt. 2, reel 4, frames 212–14 (Univ. Publ’ns of Am.).

<sup>16</sup> Urofsky, *Division and Discord*, supra note 10, at 217–18, 222.

giving a society coherence and continuity[.]”<sup>17</sup> 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.<sup>18</sup> Indeed, on the basis of legislative history and precedent, Frankfurter had to concede that “*Plessy* is right.”<sup>19</sup>

*Brown* presented a similar dilemma for Justice Jackson, who also found segregation anathema. In a 1950 letter, Jackson, who had left the Court during the 1945–46 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 segregation policies.”<sup>20</sup> Yet, like Justice Frankfurter, Jackson thought that judges were obliged to separate their personal views from the law, and he was loath to overrule precedent.

Justice 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.”<sup>21</sup> 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. . . .

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<sup>17</sup> Mary Frances Berry, *Stability, Security, and Continuity: Mr. Justice Burton and Decision-Making in the Supreme Court 1945–1958*, at 142 (1978).

<sup>18</sup> Edith Udell Fierst, Note, *Constitutionality of Educational Segregation*, 17 *Geo. Wash. L. Rev.* 208, 214 n.30 (1949).

<sup>19</sup> Justice William O. Douglas, Conference Notes at 2, *Briggs v. Elliott* (Library of Congress, William O. Douglas Papers, Box 1149, case file: Segregation Cases).

<sup>20</sup> Letter from Justice Robert H. Jackson to Professor Charles Fairman (Mar. 13, 1950) (Library of Congress, Jackson Papers, Box 12, case file: Fairman).

<sup>21</sup> Justice Robert H. Jackson, Draft Concurrence at 1, *In re School Segregation Cases* (Library of Congress, Jackson Papers, Box 184, case file: Segregation Cases).

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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.<sup>22</sup>

Justice 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 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 is designed to advance, and has sometimes called down upon itself severe rebuke.”<sup>23</sup> 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.”<sup>24</sup> Enforcement would require coercing “not merely individuals but the public itself.”<sup>25</sup> 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 or Truman on the as-

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<sup>22</sup> Id. at 5, 10.

<sup>23</sup> Robert H. Jackson, *The Supreme Court in the American System of Government* 80 (1955); see also Gregory S. Chernack, *The Clash of Two Worlds: Justice Robert H. Jackson, Institutional Pragmatism, and Brown*, 72 *Temp. L. Rev.* 51, 53–54, 59–63, 73–75, 88–89 (1999) (describing Jackson’s view that judicial activism could undermine the power of the judiciary).

<sup>24</sup> Robert H. Jackson, *Draft Concurrence at 8–10*, In re School Segregation Cases (Library of Congress, Jackson Papers, Box 184, case file: Segregation Cases).

<sup>25</sup> Id.

sumption that they supported, as Justice 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.”<sup>26</sup> 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 understood the *Lochner*<sup>27</sup> 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.”<sup>28</sup>

Thus, several Justices wondered whether the Court was the right institution to forbid segregation. Several expressed views similar to Chief Justice Vinson’s: If segregation was to be condemned, “it would be better if [Congress] would act.”<sup>29</sup> Justice Jackson cautioned:

However desirable it may be to abolish educational segregation, we cannot, with a proper sense of responsibility, ignore the question whether the use of the 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.<sup>30</sup>

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<sup>26</sup> Letter from Justice Robert H. Jackson to Professor Charles Fairman, *supra* note 20.

<sup>27</sup> *Lochner v. New York*, 198 U.S. 45 (1905).

<sup>28</sup> WHR [William H. Rehnquist], A Random Thought on the Segregation Cases at 2, In re School Segregation Cases (Library of Congress, Jackson Papers, Box 184, case file: Segregation Cases).

<sup>29</sup> Justice Harold H. Burton, Conference Notes at 1, In re School Segregation Cases (Library of Congress, Harold H. Burton Papers, Box 244).

<sup>30</sup> Jackson, *supra* note 24, at 7–8.

“[I]f we have to decide the question,” he lamented, “then representative government has failed.”<sup>31</sup>

## II. WHY *BROWN* WAS POSSIBLE

In the end, even the most conflicted Justices voted to invalidate segregation. How were they able to overcome their ambivalence? All judicial decisionmaking involves extralegal, or “political” considerations, such as the judges’ personal values, social mores, and external political pressure.<sup>32</sup> 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,<sup>33</sup> 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.<sup>34</sup> The ideology of the war was antifascist and pro-democratic, 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.”<sup>35</sup> 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 course of the decade, more than one and a half million Southern blacks, pushed by changes in Southern

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<sup>31</sup> Douglas, *supra* note 19, at 2.

<sup>32</sup> For an elaboration on this view of how judges decide cases, see Klarman, *supra* note 2, at 4–6, 446–54.

<sup>33</sup> *Gong Lum v. Rice*, 275 U.S. 78 (1927).

<sup>34</sup> This and the following three paragraphs are based on Klarman, *supra* note 2, at 173–93, in which the relevant literature is cited.

<sup>35</sup> Robert J. Norrell, *Reaping the Whirlwind: The Civil Rights Movement in Tuskegee* 60–61 (1985).

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 rural areas to cities within the South, facilitating the creation of a black middle class that had the inclination, capacity, and opportunity to engage in coordinated social protest.

The onset of the Cold War in the late 1940s provided 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, "[r]acial discrimination furnishes grist for the Communist propaganda mills."<sup>36</sup> After *Brown*, supporters of the decision boasted that America's leadership of the free world "now rests on a firmer basis"<sup>37</sup> and that American democracy had been "vindicat[ed] . . . in the eyes of the world."<sup>38</sup>

By the early 1950s such forces had produced concrete racial reforms. In 1947, Jackie Robinson led the desegregation of major league baseball. In 1948, President Harry S Truman issued executive orders desegregating the federal military and the civil service. Dramatic changes in racial practices were occurring even in the South. Black voter registration there increased from three percent in 1940 to twenty percent in 1950.<sup>39</sup> 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.

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<sup>36</sup> Brief for the United States as Amicus Curiae at 6, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (No. 1), reprinted in 49 Landmark Briefs and Arguments of the Supreme Court of the United States 113, 121 (Philip B. Kurland & Gerhard Casper eds., 1975); see also Mark V. Tushnet, *Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936–1961*, at 172–73 (1994) (describing the history of this "most important brief").

<sup>37</sup> Educators Comment On Schools Decision, *Chicago Defender*, May 22, 1954, at 5 (quoting John Lewis, President of Morris Brown College in Atlanta, Georgia).

<sup>38</sup> *Id.* at 6 (quoting William R. Strassner, President of Shaw University in Salem, North Carolina).

<sup>39</sup> 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) [hereinafter Garrow, *Protest at Selma*].

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. Justice Minton detected “a different world today” with regard to race.<sup>40</sup> Justice 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.”<sup>41</sup> Justice 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.”<sup>42</sup> Blacks had thus “overcome the presumptions” on which the system was based and race “no longer affords a reasonable basis” for educational classifications.<sup>43</sup>

It was these sorts of changes that made *Brown* possible. Justice 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.”<sup>44</sup> 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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<sup>40</sup> Justice Harold H. Burton, Conference Notes at 9–10, In re School Segregation Cases (Library of Congress, Harold H. Burton Papers, Box 244).

<sup>41</sup> Memorandum from Felix Frankfurter, supra note 14.

<sup>42</sup> Jackson, supra note 21, at 1, 20.

<sup>43</sup> Id. at 20–21.

<sup>44</sup> Justice William O. Douglas, Memorandum to File (Jan. 25, 1960), in *The Douglas Letters: Selections from the Private Papers of Justice William O. Douglas* 169, 169 (Melvin I. Urofsky ed., 1987).

III. *BROWN* AND THE CIVIL RIGHTS MOVEMENT

If *Brown* did not create the movement for racial change that swept the nation in the 1950s and 1960s, what were its contributions to that movement?<sup>45</sup> 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,”<sup>46</sup> and another later recalled that blacks “literally got out and danced in the streets.”<sup>47</sup> *Brown* also inspired Southern blacks to file petitions and lawsuits challenging school segregation, even in parts 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. By the early 1960s, a powerful direct-action protest movement—sit-ins, freedom rides, and street demonstrations—had exploded in the South.<sup>48</sup> 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 and 1962; Mississippi officials defused the Freedom Rides in a similar manner in the summer of 1961. When Southern sheriffs used beatings, police dogs, and fire hoses to suppress protestors, however, media attention escalated, and Northerners reacted with horror and outrage. Brutal assaults on peaceful demonstrators by Southern law enforcement officers transformed Northern opinion on racial issues and enabled the passage of landmark civil rights legislation.

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<sup>45</sup> The connection between *Brown* and the civil rights movement is explored in greater detail in Klarman, *supra* note 2, at 363–442.

<sup>46</sup> Educators Comment On Schools Decision, *supra* note 37, at 5 (quoting Dr. Horace M. Bond, President of Lincoln University).

<sup>47</sup> Aldon D. Morris, *The Origins of the Civil Rights Movement: Black Communities Organizing for Change* 81 (1984) (quoting Dr. Benjamin Mays, President of Morehouse College).

<sup>48</sup> For this paragraph, see generally Klarman, *supra* note 2, at 385–442.

*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 progress on racial reform in the region. Before *Brown*, most white Southerners thought that the NAACP “at worst was a bunch of Republicans,”<sup>49</sup> but afterwards the organization “became an object of consuming hatred.”<sup>50</sup> 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*<sup>51</sup> in 1950, 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 were willing to go to violent lengths to maintain white supremacy and resist desegregation. After years of quiescence, the Ku Klux Klan (“KKK”) reappeared in such states as South Carolina, Florida, and Alabama.<sup>52</sup> A Klan leader reported that *Brown* created “a situation loaded with dynamite” and “really gave us a push.”<sup>53</sup> Now that the Justices had “abolished the Mason-Dixon line,” Klansmen vowed “to establish the Smith & Wesson line.”<sup>54</sup> White citizens’ councils, organizations committed to preserving segregation while ostensibly eschewing the violent tactics of the Klan, also took a militant stance. A Mississippi council asserted that “there is a point beyond which even the most judicious

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<sup>49</sup> Letter from Roy Wilkins to W. Lester Banks (Aug. 20, 1957), *microformed on Papers of the NAACP*, pt. 20, reel 12, frame 982 (John H. Bracey, Jr. & August Meier eds., Univ. Publ’ns of Am.) [hereinafter NAACP Papers].

<sup>50</sup> Benjamin Muse, *Ten Years of Prelude: The Story of Integration Since the Supreme Court’s 1954 Decision* 39 (1964).

<sup>51</sup> 339 U.S. 629 (1950) (holding that the Fourteenth Amendment required that a qualified black student be admitted to the all-white University of Texas Law School).

<sup>52</sup> See Klarman, *supra* note 2, at 392.

<sup>53</sup> N.K. Perlow, *KKK Leader Warns: ‘We Mean Business,’* *Police Gazette*, Aug. 1956, at 5, *microformed on NAACP Papers*, *supra* note 49, pt. 20, reel 13, frame 444.

<sup>54</sup> Stan Opatowsky, *Dixie Dynamite: The Inside Story of the White Citizens Councils*, *N.Y. Post*, Jan. 20, 1957, at 3, *microformed on NAACP Papers*, *supra* note 49, pt. 20, reel 13, frame 682.

restraint becomes cowardice.”<sup>55</sup> 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.”<sup>56</sup> 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.<sup>57</sup>

Three murders in Mississippi in 1955 showed that the vitriolic response to *Brown* was not merely rhetorical.<sup>58</sup> Although Mississippi blacks exercising their right to vote in the late 1940s had risked harassment and beatings, the stakes were raised when two blacks, the Reverend George Lee and Lamar Smith, 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 Emmett Till was also murdered in Mississippi in 1955 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.”<sup>59</sup> The NAACP published a pamphlet that year entitled, “M is for Mississippi and Murder.”<sup>60</sup>

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.<sup>61</sup> 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

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<sup>55</sup> Citizens’ Council Magazine Comments on ‘Moderates,’ Southern School News, Feb. 1963, at 17.

<sup>56</sup> Little Rock, Ark. District Sees 3 New Developments, Southern School News, Aug. 1957, at 7.

<sup>57</sup> Handbill circulated at Montgomery citizens’ council meeting (Feb. 10, 1957), microformed on NAACP Papers, supra note 49, pt. 20, reel 5, frame 126.

<sup>58</sup> For this paragraph, and more about the murders of the Reverend George Lee, Lamar Smith, and Emmett Till, see James C. Cobb, *The Most Southern Place on Earth: The Mississippi Delta and the Roots of Regional Identity* 214–22 (1992); John Dittmer, *Local People: The Struggle for Civil Rights in Mississippi* 53–58 (1994); 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).

<sup>59</sup> Dittmer, supra note 58, at 58.

<sup>60</sup> NAACP, *M is for Mississippi and Murder* (Jan. 1956), microformed on NAACP Papers, supra note 49, pt. 20, reel 2, frames 656–58.

<sup>61</sup> Whitfield, supra note 58, at 22–23, 145.

(Mississippi) *Herald* declared, Till's blood was on the hands of the Supreme Court Justices who had decided *Brown*.<sup>62</sup> Yet the *Herald* might more accurately have blamed Till's murder and the South's stunning racial 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 common pattern: Candidates sought to show that they were the most "blatantly and uncompromisingly prepared to cling to segregation at all costs."<sup>63</sup> As "moderation" became a term of derision, the political center collapsed, leaving only "those who want[ed] to maintain the Southern way of life or those who want[ed] to mix the races."<sup>64</sup> Moderate critics of massive resistance were labeled "double crosser[s],"<sup>65</sup> "sugar-coated integrationists,"<sup>66</sup> "cowards," "traitors," and "burglars . . . [who] want to rob us of our priceless heritage."<sup>67</sup> 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 much 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 bound to recognize the legality" of *Brown*, which he called an "act of tyranny,"<sup>68</sup> and proclaimed that the South "stands ready to battle side-by-side for its sacred rights . . . but not with guns."<sup>69</sup> Congressman James Davis of Georgia insisted that "[t]here

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<sup>62</sup> See NAACP, *M is for Mississippi and Murder*, supra note 60 (quoting a *Herald* piece from early September, 1955).

<sup>63</sup> Muse, supra note 50, at 168.

<sup>64</sup> See Weldon James, *The South's Own Civil War: Battle for the Schools*, in *With All Deliberate Speed: Segregation-Desegregation in Southern Schools* 15, 23 (Don Shoemaker ed., 1957) (quoting the *Montgomery Advertiser*, May 12, 1957).

<sup>65</sup> Virginia, *Southern School News*, Nov. 1954, at 15 (quoting Rep. Tuck of Virginia).

<sup>66</sup> Georgia College Requirements Are Tighter, *Southern School News*, July 1956, at 3 (quoting Gov. Marvin Griffin of Georgia).

<sup>67</sup> The preceding three quotes are from *Legal Action Studied Following School Enrollment Rejection*, *Southern School News*, Oct. 1959, at 3 (quoting Gov. Ross Barnett of Mississippi).

<sup>68</sup> Georgia, *Southern School News*, Nov. 4, 1954, at 10.

<sup>69</sup> Louisiana is 6th State to Adopt Resolution of Interposition, *Southern School News*, June 1956, at 3.

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.”<sup>70</sup> Such lip service to nonviolence 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.”<sup>71</sup>

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.<sup>72</sup> James Meredith, the first black man to attend the University of Mississippi, attributed the assassination of the NAACP’s Mississippi field secretary, Medgar Evers, to “governors of the Southern states and their defiant and provocative actions.”<sup>73</sup> One Tennessee lawyer blamed violence related to school desegregation on congressmen who had signed the Southern Manifesto,<sup>74</sup> which assailed *Brown* as a “clear abuse of judicial power” and pledged all “lawful means” of resistance: “What the hell do you expect 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[?]”<sup>75</sup> After a temple was bombed in Atlanta in 1958, Mayor William Hartsfield

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<sup>70</sup> Rep. James C. Davis of Georgia, Speech In Defense of Constitutional Government and State Sovereignty, Delivered at West Memphis, Ark. (Mar. 31, 1956), in 84 Cong. Rec. 58,513, at 2, 3, 7 (Apr. 23, 1956) (extension of remarks of Rep. John Bell Williams of Mississippi), *microformed on* NAACP Papers, *supra* note 49, pt. 20, reel 13, frames 345–51.

<sup>71</sup> Press Release, NAACP, Alabama Lawmaker’s Call to Race Violence is Condemned by NAACP (Mar. 1, 1956) (quoting Rep. W.L. Martin), *microformed on* NAACP Papers, *supra* note 49, pt. 20, reel 5, frame 168.

<sup>72</sup> Officials Express Concern At Poplarville Incident, Southern School News, May 1959, at 8.

<sup>73</sup> Injunction Motion Asks Jackson Desegregate Schools by This Fall, Southern School News, Aug. 1963, at 20.

<sup>74</sup> The Southern Manifesto is reproduced in ‘Southern Manifesto’ Criticizes Supreme Court, Southern School News, Apr. 1956, at 2.

<sup>75</sup> J.W. Peltason, Fifty-Eight Lonely Men: Southern Federal Judges and School Desegregation 138 (1961) (anonymous quote).

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.”<sup>76</sup>

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 in transforming national opinion on race.

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.<sup>77</sup> By 1950, however, civic leaders had come to regard Connor as 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 détente 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.

After *Brown*, however, the city’s racial progress ground to a halt.<sup>78</sup> 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 other brutalities, while

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<sup>76</sup> Memorandum from Robert E. Bondy, Director, National Social Welfare Assembly, Inc., to Executives of Voluntary Affiliate Organizations (Oct. 20, 1958), *microformed on NAACP Papers*, supra note 49, pt. 20, reel 6, frame 723 (quoting Hartsfield).

<sup>77</sup> For this paragraph, see Glenn T. Eskew, *But for Birmingham: The Local and National Movements in the Civil Rights Struggle* 91–105 (1997); William A. Nunnolley, *Bull Connor* 4, 40–44, 67 (1991).

<sup>78</sup> For this paragraph, see Eskew, supra note 77, at 118, 153, 157; Andrew M. Manis, *A Fire You Can’t Put Out: The Civil Rights Life of Birmingham’s Reverend Fred Shuttlesworth* 84, 86, 137, 161, 170–73 (1999); Nunnolley, supra note 77, at 4, 51–67, 74–75, 78; J. Mills Thornton III, *Municipal Politics and the Course of the Movement*, in *New Directions in Civil Rights Studies* 38, 48–49 (Armstead L. Robinson & Patricia Sullivan eds., 1991).

the police, under Connor's control, declined to interfere. Standing for reelection in 1961, Connor offered the Klan fifteen minutes of "open season" on the Freedom Riders, as they rolled into town.<sup>79</sup> After horrific beatings had been administered to media representatives as well as demonstrators, the *Birmingham News* wondered, "[w]here were the police?"<sup>80</sup> 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.<sup>81</sup> 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 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."<sup>82</sup>

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"<sup>83</sup> and demanded that politicians take "action to immediately put to an end the barbarism and savagery in Birmingham."<sup>84</sup> Within ten weeks, spin-off demonstrations had spread to more than one hundred cities.

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<sup>79</sup> Eskew, *supra* note 77, at 153–57; Manis, *supra* note 78, at 262–64; Nunnelley, *supra* note 77, at 98–99.

<sup>80</sup> See Eskew, *supra* note 77, at 160; Nunnelley, *supra* note 77, at 101.

<sup>81</sup> For this paragraph and the following two, and more on the SCLC's Birmingham strategy, see Eskew, *supra* note 77, at 3–7, 217–99; David J. Garrow, *Bearing the Cross: Martin Luther King, Jr., and the Southern Christian Leadership Conference* 227–28, 231–64 (1988) [hereinafter *Garrow, Bearing the Cross*]; Garrow, *Protest at Selma*, *supra* note 39, at 138–41, 166–68; Martin Luther King, Jr., *Why We Can't Wait* 67–69, 79, 114 (1964); Manis, *supra* note 78, at 331–32, 349, 365–66, 369–72.

<sup>82</sup> Garrow, *Bearing the Cross*, *supra* note 81, at 227–28.

<sup>83</sup> Letter from Rose V. Russell, Legislative Representative, Teachers Union of the City of New York, to President John F. Kennedy (May 8, 1963), *microformed on NAACP Papers*, *supra* note 49, pt. 20, reel 4, frame 307.

<sup>84</sup> Letter from Nubar Esaian to President John F. Kennedy (May 8, 1963), *microformed on NAACP Papers*, *supra* note 49, pt. 20, reel 4, frames 313–15.

Televised brutality against peaceful civil rights demonstrators in Birmingham dramatically altered Northern opinions on race issues, leading directly to the passage of the Civil Rights Act of 1964.<sup>85</sup> Opinion polls revealed that the percentage of Americans who deemed civil rights the nation's most urgent issue rose from four percent before Birmingham to fifty-two percent after.<sup>86</sup> Members of Congress denounced the Birmingham violence and, in the same breath, called for measures to end federal aid to segregated schools. Kennedy overhauled his earlier civil rights proposals and took 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 American Constitution."<sup>87</sup>

Like Bull Connor, Alabama's governor, George Wallace, was an unwitting agent of racial progress. Perhaps more than any other individual, Wallace personified the radicalizing 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.<sup>88</sup>

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,<sup>89</sup> leaving Wallace to ruminate that "they out-niggered me that time, but they will never do it again."<sup>90</sup> He made good on

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<sup>85</sup> Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

<sup>86</sup> George H. Gallup, 3 *The Gallup Poll: Public Opinion 1937–1971*, at 1769 (1972).

<sup>87</sup> Radio and Television Report to the American People on Civil Rights, 1963 Pub. Papers 469 (June 11, 1963).

<sup>88</sup> Dan T. Carter, *The Politics of Rage: George Wallace, the Origins of the New Conservatism, and the Transformation of American Politics* 84–86 (1995).

<sup>89</sup> See Marshall Frady, *Wallace* 126–31 (1968).

<sup>90</sup> Numan V. Bartley & Hugh D. Graham, *Southern Politics and the Second Reconstruction* 67 (1975).

that vow in 1962, winning on a campaign promise to defy federal integration orders. In his inaugural address, he declared: "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 . . . ." <sup>91</sup>

Like most Southern politicians, Wallace publicly condemned violence. <sup>92</sup> 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. <sup>93</sup> In the summer of 1963, Wallace fulfilled a campaign pledge by temporarily blocking the entrance to the University of Alabama. <sup>94</sup> That September, Wallace used state troopers 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." <sup>95</sup>

Threatened with contempt citations by all five Alabama district judges, Wallace eventually relented. The schools desegregated, but within a week tragedy struck. Birmingham Klansmen, possibly inspired by such gubernatorial proclamations as "I can't fight federal bayonets with my bare hands," <sup>96</sup> dynamited the Sixteenth Street Baptist Church, killing four black schoolgirls. <sup>97</sup> Within hours of the bombing on September 15, 1963, two other black teenagers were 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

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<sup>91</sup> Gov. Wallace Reaffirms Intent To Keep Segregation, *Southern School News*, Feb. 1963, at 10.

<sup>92</sup> Carter, *supra* note 88, at 114.

<sup>93</sup> See *id.* at 119–21.

<sup>94</sup> Court Tells University of Alabama to Admit Three Negro Students, *Southern School News*, June 1963, at 1; Gov. Wallace Says Alabama to Uphold Law During Crisis, *id.* at 5.

<sup>95</sup> Carter, *supra* note 88, at 174 (quoting John Herbers, Wallace Urges Racial 'Reality'; Scores the Advice of 'Theorists,' *N.Y. Times*, Sept. 6, 1963, at 14).

<sup>96</sup> See Carter, *supra* note 88, at 173.

<sup>97</sup> See Carter, *supra* note 88, at 176–81.

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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.”<sup>98</sup> President Kennedy, noting “a deep sense of outrage and grief,” thought it “regrettable that public disparagement of law and order has encouraged violence which has fallen on the innocent.”<sup>99</sup> 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 the bombing, 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.”<sup>100</sup> 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.”<sup>101</sup> The bombing, she went on, had “certainly changed my attitude,” which had been “somewhat lukewarm” on civil rights.<sup>102</sup> 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.”<sup>103</sup> The NAACP urged its members to “flood Congress with letters in support of necessary civil rights legislation to curb such outrages,”<sup>104</sup> and many of them did.

Despite such growing outrage, Wallace remained enormously popular with his constituents, and he continued to rail against the

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<sup>98</sup> Three Arrested, Dynamite Seized in Birmingham, *Southern School News*, Oct. 1963, at 1.

<sup>99</sup> *Id.*

<sup>100</sup> Letter from Donald B. Brown to Roy Wilkins (Sept. 18, 1963), *microformed on NAACP Papers*, supra note 49, pt. 20, reel 3, frame 941.

<sup>101</sup> Letter from Elouise May to NAACP (Sept. 16, 1963), *microformed on NAACP Papers*, supra note 49, pt. 20, reel 3, frame 947.

<sup>102</sup> *Id.*

<sup>103</sup> Letter from Robert E. Feir to Roy Wilkins (Sept. 23, 1963), *microformed on NAACP Papers*, supra note 49, pt. 20, reel 3, frame 959.

<sup>104</sup> Press Release, NAACP, NAACP Units Hold Services for Birmingham Bomb Victims (Sept. 21, 1963), *microformed on NAACP Papers*, supra note 49, pt. 20, reel 3, frame 986.

“shocking” pronouncements of federal “judicial tyrant[s]” and to urge local authorities to resist desegregation.<sup>105</sup> 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. King and his colleagues were drawn to the site partly by a law enforcement officer of Bull Connor-like proclivities:<sup>106</sup> 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.”<sup>107</sup>

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,”<sup>108</sup> 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.<sup>109</sup> Two white volunteers from the North were among those 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.”<sup>110</sup> President Johnson “deplored the brutality.”<sup>111</sup> Huge sympathy demonstrations took place across

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<sup>105</sup> Auburn Quietly Registers Negro; Strict Security Rules Enforced, Southern School News, Jan. 1964, at 1.

<sup>106</sup> For this paragraph and the next, discussing the events in Selma, Alabama in early 1965, see Carter, *supra* note 88, at 246–49; Adam Fairclough, *To Redeem the Soul of America: The Southern Christian Leadership Conference and Martin Luther King, Jr.* 229–43 (1987); Stephen L. Longenecker, *Selma’s Peacemaker: Ralph Smeltzer and Civil Rights Mediation* 174–77 (1987).

<sup>107</sup> Thornton, *supra* note 78, at 60.

<sup>108</sup> Longenecker, *supra* note 106, at 176.

<sup>109</sup> See Carter, *supra* note 88, at 248.

<sup>110</sup> Civil Rights, *Time*, Mar. 19, 1965, at 24.

<sup>111</sup> *Id.*

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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.<sup>112</sup> 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 the crippling legacy of bigotry and injustice” and declared his faith that “we shall overcome.”<sup>113</sup>

#### CONCLUSION

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.<sup>114</sup> 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.

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<sup>112</sup> 111 Cong. Rec. 4984–89 (1965) (quoting Senators Douglas and Scott, respectively).

<sup>113</sup> Lyndon B. Johnson, Special Message to the Congress: The American Promise, *in* 1965 Pub. Papers 281, 284 (Mar. 15, 1965).

<sup>114</sup> See Klarman, *supra* note 2, at 365–66.