Boden Lecture

Brown v. Board of Education

Why was it a hard case and how did the decision matter?

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I. Why was *Brown* a hard case?

Most people today would be surprised to learn that *Brown v. Board of Education*, probably the most famous decision in the history of the U.S. Supreme Court, 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.

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 inclined that way.

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 Stanley 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. 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 Hugo Black called "Hitler's creed." 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

Civil Rights March on Washington, D.C. Library of Congress Prints and Photographs Division, 1963.

upon "the compulsions of governing legal principles," not "the idiosyncrasies of a merely personal judgment." 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." 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. Nonetheless, he insisted that his personal views were of limited relevance to the legal question of whether segregation was constitutional. The Court could invalidate the practice, Frankfurter believed, only if it was legally as well as morally objectionable.

School integration at Barnard School, Washington, D.C. Library of Congress Prints and Photographs Division, 1955.

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 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." Frankfurter was no doctrinaire originalist; he believed that the meaning of constitutional concepts can change over time. But this did not mean that judges were free to write their own moral views into the Constitution. Nor could Frankfurter maintain that evolving social standards, quite apart from the convictions of the justices, condemned segregation; in the early 1950s, 21 states and the District of Columbia still had mandatory or optional school segregation. Precedent also strongly supported the practice. Of 44 challenges to school segregation adjudicated by state appellate and lower federal courts between 1865 and 1935, not one had succeeded. Indeed, on the basis of legislative history and precedent, Frankfurter had to concede that "Plessy is right."

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 segregation policies." 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." 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.

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 was designed to

advance, and has sometimes called down upon itself severe rebuke." 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." 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 President Franklin D. Roosevelt or President Harry S. 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." 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* era, the period between 1905 and 1937, when the Court had invalidated minimum-wage, maximum-hour, and 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."

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

In the end, even the most conflicted justices voted to invalidate segregation. How were they able to overcome their ambivalence? All judicial decision-making involves extralegal or "political" considerations, such as the judges' personal values, social mores, and external political pressure. But when the law—as reflected in text, original understanding, precedent, and custom—is clear, judges will generally follow it. And 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, 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. 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." Thousands more joined the NAACP, and many became civil rights litigants.

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 agriculture and pulled by wartime industrial demand, migrated to northern cities. This mass relocation—from a region in which blacks were nearly universally disenfranchised 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 coordinated 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." After *Brown*, supporters of the decision boasted that America's leadership of the free world "now rests on a firmer basis" and that American democracy had been "vindicat[ed] . . . in the eyes of the world."

By the early 1950s, such forces had produced concrete racial reforms. In 1947, Jackie Robinson desegregated major league baseball. In 1948, President Truman issued executive orders desegregating the federal military and civil service. In 1950, Ralph Bunche became

the first black man to win a Nobel Peace Prize. Dramatic changes in racial practices were occurring even in the South. Black voter registration there increased from 3 percent in 1940 to 20 percent in 1950. Dozens of urban police forces in the South hired their first black officers, and blacks began serving again on southern juries, often for the first time since Reconstruction. Minor-league baseball teams, even in such places as Montgomery and Birmingham, Alabama, signed their first black players. Most southern states peacefully desegregated their graduate and professional schools under court order.

As they deliberated over *Brown*, the justices expressed astonishment at the extent of the recent changes. 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." Jackson may have gone farthest, 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."

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." 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.

II. How did *Brown* matter?

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? 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," and another later recalled that blacks "literally got out and danced in the streets." *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. 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. 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* 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; a Klan leader reported that *Brown* created "a situation loaded with dynamite" and "really gave us a push." Now that the justices had "abolished the Mason-Dixon line," Klansmen vowed "to establish the Smith and Wesson line." Even citizens' councils, organizations committed to preserving segrega-

The court that decided *Brown*. Front row, left to right: Felix Frankfurter (1939–1962), Hugo Black (1937–1971), Chief Justice Earl Warren (1953–1969), Stanley F. Reed (1938–1957), William O. Douglas (1939–1975). Back row, left to right: Tom C. Clark (1949–1967), Robert H. Jackson (1941–1954), Harold H. Burton (1945–1958), Sherman Minton (1949–1956).

tion while ostensibly eschewing the violent tactics of the Klan, took a militant stance. 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." 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.

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." As "moderation" became a term of derision, the political center collapsed, and moderate critics of massive resistance were labeled "double crossers," "sugar-coated integrationists," "cowards," and "traitors." 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 tyranny." Congressman James Davis of Georgia 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" and denying any obligation "to bow the neck to this new form of tyranny."

In the end, whether such political demagoguery actually produced violence mattered less than the carefully cultivated perception that it did so. African-American leaders and the NAACP constantly asserted such a linkage. 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." 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: "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?"

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 that 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. 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 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.

After *Brown*, however, the city's racial progress ground to a halt. 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 reelec-

tion 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?" 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. 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."

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" and demanded that politicians take "action to immediately put to an end the barbarism and savagery in Birmingham." Within 10 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. Members of Congress denounced the Birmingham violence and, in the same breath, introduced measures to end federal aid to segregated schools. Only after the police dogs and fire hoses of Birmingham did President Kennedy announce on national television that civil rights was a "moral issue as old as the scriptures and as clear as the American Constitution."

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.

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." He made good on that vow in 1962, winning on a campaign promise of defying 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."

Like most southern politicians, Wallace publicly condemned violence. Yet his actions encouraged the brutality that helped transform national opinion on race. In the summer of 1963, Wallace fulfilled his campaign pledge by temporarily blocking the entrance to the University of Alabama to prevent the matriculation of two black students. 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, who he insisted were "not thugs—they are good working people who get mad when they see something like this happen."

Threatened with contempt citations by all five Alabama federal district judges, Wallace eventually relented. The schools desegregated, but within a week

Civil Rights March on Washington. U.S. National Archives, 1963.

tragedy had struck. Birmingham Klansmen, possibly inspired by such gubernatorial proclamations as "I can't fight federal bayonets with my bare hands," 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." 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." 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." 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." A white youngster 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." The NAACP urged its members to "flood Congress with letters in support of necessary civil rights legislation to curb such outrages," 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 tyrant[s]" and to urge local authorities to resist desegregation. 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—Dallas County Sheriff Jim Clark.

Clark played his role to perfection, and the result was another resounding success for the civil rights movement. 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," 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 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." President Lyndon Baines Johnson "deplored the brutality." 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. 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."

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 Dwight D. Eisenhower that the NAACP should rein in its demands for immediate desegregation. 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. ■