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School Desegregation, Law and Order, and Litigating Social Justice in Alabama, 1954-1973

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SCHOOL DESEGREGATION, LAW AND ORDER, AND LITIGATING SOCIAL JUSTICE IN ALABAMA, 1954-1973

by

JOSEPH M. BAGLEY

Under the Direction of Robert Baker and Michelle Brattain

ABSTRACT

This study examines the legal struggle over school desegregation in Alabama in the two decades following the Supreme Court's *Brown v. Board* decision of 1954. It seeks to better understand the activists who mounted a litigious assault on segregated education, the segregationists who opposed them, and the ways in which law shaped both of these efforts. Inspired by the National Association for the Advancement of Colored People's (NAACP) campaign to implement *Brown*, blacks sought access to their constitutional rights in the state's federal courts, where they were ultimately able to force substantial compliance. Whites, however, converted massive resistance into an ostensibly colorblind movement to preserve "law and order," while at the same time taking effective measures to preserve segregation and white privilege.

As soon as the NAACP implementation campaign began, self-styled moderate segregationists began to abandon self-defeating forms of resistance and to fashion a creed of "law and order." When black activists achieved a litigious breakthrough in 1963, the developing creed allowed segregationists to reject violence and outright defiance of the law, to accept token desegregation, and to begin to stake their own claims to constitutional rights – all without forcing them to repudiate segregation and white supremacy. When continuing litigation forced school systems to abandon ineffective "freedom of

choice” desegregation plans for compulsory pupil assignment plans, these so-called moderates began using their individual rights language to justify flight to private segregationist academies, independent suburban school systems, and otherwise safely white school districts. Political and legal historians have underappreciated the deep and broad roots of the narrative of white racial innocence, the endurance of massive resistance, and the pivotal role which school desegregation litigation played in channeling both into a broader movement towards modern conservatism.

The cases considered here – particularly the statewide *Lee v. Macon County Board of Education* case – demonstrate the effectiveness of litigation in bringing down official state and local barriers to equal opportunity for minorities and in enforcing constitutional law. But they also showcase the limits of litigation in effecting social justice in the face of powerfully constructed narratives of resistance seemingly built upon the nation’s founding principles.

INDEX WORDS: Alabama, Civil rights, School desegregation, Integration, Education, Law, Politics, Litigation, Conservatism, New Right, Social justice, Equality, Constitutional law, Massive resistance, Segregationists, Segregation, White supremacy, Individual rights, Freedom of association, Liberalism, Racial innocence

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JOSEPH M. BAGLEY

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Doctor of Philosophy

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TABLE OF CONTENTS

ACKNOWLEDGMENTS..... iv

TABLE OF CONTENTS..... vi

INTRODUCTION..... 1

PART I: THE TRIUMPH OF MASSIVE RESISTANCE AND THE LITIGIOUS BREAKTHROUGH, 1954-63..... 26

 CHAPTER 1: THE NAACP, THE WHITE CITIZENS’ COUNCIL, AND THE FATE OF BI-RACIAL LIBERALISM .. 26

 CHAPTER 2: THE FALL OF JIM FOLSOM, THE RISE OF JOHN PATTERSON, AND THE BANISHMENT OF THE
 NAACP, 1955-59..... 72

 CHAPTER 3: FRED SHUTTLESWORTH, THE ACMHR, AND THE INITIATION OF LITIGATION, 1956-59 ... 123

 CHAPTER 4: THE FIFTH CIRCUIT, THE DEPARTMENT OF JUSTICE, AND THE PROMISE OF LITIGATION,
 1962 151

 CHAPTER 5: THE LITIGIOUS BREAKTHROUGH BEGINS, SPRING, 1963..... 178

 CHAPTER 6: “THE LAST GRAIN OF SALT FROM THE LEGAL HOURGLASS,” SUMMER, 1963 208

 CHAPTER 7: “THE PURSUIT OF ALABAMA’S HAPPINESS” 262

PART II: THE LITIGIOUS ASSAULT AND THE REARTICULATION OF RESISTANCE, 1964-73 290

 CHAPTER 8: “NOW A SINGLE SHOT CAN DO IT”: *LEE V. MACON* AND THE CONCEPTION OF THE
 STATEWIDE INJUNCTION, SPRING, 1964 290

 CHAPTER 9: RUSSIAN ROULETTE, ALABAMA STYLE: *LEE V. MACON*, THE CIVIL RIGHTS ACT, AND THE
 HEW GUIDELINES, 1964-65..... 329

 CHAPTER 10: “BETWEEN THE DEVIL AND THE DEEP”: DEFYING THE REVISED HEW GUIDELINES, 1965-
 66 371

CHAPTER 11: “SEGREGATION IS STILL A PERFECTLY GOOD WORD”: FREEDOM OF CHOICE IN PRACTICE, <i>LEE V. MACON</i> ON TRIAL, 1966-67	414
CHAPTER 12: “THE COURT IS THE ONLY AUTHORITY TO DO IT”: THE STATEWIDE <i>LEE V. MACON</i> DECREE, 1967	450
CHAPTER 13: THE FLEETING FREEDOM TO CHOOSE, 1967-68	497
CHAPTER 14: THE TRAFFIC LIGHT CHANGES: THE <i>GREEN V. COUNTY SCHOOL BOARD</i> EFFECT, 1968	552
CHAPTER 15: THE “FINAL RESTING PLACE” OF ‘ALL DELIBERATE SPEED’ AND THE SPREAD OF COMPULSORY ASSIGNMENT, 1969.....	582
CHAPTER 16: THE COMPULSORY ASSIGNMENT REVOLT IN MOBILE AND JEFFERSON COUNTIES, 1970-71	614
CHAPTER 17: “HARVEST TIME”: PROTESTING THE REALITIES OF COMPULSORY ASSIGNMENT STATEWIDE, 1969-71	660
CHAPTER 18: <i>SWANN</i> SONG, 1971-73	704
EPILOGUE: “IF EVER IS GOING TO HAPPEN”	751
BIBLIOGRAPHY	780
PRIMARY SOURCES	780
SECONDARY SOURCES	786

INTRODUCTION

Even when, as the pressure grew, some few wise citizens were bold enough to face the inevitable and come out with a plea for law and order, there was no heart in their voices and their words were unaccompanied by any moral conviction.¹

We cannot have respect for “law and order” while at the same time using every available means short of violence to circumvent or defy the law of the land as interpreted by the courts. Only by positive steps, beginning with admission of our sins, can we begin to purge our society of the sickness in its soul.²

-Letters to the Editor of the *Birmingham News*, September, 1963

On September 3, 1954, a group of black students, parents, and local leaders in Montgomery, Alabama tried to turn the Supreme Court’s recent *Brown v. Board of Education* decision into a meaningful reality. They attempted to register at the Harrison Elementary School – a new, twenty-classroom facility, completed just in time to open its doors to 650 children, all of them white. Harrison was built to accommodate a growing white neighborhood on the city’s southern edge. The Montgomery city-county school board had chosen a location just a few blocks south of the encroaching white sprawl, anticipating even more growth in the coming months and years. Beyond the school’s back doors, even farther south, was the Abraham’s Vineyard neighborhood – an all-black section which had once been on the outskirts of town. For decades Abraham’s Vineyard had been served by a three-classroom, three-teacher black elementary school known as The Vineyard School. It enrolled about 80 students, all black. Harrison and Vineyard sat on the same block. Despite the *Brown* decision, the school board had given no thought to replacing one with the other, however. The two schools simply

¹ *Birmingham News*, Sept. 30, 1963, reprinted as Southern Regional Council Report L-46, Nov. 15, 1963, *Facts on Film*, Southern Education Reporting Service (Nashville: Tennessee Microfilms, 1958-1973), 1963-64 Supplement, Miscellaneous Materials.

² *Birmingham News*, Sept. 23, 1963.

sat together on a dividing line between two worlds – separate and wholly unequal. It was a line which no one had dared to cross until that day.³

Earlier that year, the Vineyard School had been slated for abandonment by the Montgomery school board, but the Abraham’s Vineyard Parent-Teacher Association (PTA) had protested. They pleaded that the school instead be renovated and brought up to standard. The PTA argued that if the neighborhood school were abandoned, children who had always walked down the street to school would have to be bussed across town to another black school. The board had agreed to renovate the tiny, dilapidated schoolhouse, which it also moved to the other end of the block, where it faced the black neighborhood to the south instead of the approaching white neighborhood to be served by Harrison. The improvements to the Vineyard School revealed much about the state of segregated education in Alabama. They included a new paint job, the addition of a new classroom (the third), and the installation of running water, inside toilets to replace the outhouses, and new furniture. The school board assumed the Abraham’s Vineyard residents would be pleased with the makeover. But as the beginning of the school year approached, Vineyard was still without gas, electricity, or a lunchroom, and its lot was damaged and un-landscaped from the moving of the facility.⁴

September 3, 1954 was enrollment day in Montgomery, and the Harrison School opened its doors to students for the first time. After most of the white students had enrolled and gone home for the day, a group of black families from the Abraham’s Vineyard neighborhood marched in the sweltering 95-degree heat to the school and attempted to enroll their children. Along with the group were E.D. Nixon and Horace Bell, local leaders with the National Association for the Advancement of Colored

³ *Southern School News*, Oct 1, 1954; *Southern School News* was a publication of the Nashville-based Southern Education Reporting Service, a group of journalists and educators dedicated to disseminating and cataloguing information on school desegregation in the southern and border states from 1954 to 1973. United States District Judge Frank M. Johnson used the phrase “meaningful reality” to describe the goal of plaintiffs in the case of *Lee v. Macon County Board of Education* in 1967; see Chapter 12 for the full quotation; see also Joseph Bagley, *A Meaningful Reality: The Desegregation of the Opelika, Alabama City School System, 1965-72* (M.A. thesis, Auburn University, 2007).

⁴ *Southern School News*, Oct 1, 1954.

People (NAACP). Upon arriving at the new school, the party was cordially invited into the principal's office to fill out enrollment forms. The principal obliged the group with this formality and some attendant pleasantries. He then informed the parents that their addresses indicated that the children lived in another district and could not, therefore, enroll. This was true after all. The Harrison attendance area had been carefully gerrymandered to ensure all-white enrollment. Few whites in Alabama thought the School Segregation Cases – collectively known as *Brown v. Board* – would actually have any real impact in the state, but the Montgomery school board had planned accordingly in case they did. If the board could no longer admit that attendance was based on race, it would draw boundaries around neighborhoods as such and claim the process was colorblind. They were, as it turned out, ahead of their time.⁵

The Abraham's Vineyard PTA issued a statement three days later arguing that the school board had failed to live up to all of its promises. The school board said it had done its part and was still in the process of making the necessary improvements. School officials added that the recent Harrison enrollment attempt had been organized by "white agitators," namely one Aubrey Williams, the son of a local publisher. Williams' father was a former Roosevelt bureaucrat and the editor of one of a very few openly anti-segregation publications in the state. The younger Williams had, in fact, been along in a strictly observatory, perhaps even celebratory, capacity. In pinning activism on "outside" agitation, however, the school board was again anticipating the norm.⁶

Montgomery school officials also proved prescient in their public response to what was soon referred to as the "Harrison incident." The chairman of the school board, T.L. Bear, announced that he and the school board would continue to uphold the law: the law of the state of Alabama. The state's constitution expressly forbid race "mixing" in schools, and Bear was sworn to uphold it. "If and when,"

⁵ *Southern School News*, Oct. 1, 1954; *Montgomery Advertiser*, September 3, 4, 1954.

⁶ *Southern School News*, Oct 1, 1954; Fred Gray, *Bus Ride to Justice: Changing the System by the System* (Selma: Black Belt Press, 1995), pp. 204-5.

he said, “the Supreme Court hands down a ruling declaring segregation unconstitutional in all states, and the Alabama legislature passes a law in accordance with it,” then the Montgomery County Board of Education would then consider what it should do about enrollment. Until then it was not even up for consideration. Such was the mindset of many white Alabamians who bothered to concern themselves with the legal ramifications of the School Segregation Cases decision. *Brown* was simply the law of the case, not the law of the land.⁷

State and local NAACP officials were planning even then to force the issue in federal court. Bell and Nixon announced to the press at the time of the Harrison enrollment attempt that they were tagging along as “observers,” but Bell himself told reporters that he was “certain” that the NAACP would not “let the matter drop.” They began even then to consider a legal challenge to the racial gerrymandering of district lines. As head of the local NAACP branch’s education committee, Nixon drafted and delivered a 12-point program request to the school board in October. The school board did not respond. W.C. Patton, the state’s NAACP field secretary, told the press that this was just the beginning of a statewide campaign to force desegregation. Other attempts were sure to be made, and each would form the basis for a legal challenge to Alabama’s segregated system of education. Indeed, the national and regional NAACP had begun organizing an implementation program the week after the school cases decision was handed down. The resulting NAACP petitioning drive was the opening salvo in a legal battle which would stretch into the 1970s and beyond.⁸

The attempted enrollment at Harrison Elementary was the first effort to desegregate an Alabama school. After its unceremonious failure, schools in the state would remain entirely segregated for almost another ten years. As many of Montgomery’s black leaders began to focus their attention on other battles, beginning famously with segregated city busses, the days progressed as usual at Harrison

⁷ *Montgomery Advertiser*, September 4, 1954.

⁸ *Montgomery Advertiser*, September 4, 1954, *New York Times*, September 3, 1954; *Birmingham News*, Oct 31, 1954.

and The Vineyard School and hundreds of other schools in the Deep South. The usual in south Montgomery that fall was a tableau that revealed at once the imprint of the past, the imperatives of the present, and the promise of the future. Under the warm October sun, children at Harrison played at recess in an open lot behind the school – its gleaming facade a testament to the school board’s commitment to providing its students with modern facilities. Across that same lot, Vineyard students played in the shadow of their own school – its meager renovations a testament to how far whites in the South might go to maintain the myth of “separate but equal” in the face of *Brown*. According to one account, there was “no physical barrier” between the two playgrounds and “[no] apparent line of demarcation” between the school children. But “whether by instruction or choice,” the children left a “no-man’s land of perhaps 100 yards between them.”⁹

This dissertation is an examination of the resulting 20 years of school desegregation litigation in Alabama. It seeks to better understand the role of law in both social justice movements and the resistance movements which have opposed them. Nearly ten years after the Harrison incident, the litigious efforts of the NAACP Legal Defense and Education Fund (LDF) and local activist-plaintiffs in the federal courts finally breached the walls of the Jim Crow schoolhouse in Alabama. This breakthrough forced a rearticulation of massive white resistance which has been the most compelling legacy of the school desegregation contest. In the immediate aftermath of Harrison, so-called “massive resistance” triumphed, with the political ascendancy of hardline segregationists and the statewide banishment of the Alabama NAACP. These developments, along with violent resistance and economic reprisal, forced blacks to again seek access to their constitutional rights in the state’s federal courts. When the litigious breakthrough occurred in 1963, some moderate segregationists began to fashion a creed of “law and

⁹ *New York Times*, September 3, 1954; *Southern School News*, October 1, 1954.

order.” It allowed them to reject self-defeating forms of resistance, without forcing them to repudiate segregation and white supremacy. They reluctantly accepted court-ordered token desegregation, not because it was the right thing to do, but because the alternatives had either been exhausted or were too risky.

When continuing litigation forced school systems, beginning in 1969, to abandon ineffective “freedom of choice” desegregation plans for compulsory assignment plans, these self-styled moderates rekindled massive resistance, this time using a language of constitutional individual rights to justify their flight to segregationist academies, independent suburban school systems, or otherwise safely white school districts where they could enjoy “equal justice under the law.” Whites began to see their evasion of integrated education as part of a narrative of righteous resistance to encroachments upon these rights, and they understood themselves to be besieged by a federal government sympathetic to only the claims of an unworthy and needlessly dissatisfied minority. Black activist-litigants ultimately succeeded in forcing substantial compliance with *Brown*, but the law itself allowed whites to channel their resistance in effective ways. In Part I of this dissertation, I describe the process whereby black activist-litigants were nearly defeated by the forces of massive resistance but managed to achieve breakthrough in 1963. In Part II I explain how white resistance responded by adjusting its message to the imperatives of “law and order.” I argue that massive resistance became massive evasion, and that, as a consequence, the goal of equal educational opportunity has remained elusive.

Part I: The Triumph of Massive Resistance and the Litigious Breakthrough, 1954-63

The School Segregation Cases were the culmination of decades of race relations litigation shepherded by the national NAACP.¹⁰ But the May 17, 1954 decision reported as *Brown v. Board of*

¹⁰ On the long history of the School Segregation Cases, leading up to the 1954 and 1955 decisions, see Richard Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality* (New York: Vintage, 1977).

Education of Topeka was as much a beginning as it was an end, especially in Alabama. Segregated education was a pillar of white supremacy in Alabama and across the South. Dogged resistance to any change in the status quo began almost immediately among the most committed segregationists. As soon as blacks began to assert their claims to the U.S. Supreme Court's mandate, resistance spread to all levels of white society, variegated though it would become. A new group of segregationist leaders quickly organized resistance to any implementation of the decision by forming a number of collective defense organizations, most notably the White Citizens' Council – a white supremacist group whose entire reason for being was defiant resistance of any breach of the color line in education. The Citizens' Council used propaganda, mass meetings, and economic reprisal to forestall the implementation of *Brown*. The Council in Alabama also counted among its membership emerging leaders in the state government, and these officials initiated a campaign in the legislature to erect as many legal barriers to desegregation as possible. Their success in pitching these efforts to the white electorate as sustainable barriers to integration led to a takeover of all levels of the state government and the creation of a united hardline-segregationist front in 1958.

As Michael Klarman and Adam Fairclough have argued, the fervent commitment of the these segregationists allowed them to forcefully marginalize would-be racial moderates, or the more liberally-inclined among whites.¹¹ They were able to do so in Alabama, in part, by taking advantage of the political mal-apportionment that had long supported the so-called Bourbon leadership. They also sought to bifurcate the issue of segregation: they fully racialized politics in the state and characterized anyone who did not support outright and immediate defiance as an integrationist, a race-traitor, or in committed Cold Warrior fashion, a communist.¹² Failure to commit to "massive resistance" of school

¹¹ Michael Klarman, "Why Massive Resistance," pp. 21-38, and Adam Fairclough, "A Political Coup d'état?: How the Enemies of Earl Long Overwhelmed Racial Moderation in Louisiana," pp. 56-75, in Clive Webb, Ed., *Massive Resistance: White Opposition to the Second Reconstruction* (New York: Oxford University Press, 2001).

¹² See, for the Red-baiting of moderate white politicians and black activists in Cold Warrior fashion, George Lewis, "White South, Red Nation: Massive Resistance and the Cold War," in Webb, *Massive Resistance*, pp.

desegregation was also represented as a failure to defend the honor and integrity of the state from “outside agitators,” especially the federal government. The memory of the Civil War, Reconstruction, and the “Redemption” of the South in its fight for the “Lost Cause” of states’ rights and the antebellum way of life was, therefore, bound up in these accusations.¹³

The ideology of the White Citizens’ Council included a number of other recruitment tools which have not received as much attention. The threat of integrated classrooms was roundly characterized as a threat to the southern white woman’s bedroom, and segregationists used this threat as way to frighten whites into action. Miscegenation – sexual intercourse and/or marriage between white men and black women – had long been the core fear in the heart of many southern white men. It threatened their own manhood and portended the demise of western civilization through the “mongrelization” of the white race.¹⁴ Thus, through appeals to biological racism and gendered identity, segregationists mobilized additional white support.

Another tool for segregationists, both within the Citizens’ Council and without, was an appeal to maintaining “law and order.” Appeals to resistance within the law allowed segregationists to separate themselves from working class white supremacists, like those associated with the Ku Klux Klan, whose violent methods of repression were seen as crass and unproductive. The economic argument inherent in the “law and order” creed also won over many middle class white segregationists. Reluctant segregationists could easily admit that violent resistance, just like integrationist agitation, had the potential to disrupt business at home, to tarnish the state’s image abroad, and to handicap or even

117-35. See also George Lewis, *Massive Resistance: The White Response to the Civil Rights Movement* (New York: Oxford University Press, 2010).

¹³ See, for the memory and lasting socio-political impact of the Civil War and the Lost Cause, David Goldfield, *Still Fighting the Civil War: The American South and Southern History* (Baton Rouge: Louisiana State University Press, 2004).

¹⁴ Jane Daily, "The Theology of Massive Resistance: Sex, Segregation, and the Sacred After *Brown*," in Webb, *Massive Resistance*, convincingly demonstrates the importance of miscegenation fears to the massive resistance movement, though she does so strictly in support of the argument that white religious leaders found ways to support the movement.

destroy industrial recruitment.¹⁵ Acknowledging the intellectual inadequacy of white supremacy, the wrongheadedness of defiance, or the immorality of segregation were all much more difficult. Those segregationists who utilized and were won over to the cause of “law and order” represented the first in a succession of so-called moderates who, rather than work towards peaceful and meaningful compliance and implementation, continually frustrated these efforts, ultimately leading to sustained and substantial evasion.¹⁶

As Brian Dougherty and Charles Bolton have argued, scholars have mistreated massive resistance to integrated education in another important way. Few have acknowledged that segregationists resistors were reacting so urgently in their defense of the color line as a direct result of the activity of local black activists. Dougherty and Bolton have effectively demonstrated that “many elements of southern massive resistance appear to be more closely related to the actions of blacks and black organizations than previously noted.” The School Segregation Cases decisions and the threat of federal involvement beyond them were alarming, but it took black action on the ground to instill the fear in whites which ignited massive resistance. Just as the contributors to Dougherty and Bolton’s collection of essays on the implementation of *Brown* have argued about other states, the spike in segregationist organization and legislation in Alabama was closely related, specifically, to the implementation drive of the NAACP.¹⁷ Scholars have often adequately portrayed massive resistance without giving equal treatment to that which was being resisted, especially in regards to the NAACP,

¹⁵ See, for similar arguments about “business progressives,” Glen T. Eskew, *But for Birmingham: The Local and National Movements in the Civil Rights Struggle* (Chapel Hill: University of North Carolina Press, 1997), J. Mills Thornton, *Dividing Lines: Municipal Politics and the Struggle for Civil Rights in Montgomery, Birmingham, and Selma* (Tuscaloosa: University of Alabama Press, 2002), and Jeff Roche, *Restructured Resistance: The Sibley Commission and the Politics of Desegregation in Georgia* (Athens: University of Georgia Press, 1998).

¹⁶ Even when many of these so-called moderates acceded to the futility of defiance, the focus remained on compliance with the “law of the land,” not on the intellectual inadequacy of white supremacy or the immorality of segregation. This provided the intellectual foundation for “white flight”-style evasion.

¹⁷ Brian J. Dougherty and Charles C. Bolton, *With All Deliberate Speed: The Implementation of Brown v. Board of Education* (Fayetteville: University of Arkansas Press, 2008), p viii; the argument is made in the introduction and fleshed out in some of the essays, but none of these covers Alabama; J. Mills Thornton, in *Dividing Lines*, makes this argument about segregationists in Birmingham, where he suggests that massive resistance did not materialize until the first NAACP petitions were filed with the local board of education in 1955.

which has been, itself, dismissed by some scholars of the movement as a “stodgy and elitist” organization, out of touch with the core of the movement.¹⁸

NAACP members in communities, large and small, across Alabama engaged in a sustained petitioning and registration drive in the years following the *Brown* decision and the Supreme Court’s follow-up implementation decree, known as *Brown II*.¹⁹ Local school officials met this campaign with a mixture of disregard and contempt. The Citizen’s Council met the threat with its own campaign of economic reprisal. And each round of petitions encouraged the segregationist leadership in the state’s legislature to more urgently pass legislation in defense of the assault. Despite intransigence, reprisal, and the ever-present threat of violence – from even some members of the supposedly non-violent Citizens’ Councils – blacks continued to petition school authorities for implementation, with the understanding that litigation would likely soon follow. Not only, as Daugherty and Bolton argue, does this activism represent an “essentially unknown” aspect of NAACP history, it is not generally credited with being at the heart of black civil rights activism in the 1950s. In Alabama this is reflected in an overabundance of popular and scholarly attention paid to the more visible campaigns of the early “classical phase” of the civil rights movement, namely the Montgomery bus boycott and the attempted enrollment of Autherine Lucy at the University of Alabama.²⁰

¹⁸ See, in this vein, James Patterson, *Brown v. Board of Education: A Civil Rights Milestone and Its Troubled Legacy* (New York: Oxford University Press, 2001), Webb, *Massive Resistance*, Michael Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (New York: Oxford University Press, 2004); Numan Bartley, *The Rise of Massive Resistance: Race and Politics in the South During the 1960s* (Baton Rouge: Louisiana State University Press, 1969, 1997); Lewis, *Massive Resistance*; and J. Harvie Wilkinson, *From Brown to Bakke: The Supreme Court and School Integration, 1954-1978* (New York: Oxford University Press, 1981).

¹⁹ *Brown v. Board of Education of Topeka*, 349 U.S. 294 (1955).

²⁰ Dougherty and Bolton, *With All Deliberate Speed*, pp. vii, vii-ix. See, for treatments of the movement in Alabama in the 1950s, generally, Wayne Flynt, *Alabama in the Twentieth Century* (Tuscaloosa: University of Alabama Press, 2004), Frye Gaillard, *Cradle of Freedom: Alabama and the Movement that Changed America* (Tuscaloosa: University of Alabama Press, 2004), and Taylor Branch, *Parting the Waters, America in the King Years, 1954-1963* (New York: Simon and Schuster, 1988). See, for the bus boycott, specifically, David Garrow, *Bearing the Cross: Martin Luther King and the Southern Christian Leadership Conference* (New York: Harper, 1999); Thornton, *Dividing Lines*; Fred Gray, *Bus Ride to Justice*; and Harvard Sitkoff, *The Struggle for Black Equality, 1954-1992* (New York: McMillen, 1993). See, for the Lucy Crisis, E. Culpepper Clarke, *The Schoolhouse Door: Segregation’s Last Stand in Alabama* (New York: Oxford University Press, 1995). The over-attention to flashpoints like the bus boycott

Despite the efforts of local activists, and as a direct result of the massive resistance their activity engendered, Alabama maintained absolute segregation in its public schools for nine years after *Brown*. For most of that time, the NAACP was barred from operation in Alabama by Attorney General John Patterson, who used white supremacist jurists in the discriminatory state court system to oust the organization in 1956. The successful attack-campaign won Patterson the governor's chair and represented the culmination of the rise of arch-segregationist leaders in Alabama. Their triumph was concomitant with the demise of Governor Jim Folsom, whose liberal attempts at moderation failed to sway voters like the segregationists' own defiant appeals to hardliners and law-and-order-style appeals to would-be racial moderates.²¹ With the NAACP out and the arch segregationists in, the outlook for implementation of *Brown* reached its lowest point.

From this nadir, a group of black activists took their challenge to the federal trial courts, the only place where they had any hope of securing their constitutional right to desegregated education. Initially, this had to be done without the assistance of the NAACP or the federal government; however, the NAACP-LDF and the United States Department of Justice's Civil Rights Division (CRD) soon assisted in what would become a litigious assault against Jim Crow schools. The Reverend Fred Shuttlesworth in Birmingham provided the model: local activists who were shielded from economic reprisal filed complaints in federal district courts with the assistance of willing local counsel and, ultimately, the LDF and CRD. By 1963, activists had filed suit in four cities, and the Justice Department had filed two suits of its own. Some federal judges sympathetic to segregationists' desire to maintain the status quo initially frustrated these efforts. But the Fifth Circuit Court of Appeals reversed these decisions and remanded

is even more obvious and egregious in public history; see for example, the *Eyes on the Prize* documentary film series (Blackside Film and Media, 1987). See, for dismissal of the NAACP as "stodgy and elitist," Eskew, *But for Birmingham*, pp. 15-17.

²¹ Thomas Gilliam, *The Second Folsom Administration: The Destruction of Alabama Liberalism, 1954-1958* (PhD Diss., Auburn University, 1975), has given a good account of the marginalization of Alabama liberals, though with Alabama governor Jim Folsom at the center, not the issue of school desegregation and the implementation activity of the NAACP in local communities; Gilliam also does not recognize the importance of "law and order" moderates, especially the lasting role those "moderates" would play in the 1960s.

the cases with demands that relief be granted. A sustained effort in court finally brought about a breach in the wall of segregated education in Alabama that fall, but not without a dramatic stand mounted by Governor George Wallace and other obdurate segregationists. The efforts of not only Wallace, but countless other state and local elected officials encouraged continuing defiant resistance. At the same time, Wallace's failure indicated the futility of blatant and expressed defiance of the law. Whites had to somehow account for the success of the desegregation litigation campaign and fashion a resistance movement within the bounds of the law before desegregation proceeded beyond mere tokenism.

Part II: The Litigious Assault and the Rearticulation of Resistance, 1964-73

The NAACP-LDF, the CRD, and local activist-plaintiffs followed-up the litigious breakthrough with an all-out assault on segregated schools in Alabama. The primary front in this assault was the case of *Lee v. Macon County Board of Education*. State-level interference with initial court-ordered desegregation efforts in several cases in 1963 opened up the possibility of a statewide injunction, which plaintiffs subsequently sought in *Lee v. Macon*. State authorities pressured local school officials to defy federal court orders and threatened to exploit local segregationist opposition. School boards – which were generally loath to desegregate regardless – found themselves caught between state authority and community pressure on one side and federal authority on the other. Though it took 4 years of sustained, reckless defiance from the state and continuing recalcitrance from local school systems, the plaintiffs in *Lee* ultimately secured the first statewide structural injunction in United States legal history. This brought 99 school systems under one injunction and the concomitant supervision of a three-judge federal district court. As a “litigating *amicus curiae*,” the United States was represented in the case by the Civil Rights Division, which acted as the investigative and advisory arm of the court. The LDF and its associated counsel continued to represent the interest of the plaintiff class. Thus the CRD, the LDF, the court, and in the case of *Lee v. Macon*, Judge Frank M. Johnson especially, engineered the restructuring

of the Alabama public education system over the course of many years. Some school systems remained under injunctions in cases splintered from *Lee v. Macon* as of 2013. The new relief concept introduced in the case served as a model for activist-litigants, for the Justice Department, and for federal judges. Not only did it promise to finally and significantly accelerate school desegregation, it struck at the heart of the segregationist doctrine of states' rights by subjecting state institutions and state citizens to prolonged and direct supervision and administration by federal authorities.

Along with the *Lee* case, blacks filed at least 19 other successful school desegregation cases in Alabama as part of the litigious assault. Some of these cases proved to be influential in their own right, especially *Stout v. Jefferson County Board of Education* and *Davis v. Board of School Commissioners of Mobile County*. Both suits became important battlegrounds in the struggle to effectively desegregate metropolitan areas and in the concomitant fight over "busing." In addition to this and other litigation, there were federal administrative efforts to end segregated education, independent of the CRD. After the passage of the Civil Rights Act of 1964, the United States Department of Health, Education, and Welfare (HEW) pursued its own implementation program across the South. The so-called HEW desegregation Guidelines were sanctioned and even adopted as a model in the *Jefferson* case. But HEW soon found itself subject to court scrutiny and even censure. The department's enforcement mechanism – the deferral or suspension of federal funding – ran afoul of the *Lee v. Macon* court when it was used against systems which the court considered to be in compliance. HEW was soon enjoined from interfering with the administration of the court's decree and subsequently limited to an advisory role.

Throughout the litigious assault, the judges on the state's federal benches exerted a tremendous influence on the pace and nature of desegregation. For example, Judge Johnson, as part of the three-judge panel adjudicating the *Lee v. Macon* case, set the tone for speedy and effective desegregation. Judge Daniel Thomas and others, however, utilized any and all opportunities for delay.

Crucial to the fate of desegregation litigation in Alabama, then, was the Fifth Circuit Court of Appeals. A majority of judges on the appellate court had come to favor more stringent desegregation plans by the second half of the 1960s, and a core group known as “The Four” began to take a lead role in fashioning desegregation jurisprudence. By 1968 the judges’ irritation at the continuing intransigence of white school officials at all levels in Alabama and elsewhere led to the rejection of the so-called “freedom of choice” method of desegregation.

Freedom of choice was designed to allow all students within a school district to choose the school which they wished to attend, regardless of its past identification as a black or white school. To operate effectively, such a system required the removal of “choice-influencing factors” such as racially identifiable faculties. School boards refused to implement such plans in good faith. They relied instead on assumptions of black teacher inferiority and on assumptions – which turned out to be self-fulfilling prophecies – that whites would refuse to send their children to formerly all-black schools. Freedom of choice promised nothing more than tokenism and showed no realistic possibility of ever eliminating what was being called the “dual school system based upon race.”

From 1968 into the 1970s, litigation forced school districts to abandon freedom of choice and to use compulsory pupil assignment in order to eliminate their dual systems. Segregationists protested and avoided compulsory assignment as fervently as any whites had resisted school desegregation since the *Brown* decisions themselves. The foremost proponent of this resistance at the state level was not George Wallace, but his protégé and successor, Albert Brewer. Brewer chastised his former mentor for failing to prevent desegregation, condemned federal judges who issued desegregation orders (including those who did so only upon the command of the appellate court), and generally worked to frustrate any and all efforts to move desegregation beyond tokenism. When Wallace defeated Brewer and returned to the governor’s chair, he had, himself, been forced to adopt a more realistic defense of white privilege. By that time school systems had begun to desegregate system-wide, but many whites had already

exercised what they were beginning to call their “freedom of association” and fled these systems for private schools known as segregationist academies, for whiter school districts, or for safely white independent suburban school systems around the state’s major cities, especially Birmingham.

Law and Order, Strategic Accommodations, and Colorblindness

So-called massive resistance ultimately failed to prevent school desegregation, but its transformation in the wake of that failure has perhaps been of more consequence. Initially recognized as a period of intense opposition to desegregation that gave way in the early 1960s to reluctant compliance, some scholars have come to realize that resistance simply adapted. Violent resistance continued, and even peaked in Alabama as schools were desegregated for the first time in 1963. The Ku Klux Klan, the National States’ Rights Party, and other extremist groups responded to the breach of the color line with increased activity, rather than with any sort of retreat. But resistance remained protean. As black activists and their erstwhile allies in the federal government achieved breakthrough despite this spike in violent resistance, most segregationists were forced to make what historian Joseph Crespino has called “strategic accommodations.”²² In a sort of orderly retreat, they reaffirmed their rejection of violent resistance, and they begrudgingly accepted the rule of law and the authority of the federal court system. In a seemingly proactive call to maintain “law and order,” segregationists then established such reaffirmation and acceptance as the standard for morally sound behavior and responsible citizenship. When black activists carried the struggle into the courtroom, whites crafted their defense accordingly. There would be no moral awakening. As legal historian Tony Freyer has argued in reference to the

²² Joseph Crespino, *In Search of Another Country: Mississippi and the Conservative Counterrevolution* (Princeton: Princeton University Press, 2009), pp. 1-3.

school desegregation battle in Little Rock, Arkansas, the failure to achieve such an awakening was a principal factor in limiting desegregation's effectiveness.²³

Massive resistance was able to survive in an arguably more potent form. Gone were the "stands in schoolhouse doors" associated with demagogues like Wallace, the legislative sessions devoted to what supporters and detractors alike called "nigger bills," and the attempts to banish the NAACP using the state court system. They were gone because they were ineffective against the litigious assault in the federal courts. Segregationists replaced this form of resistance with a more subtle form that became all the more powerful by denying its own roots. Using the phrase massive resistance to characterize only the period of unsuccessful, reckless, and ultimately self-defeating defiance has had the effect of obscuring the potency, dedication, and success of this resistance which followed.

Resistance after 1963 was largely in the style of the "law and order" creed. Its origins lie most immediately with the birth of the Citizens Councils, largely on the basis of the Councils' own explicitly non-violent resistance strategy. Just as non-violence then never would have been confused with acceptance, calls to "law and order" in the 1960s carried with them no semblance of wider acquiescence. Law-and-order segregationists abhorred violence and outright defiance of federal law, but they did not repudiate segregation or white supremacy. Particularly after the outbreak of tragic violence in the wake of the state's first federal school desegregation orders, "law and order" came to mean only minimal acceptance, somewhere between simple non-violence and court-ordered compliance. For some it meant continuing to pursue some seemingly legal means of defiance. Court-ordered desegregation brought increasingly intense, defiant rhetoric; desperate demonstrations; and, most significantly, a reinvigorated movement to establish private, segregated schools. Carrying the banner for this group of segregationists was Wallace. At the same time, many formerly defiant

²³ Tony Freyer, *The Little Rock Crisis: A Constitutional Interpretation* (New York: Greenwood Press, 1984); see also Tony Freyer, *Little Rock on Trial: Cooper v. Aaron and School Desegregation* (Lawrence: University Press of Kansas, 2007).

segregationists rejected the Wallace line and began to take up the “law and order” call as a way to rally whites behind compliance with court orders. A majority of these people were either local school officials who recoiled at the thought of risking a contempt citation and the threat of a fine or jail time, or local city/county officials and businesspeople who feared the closure of all public schools upon the establishment of viable private schools for whites. Their compliance efforts never exceeded the bare minimum required by federal authorities, and their public statements in support of such efforts were unfailingly dressed in reluctance, regret, and occasionally outright disgust.

The persistence of law-and-order-style segregationist defiance, along with the failure of compliant segregationists to embrace more than law and order, constituted a vital transitional point in Alabama politics. Both segregationist groups had to accept, on some level, that token desegregation of previously all-white schools was inevitable once it was ordered by the federal courts and backed by the federal executive. Situating this acceptance within a narrative of law and order allowed them to continue to assail the federal government, even as they accepted its primacy under the rule of law in the federal system, and it allowed them to cling to their fundamental beliefs in white supremacy and racial separation. Ultimately, many of these Alabamians would channel their critiques and beliefs into a more politically sophisticated movement. As Crespino has argued about whites in mostly rural Mississippi, they “rearticulated their resentment in ways that would resonate” within the broader American political arena. By 1965 in Alabama, the brash and openly racist segregationist politicians of the old, rural Black Belt aristocracy were on their way out of politics. They were being replaced by those, in cities and towns alike, who found ways to remain true to their segregationist principles while at the same time working reluctantly towards compliance with federally-ordered desegregation. Support for law and order provided a bridge between bitter-ender type resistance and the eventual acceptance of widespread school desegregation by a white population which continued to find it repugnant. Once that acceptance had come, whites began to seek out other avenues of evasion, beyond violence and outright

defiance. They stopped assailing school desegregation law itself and instead began to decry limitations on their personal freedoms, irrespective of race. It was, in a sense, the individualized equivalent of arguing that the Civil War had been fought over states' rights and not slavery.²⁴

Central to this rearticulation was the adoption of what historian Matthew Lassiter has called "colorblindness." Lassiter has argued that southern whites in metropolitan areas in the wake of desegregation rallied around a "color-blind discourse" which championed "meritocratic individualism" and denied its own origins in the defense of structural racism. The development of a "suburban ideology of racial innocence" thus became a way for many whites to preserve class-based privileges. The law and order narrative anticipated such "colorblind" assertions, and it applied not only in the metropolitan areas which are the subject of Lassiter's study, but to the rural areas of the state as well. Law and order presaged late-60s and 70s suburban colorblindness not only in its disingenuous disregard for race in the preservation of white privilege, but also in its function as a strategic accommodation. For whites in Alabama to begin to assert their meritocratic individualism, they first had to accept the failure of massive resistance to prevent desegregation in the first place. Embracing law and order allowed whites to continue on the path of evasion even as they repudiated the path of continuing total and violent defiance. As Lassiter has himself argued, "open support for compliance with the law and preservation of public education, rather than an absolutist defense of the racial caste line," allowed for the development of a "colorblind" ideology of school desegregation. Segregationists in Alabama were well within the bounds of "law and order" not only when they began to escape desegregated city school systems for white suburbs with independent systems of their own, but also when they set up and enrolled in a rash of new private academies for whites only. Their actions were only irresponsible if they were violent, directly encouraged violence, or constituted direct defiance of court orders. These standards, and this disingenuous disregard for old, openly racist forms of resistance not only began to

²⁴ Crespino, *In Search of Another Country*, p. 4.

take form as soon as the NAACP went to work in Alabama trying to implement *Brown*, they drew even then on a long tradition of racial “innocence” and racial denial.²⁵

When whites in the 1950s, 60s, and 70s justified their flight, they did it not by claiming the continuing validity of white supremacy and segregation, but by claiming a right to what historian Kevin Kruse has identified as “freedom of association.” In his study of metropolitan Atlanta, Kruse has argued that “white resistance to desegregation was never as immobile or monolithic as its practitioners and chroniclers would have us believe,” and that segregationists were able to “preserve and, indeed, perfect the realities of racial segregation outside the realm of law and politics.” When “forced to abandon their traditional, populist, and often starkly racist demagoguery,” they instead “craft[ed] a new conservatism predicated on a language of rights, freedoms, and individualism.” Clinging to the language of law and order was the first step in such a transformation for Alabama’s segregationists. It was the mechanism by which they first abandoned traditional “massive resistance,” allowing them to then set about crafting the more durable iteration. It was an important reason why massive resistance was able to adapt and thrive.²⁶

Political historians like Kruse, Lassiter, and Crespino have ushered in a new era in the study of the conservative counterrevolution of the 1960s, 70s, and 80s. They have moved beyond the once-dominant interpretation of historian Dan Carter. In his biography of George Wallace, Carter first emphasized the role of race, and indeed racism, in the rise of the New Right. Carter argued that Wallace learned to use coded racial language to appeal to racist white supremacists across the country, and that Richard Nixon ultimately adopted this same technique as part of his so-called “Southern Strategy” in the 1968 and 1972 presidential elections. According to Carter, the art form was perfected by Ronald Reagan

²⁵ Matthew Lassiter, *The Silent Majority: Suburban Politics in the Sunbelt South* (Princeton University Press, 2006), pp. 1-20, 30, 148.

²⁶ Kevin Kruse, “The Fight for Freedom of Association: Segregationist Rights and Resistance in Atlanta,” Webb, *Massive Resistance*, pp. 99-116; see also Kevin Kruse, *White Flight: Atlanta and the Making of Modern Conservatism* (Princeton University Press, 2005), pp. 1-15, 161-79, 234-58.

in his presidential bids in the 1980s and even carried forward by the likes of George H.W. Bush and Newt Gingrich. The new school of historians of modern conservatism has rejected Carter's thesis in favor of a more nuanced interpretation. Among other things, they have rejected the top-down nature of the thesis, deemphasized the roles of both Wallace and Nixon, given credit to local southern whites for first mastering the art of coded racial language, added layers of motivation to whites fleeing the Democratic Party, and taken the new story of grassroots resistance national – from the suburbs of Detroit to the exurbs of Los Angeles.²⁷

What the new school has underappreciated is the early, continuing, and pivotal role which litigation played in channeling the conservative counterrevolution. This has obscured the depth and breadth of the roots of the ideology of racial innocence. From the moment NAACP efforts to implement *Brown* ignited the White Citizens' Council movement, the imperatives of litigation in federal court shaped the way that whites battled the civil rights movement. Though the new school has demonstrated that modern conservatism was molded from more than just civil rights backlash, the effort to preserve segregation and white privilege was nonetheless at the heart of the maturing conservative movement in the late 1960s and early 1970s. By the time persistent efforts in federal court brought about school desegregation in Alabama for the first time in 1963, the most thoughtful segregationists already had a model for effective resistance, even if many were still moved by self-defeating forms of defiance. As school desegregation cases dragged on, whites across the state – from the large metropolitan areas to the small towns and rural counties – perfected their defense by learning to satisfy the courts first. The threat of defeat in federal court was the primary motivating factor in

²⁷ Dan T. Carter, *The Politics of Rage: George Wallace, the Origins of the New Conservatism, and the Transformation of American Politics* (Baton Rouge: Louisiana State University Press, 1995, 2000); Dan T. Carter, *From George Wallace to Newt Gingrich: Race in the Conservative Counterrevolution, 1963-1994* (Baton Rouge: Louisiana State University Press, 1999). In addition to Kruse, Lassiter, and Crespino, supra, see also Thomas Sugrue, *Sweet Land of Liberty: The Forgotten Struggle for Civil Rights in the North* (New York: Random House, 2008); Thomas Sugrue, *The Origins of the Urban Crisis: Race and Inequality in Postwar Detroit* (Princeton: Princeton University Press, 2010); Lisa McGirr, *Suburban Warriors: The Origins of the New American Right* (Princeton: Princeton University Press, 2001).

crafting a segregationist last stand against federal government threats to not only states' rights but individual rights as well. This libertarian defensiveness became the nexus for other political concerns. The new school has appreciated this but has failed to afford early school desegregation litigation the sort of formative status which it deserves and to credit the continuing litigious battle with shaping the rearticulation of resistance. Segregationists began to learn how to rearticulate their resistance, how to blind others to their racial strategies, and how to assert their claims to what they always understood as freedom from the threat of racial dominance, all by learning to combat the dogged litigious assault mounted by black activists seeking access to equal educational opportunity.

Efficacy, Backlash, and the Role of the Lower Courts

The persistence of massive resistance and the strategic accommodations of segregationists fostered by the law-and-order narrative beg the question of the efficacy of the *Brown* decision. Michael Klarman's *From Jim Crow to Civil Rights* is currently the dominant interpretation of the efficacy of *Brown* and the role it played in the civil rights movement. Klarman's "backlash thesis" holds that the impact of *Brown* was minimal, incidental, or at best unintended, and that the segregationist reaction against it was ultimately of more consequence. As Klarman explains, the failure of litigation during the period of massive resistance forced blacks to consider other tactics, even as *Brown* "plainly inspired" continuing black activism. The white reaction to the ensuing direct action campaigns of the movement in the early 1960s, he argues, was so violent and intense precisely because of the climate *Brown* had created. *Brown* had raised the stakes, and whites, in the radicalized political environment, reacted to demonstrations with "brutal suppression." When this violent reaction was broadcast across the nation and Americans recoiled, it persuaded the Kennedy Administration and the Congress to pass the Civil Rights Act of 1964, which Klarman argues was "plainly the proximate cause of most school

desegregation in the South.”²⁸ A closer look at the implementation of *Brown* in Alabama reveals a more nuanced picture.

First, Klarman underappreciates litigation as part of the arsenal black activists successfully used throughout the 1950s and 60s. His interpretation misses the importance of the sustained petitioning and litigation campaign that blacks waged to even crack the surface of segregated education. It also underestimates the faith that black activists placed in litigation in general at a time when direct action had, itself, produced very little without the support of federal courtroom challenges.²⁹ In Alabama there is little evidence to support the conclusion that *Brown*’s inspirational impact and litigation’s subsequent failure propelled blacks into the direct action movement, which then became the principal catalyst for change. The filing of the litigation that ultimately broke the color line in the state’s schools was the result of a continuous process that dated back to the moment *Brown* was decided. The breakthrough occurred in 1963 because blacks had discovered that litigants – by then working with the NAACP-LDF – had to be shielded from economic reprisal, and because enough judges on the Fifth Circuit appellate court had become, in Klarman’s own words, “fed up with the intransigence and disingenuousness of southern whites.” Additionally, many of the most violent acts perpetrated by segregationists in

²⁸ Klarman, *From Jim Crow to Civil Rights*, pp. 342-3, 360, 363; see also, Klarman, “Why Massive Resistance,” in Webb, *Massive Resistance*, pp. 21-38. For competing interpretations of the efficacy of *Brown*, see Kenneth Mack, “The Myth of *Brown*?” *Yale Law Journal*, The Pocket Part, Nov., 2005, <http://www.thepocketpart.org>, accessed March 20, 2013, and Robert L. Hayman and Leland Ware, Eds., *Choosing Equality: Essays and Narratives on the Desegregation Experience* (State College: Penn State University Press, 2009). For the broader debate about the ability of the U.S. Supreme Court to effect social change, see especially Gerald Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change* (Chicago: University of Chicago Press, 1991, 2008), and David A. Schultz, Ed., *Leveraging the Law: Using Courts to Achieve Social Change* (New York: Peter Lang, 1998).

²⁹ Litigation and direct action worked in tandem, but litigation routinely achieved the ends to which the direct action campaign aimed, allowed the direct action protests themselves to take place, or at the very least facilitated the achievement of some stated goal; see, for high-profile examples, *Browder v. Gayle*, 142 F.Supp 707 (MD, AL, 1956), affirmed 352 U.S. 903 (1956) (invalidation of segregated busing in Montgomery, ending the famous bus boycott); *U.S. v. U.S. Klans*, 194 F.Supp. 897 (MD, AL, 1961) (court-mandated protection of the Freedom Riders); *Katzenbach v. McClung*, 233 F.Supp 815 (ND, AL, 1964), reversed 379 U.S. 294 (1964) (overruled challenge to public accommodations provisions of Civil Rights Act of 1964 initiated by Birmingham restaurateur); *Williams v. Wallace*, 240 F.Supp 100 (MD, AL, 1965) (court sanction of the Selma-to-Montgomery March); and *Dillard v. Crenshaw County*, 640 F.Supp 1347 (MD, AL, 1986) (injunctive relief to prevent violations of Section II of the Voting Rights Act).

Alabama were, in fact, in direct retaliation for engagement in the school desegregation litigation which produced this breakthrough. Thus, the backlash which caused so many Americans to recoil was, itself, part of a litigious narrative.³⁰

Klarman also underappreciates the cultural and political significance of law and order as a vehicle for continuing resistance. Scholars have challenged Klarman's interpretation by arguing that hardline southern resistance to racial change was less a product of *Brown* than a continuation of trends well developed before 1954.³¹ This was undoubtedly the case in Alabama, as the violence perpetrated by the Klan and other segregationist groups was part of a long tradition of suppression of dissent.³² There was also a long tradition of non-violent resistance to change, most notably in the form of the Dixiecrat Revolt – the late 1940s attempt to harden the Democratic Party on race.³³ Similarly, there was continuity in resistance in the years following the peak of direct action protest and violent backlash, which Klarman's interpretation obscures. In the backlash narrative, significant, impactful resistance flares with the direct action campaigns and fades along with them. Certainly, the violent suppression of the direct action movement disgusted a majority of the American populace and helped encourage the reluctant federal executive and legislative branches to support the passage of the Civil Rights Act. Focusing on trial court litigation reveals that the significant impact of segregationist resistance lies elsewhere, however. And it demonstrates that, in Alabama, the Civil Rights Act was not the proximate cause of most school desegregation; litigation was. The reaction of the violent minority of segregationists was ultimately less significant than that of the vast majority of segregationists who embraced the law and order creed in response to that litigation and in order to satisfy the federal courts. This allowed them to denounce violence and outright disobedience of court orders, while at the

³⁰ Klarman, *From Jim Crow to Civil Rights*, pp. 342, 360-3.

³¹ Anthony Badger, "Brown and Backlash," in Webb, *Massive Resistance*, pp. 39-55.

³² Kelley, *Hammer and Hoe: Alabama Communists During the Great Depression* (Chapel Hill: University of North Carolina Press, 1990), pp. 119-137; Flynt, *Alabama in the Twentieth Century*, pp. 318-19.

³³ Frederickson, *The Dixiecrat Revolt and the End of the Solid South* (Chapel Hill: University of North Carolina Press, 2001), passim; Flynt, *Alabama in the Twentieth Century*, pp. 75, 318-19.

same time maintaining their fundamental beliefs in segregated education and white privilege. And it provided the foundation for the final evasion of Alabama's long-running school desegregation cases by way of white flight.³⁴

Finally, Tony Freyer and Timothy Dixon have criticized Klarman for neglecting the role of the lower federal courts in general and for making "quasi-realist assumptions" about the motivations of judges, in particular Frank Johnson. Without rejecting the backlash thesis wholesale, they argue that Klarman has misconstrued judges' motivations by painting them as heroic figures standing up for the movement because of personal courage, cultural values, or political inclinations. This is also an indictment of Jack Bass, whose important study of the Fifth Circuit and civil rights cases has portrayed the so-called Fifth Circuit Four – along with District Judges Johnson and Skelly Wright – as "Unlikely Heroes." Freyer and Dixon maintain that such portrayals have, in the past and in the present, opened up judges to unwarranted charges of judicial activism. They argue that jurists like Johnson operated from more nuanced motivations which included commitments to "fundamental fairness" and to the role of courts as guarantors of constitutional rights for the disadvantaged. The impact of these judges' jurisprudence on civil rights litigation was mixed, according to Freyer and Dixon. It allowed black activists to maintain faith in the federal judiciary and ensured that "the status quo [did not persist] longer than it did." But it also provided southern politicians with "the political advantage of resistance." In other words, judges like Johnson gave public officials like George Wallace someone to demonize as they tried to rally segregationist voters. Freyer and Dixon's focus on lower courts has thus revealed important reconsiderations. A closer look at the course of school desegregation litigation in Alabama's trial courts allows us to even further problematize the dominant interpretation.³⁵

³⁴ *Armstrong v. Birmingham Board of Education*, see major decisions at 162 F. Supp. 372 (ND, AL, 1958); 220 F. Supp. 217 (ND, AL, 1963), reversed, 323 F.2d 333 (5th CCA, 1963).

³⁵ Tony Freyer and Timothy Dixon, *Democracy and Judicial Independence: A History of Federal Courts in Alabama, 1820-1994* (New York: Carlson, 1995), pp. 253, 252-5; Jack Bass, *Unlikely Heroes: The Dramatic Story of*

The fundamental premise undergirding Klarman's argument is that judges and their values are generally reflective of the society which produces them and that they are, thus, not well placed to effect significant social change. Though Klarman is primarily concerned with the justices of the U.S. Supreme Court, Alabama's federal district judges have seemed to demonstrate that this is only partially true. Alabama's federal trial court judges were generally reflective of white Alabama society – insofar as most of them believed in the legal and moral righteousness of segregation. Those judges who were exceptions to this rule – including but not limited to Johnson – were the main facilitators of desegregation law enforcement in Alabama and were highly influential beyond the state's borders. Along with Johnson, Circuit Judge Richard Rives and his colleagues on the Fifth Circuit court proved to be the practitioners of genuine colorblindness. They led the way, in fact, in holding school systems and state officials accountable, such that when the long-silent Supreme Court finally spoke as to the nature and timing of school desegregation implementation, it was following the Fifth Circuit.

In a segregated society, the mere enforcement of desegregation law was significant social change. In this regard, we may consider certain of Alabama's jurists to have facilitated social change through their commitments to equality before the law and fundamental fairness. That they achieved this against the will of the vast majority of Alabama's whites is significant. Not only did litigation matter in Alabama, then, it was the only way black activists could have hoped to have met with even partial success. At the same time, litigation has certainly had its limitations in effecting social justice. Equal educational opportunity has remained elusive in Alabama and elsewhere because segregationists were forced to find solutions within the law which even judges committed to colorblind justice have been unable to assail. More fundamental change would seem to have to have required one of two unlikely developments: a white moral awakening or the pursuit of solutions outside of the American political tradition.

the Southern Judges of the Fifth Judicial Circuit Who Translated the Supreme Court's Brown Decision into a Revolution for Equality (New York: Simon and Schuster, 1981).

PART I: THE TRIUMPH OF MASSIVE RESISTANCE AND THE LITIGIOUS BREAKTHROUGH, 1954-63

CHAPTER 1: THE NAACP, THE WHITE CITIZENS' COUNCIL, AND BI-RACIAL LIBERALISM

On November 29, 1954, over 1,200 white Alabamians attended a rally in Selma, Alabama in the heart of Alabama's Black Belt. Cutting across the south-central part of the state and including the capital city of Montgomery, the Black Belt was thusly named for its rich black soil. That land had been tilled by slaves when the region was home to the majority of the state's cotton plantations. In 1954 it remained the only majority black region of the state, where a small minority of whites clung more tightly to absolute white supremacy than whites anywhere else in the country. The crowd gathered on a chilly Monday night in Dallas County that fall to hear about a new movement that had originated in neighboring Mississippi in the immediate wake of *Brown*. Two members of the Mississippi legislature and a Presbyterian minister were summoned to speak to the Alabama group about what was being called the White Citizens' Council.¹

Mississippi state representative J.S. Williams told the crowd of mostly men that the Citizens' Council might look like another well-known defender of white supremacy, but it was "not a Ku Klux Klan." The Council renounced violence, whereas the Klan did not. The Council championed the rule of law and "law and order," whereas the Ku Klux Klan (KKK) took the law into its own hands. The KKK existed to frustrate a wide list of stated enemies that included Catholics and Jews; the Council had a more narrow mission. Having distanced his organization from such a crass, violent, lower-class organization as the KKK, Williams began to explain the Council's own, more specific *raison d'être*. "Our

¹ *Southern School News*, January 6, 1955; Neil R. McMillen, *The Citizens' Council: Organized Resistance to the Second Reconstruction* (Urbana: University of Illinois Press, 1971), p. 43; *Montgomery Advertiser*, Nov. 29, 1954; *Farmer's Almanac* Historical Weather online, <http://www.farmersalmanac.com/weather-history>, accessed June 1, 2013.

purpose,” he continued, “is to give a direct answer to the National Association for the Advancement of Colored People: we have a heritage in the South for which we should ever be vigilant.” Specifically, it was the NAACP which was seeking to destroy, through litigation, the cherished constitutional pillar of white supremacy that was segregated education. Williams said, “The NAACP’s motto is ‘The Negro shall be free by 1963.’ . . . And shall we accept that,” he asked. The answer was a resounding, “No!”²

Continuing to whip the crowd into a frenzy, Williams told the men of the Black Belt that the maintenance of segregation was an “honor-bound and Christian cause.” To stand by as that system was destroyed by the NAACP and by the federal judiciary would be not only dishonorable but dissatisfying to God – circumstances that were probably equally horrifying to the average southern white man. In any case, Williams argued, “We can’t have it, for if we do it would ruin the economic system of the South.” Southerners were still dependent on black labor, especially in the Black Belt. What if blacks forgot their place? The answer was clear enough. Finally he laid before the Alabamians the choice that would become the political imperative of the next ten years. “The men of the South,” he said, “are either for our council or against it. There can be no fence-straddling.” While Williams over-estimated the importance of the Citizens’ Council itself, albeit only slightly, he was right about the relevance of its mission. Many in Alabama would distance themselves publically from the Council. But any white politician who hoped to survive after the School Segregation Cases decision had to stand clearly one side of that fence, and one side only: that of continued segregation, and therefore of defiant resistance.³

One week later, Councilors held another organizational meeting in west Alabama’s Marengo County. About 400 or so of the western Black Belt’s white men gathered to hear harangues from fellow segregationists, including Alabama state senator Walter Givhan. Givhan, who would become one of the state’s leading Councilors, told the crowd that America was “a white man’s country. It always has been,” he said, “and it always will be.” He identified the NAACP as the principle enemy trying to ruin

² *Southern School News*, January 6, 1955.

³ *Southern School News*, January 6, 1955; McMillen, *The Citizens’ Council*, p. 43.

this arrangement. It was this organization that was trying to dupe the good negroes of Alabama. This was how Givhan and others professed most blacks to be: ignorant and otherwise inferior, but nonetheless content in their situation and, therefore, “good.” Good negroes did not want to destroy segregation. NAACP “outsiders” and “trouble makers” were the real threat.⁴

The senator explained further the goals of the Council’s enemy. It was the NAACP’s intention, Givhan told the men, to wrest political control of the white man’s country from him, specifically to put a black man in the office of Vice President and to then assassinate the President. “You say it can’t happen here,” he barked, “but I say it can and will unless we stand up and fight.” Givhan then touched the most sensitive nerve of all. He assured the white men in the audience that the principal goal of the NAACP, in the long run, was to “open the bedroom doors of our white women to the Negro men.” Miscegenation – a violation of Alabama law, an abomination to God, and the deepest fear in the heart of the southern white man – was the real endgame. The NAACP was pursuing “mixing” in schools, but the logical and desired outcome was racial “mixing” in the bedroom, which would result in the “mongrelization” of the white race. These were the stakes. So, when good men banded together in the White Citizens’ Council, Givhan assured them, they could face the issue of school desegregation, loaded as it was with so many potential consequences, with the confidence that “the whole of the U.S. Army is not strong enough to force that upon us.”⁵

The U.S. Supreme Court decision which came to be called simply *Brown I* had alarmed some Alabama lawmakers. Even before the decision was reported, some legislators had begun to use their offices to build defense works against it. The prevailing hope was, of course, that it would never have any impact in the state’s schools or on the South’s peculiar social arrangement. After the Harrison

⁴ *Southern School News*, January 6, 1955; McMillen, *The Citizens’ Council*, 43.

⁵ *Ibid.*

Elementary School enrollment attempt in Montgomery and the initiation of sustained NAACP activity, however, all whites in Alabama were wide awake. The imperative of the legislature became not simply blunting *Brown*, but assaulting it, destroying it. Outside the legislature, Citizens' Councils became the preferred organizational outlet for white anxieties. These were the most significant movements, then, awakened in Alabama as a direct or indirect result of the *Brown* decision: the legislative effort to nullify *Brown*; the effort to force implementation, undertaken by black parents with the assistance of the NAACP; and the effort to doggedly resist any such implementation, undertaken by segregationists, many of whom affiliated themselves with the Citizens' Council and similar organizations.

NAACP activity in the state to that point had been mostly limited to middle class black activists' efforts to register voters in a select few cities. Many blacks who had not been active members of the NAACP subsequently responded to a national and regional drive to force implementation of the Court's decision. This implementation drive then led segregationists to more urgently coordinate their defense. The powerful, middle-class-driven Citizens' Council challenged and ultimately supplanted the violent KKK for leadership of Alabama's white supremacists. Many in this new order of segregationists were members of the state legislature, and those politicians who did not formally join such organizations dedicated themselves to an active preservation of the color line in education. In short, *Brown* put hope into the hearts of many integrationist-inclined blacks, while it put fear into the hearts of many segregationist whites, and each group engaged in early efforts to either effect or forestall the decision's promise. They subsequently reinforced each other.

The NAACP and the Citizens' Council did not account for the sum total of organized reaction to *Brown*, of course. There were other white supremacist groups that emerged in response to the decision, some of which splintered from – or blurred into – the Council itself. Existing groups like the KKK benefitted from a surge in membership and an increase in activity, as well. In addition to these, there were a small number of white liberals who joined with black intellectuals in a bi-racial movement

for moderation. The Alabama Council on Human Relations (ACHR) was the strongest manifestation of this movement, but its impact remained marginal. The Citizens' Council's call for "law and order," and its characterization of the NAACP as a trouble-making group of "outsiders," won over many whites who might have been swayed by bi-racial liberals' calls for cooperation and discussion. Even if many whites remained aloof from the Council, its' message of "law and order" and moderation carried the day among a greater number than is represented by their numerical strength. Law and order and moderation, in effect, meant anything short of KKK-type violent resistance. Indeed, Alabamians might have first heard the phrase when the "Southern Law and Order Commission" in 1913 sent an anti-lynching petition to southern governors. For many councilors themselves, law-and-order moderation meant economic reprisal. For many politically inclined whites, both within the Council ranks and nominally without, it meant erecting as many effective legal barriers to any breach of segregation and white supremacy as possible. Alabama Governor Jim Folsom would eventually be the last liberal standing, while activists on both sides swirled around him in a frenzied effort to organize massive resistance and persistent pressure, and as the effort to block *Brown* helped solidify race as the locus of Alabama politics.⁶

Politics and Race in Alabama, 1875-1954

Brown did not infuse politics in Alabama with race, of course. Racial conflict was a fact of life in Alabama by the 1950s. It had only been 20 years since the "Scottsboro Boys" tragedy had exposed the lengths to which whites in Alabama would go to preserve the integrity of white supremacy in the state, including, in that case, flagrant abuse of the criminal justice system. It had been less than a decade since Alabama politicians had contributed to the temporary fracturing of the Democratic Party occasioned by the "Dixiecrat" revolt against the national party's civil rights plank. Alabama's white power structure

⁶ See, for the Southern Law and Order Commission, Flynt, *Alabama in the Twentieth Century*, p. 318.

had dealt at various times since Reconstruction with populist, biracial threats from the working class, especially in the industrial cities of Birmingham and Mobile. And white violence against blacks thought to be encroaching into white neighborhoods in Birmingham was so prevalent by the 1950s as to afford the city the unfortunately apt nickname of “Bombingham.”⁷

Alabama historian Wayne Flynt has concluded, “From the time freedmen received the vote in the late 1860s, race played a pivotal role in state politics.” According to Flynt, class was often cast alongside race. The political alliance that governed the state in the late Nineteenth and for much of the first half of the Twentieth Century was born of racial and class-based imperatives. The Black Belt “planter” elites, large landowners who lorded over masses of black tenant farmers much like antebellum planters had done before them, could trace their ascendance back to the “redemption” of the state from “radical Republican” Reconstruction rule in 1875. These Democrat planters took advantage of the national retreat from Reconstruction policy, appealed to average whites, and took firm control of the state by championing white supremacy and low taxes, in contrast to the “tax-and-spend” policy of the supposedly corrupt and inept “black Republicans.” The Alabama Bourbons, as they came to be called, maintained power amid a late 19th Century Populist challenge by aligning themselves with the industrialists and businessmen of Birmingham and its several small, satellite cities. These so-called “Big Mules” of the Birmingham district and the planters of the Black Belt, equally frightened by the prospects of a Populist coalition of poor blacks and whites, enthroned themselves and destroyed the Populist uprising with the adoption of the 1901 state constitution. This document (which remained the state’s foundational charter as of 2013) solidified Bourbon control by effectively disenfranchising thousands of poor whites and blacks through the use of voter residency requirements, criminal restrictions, a property requirement, and, most damningly of all, an annual, accumulative poll tax. The 1901

⁷ See, generally, Flynt, *Alabama in the Twentieth Century*, and William Warren Rogers, et al., *Alabama: The History of a Deep South State* (Tuscaloosa: University of Alabama Press, 1994).

constitution also ensured white solidarity, however, by institutionalizing segregation, which, along with black disenfranchisement, institutionalized white supremacy.⁸

Changes wrought by the Great Depression, the New Deal, the Second World War, and black challenges to white supremacy all brought race closer to the center of Alabama politics, ultimately at the expense of class. The Depression breathed life into progressive traditions in the state and gave rise to a cadre of New Deal liberals that competed with the Bourbon conservatives for power during the 1930s and 1940s. These liberals capitalized on the votes of small farmers in the state's northern Piedmont and southeastern Wiregrass regions and the votes of laborers in Birmingham and Mobile. The high water marks of this movement were perhaps the gubernatorial terms of Bibb Graves (1927-31, 1934-38). Graves, though, was twice succeeded by Bourbon conservatives and was himself affiliated with the great, longtime defender of white supremacy, the Ku Klux Klan. The long term prospects of the liberal movement were even dimmer than its short term failures, though. Conservatives and some progressives remained staunchly opposed to the more liberal aspects of the New Deal, and as the Roosevelt and Truman Administrations cautiously began to abandon their traditional deference to Jim Crow segregation and to court the growing black vote in the North and West, southern Democrats in Alabama and across the South began to prepare a challenge to the direction of the national party. Many white Alabamians returned home from the war eager to wrest control of southern politics from this old guard and to modernize the South. But growing black activism among veterans and the Truman Administration's nascent support for civil rights put these new southern leaders on the defensive and forced potential would-be racial moderates to harden their racial politics to fend off conservative attacks.⁹

⁸ Flynt, *Alabama in the Twentieth Century*, pp. 4-10, 30-34, see for quotation, p. 33; Carl Grafton and Anne Permaloff, *Big Mules and Branchheads: James E. Folsom and Political Power in Alabama* (Athens: University of Georgia Press, 1985), pp. 39-54; Frederickson, *The Dixiecrat Revolt*, pp. 1-10.

⁹ Flynt, *Alabama in the Twentieth Century*, pp. 57-66; Frederickson, *The Dixiecrat Revolt*, pp. 28-66.

These changes unleashed by the New Deal and the war gave rise to the Dixiecrat Revolt of 1948. The so-called revolt was the culmination of southern conservative backlash against the New Deal and a visceral response to the Truman Administration's support for civil rights legislation aimed at lynching, the poll tax, segregated interstate transportation, and the permanent establishment of the Fair Employment Practices Commission. In response to these growing threats, conservative southern Democrats resurrected Confederate President Jefferson Davis' post-bellum clarion call of "states' rights," which harmonized well with long-echoing calls for "local control." Alabama's Big Mules and Black Belters had been demanding "local control" since the New Deal. Roosevelt's policies had come to represent, to them, new threats of federal intrusion into matters they saw fit to regulate themselves, and more importantly, threats to their ascendancy. Alabama's conservative leaders realized, though, that such grievances did not resonate with the white working class, which they were trying to control. To win votes in Alabama, the Bourbon coalition leaders eventually "remembered a classic lesson of Alabama politics," as one historian has written. They knew that "if they shouted 'nigger' often enough and loud enough, the white working class would listen," and they did. Nationally, the Dixiecrats mounted a third party challenge to Truman's election which was designed to bring the party back to a defensive position on states' rights and, in effect, on Jim Crow and white supremacy in the South. The Dixiecrats in Alabama succeeded in taking control of the state's Democratic party apparatus and leaving "loyalist" Truman electors off of the primary ballot, ensuring victory for the Dixiecrat candidate – South Carolina's Strom Thurmond. Among those Alabamians who remained loyal were future Governor George C. Wallace and his political mentor, Governor James E. "Big Jim" Folsom.¹⁰

Folsom was a populist and racial moderate from the Wiregrass region who ascended to the governorship by by-passing the usual political channels (courthouse gangs) and by going directly to what he called the branchheads of politics – the people themselves. As a loyalist, he supported Truman and

¹⁰ Flynt, *Alabama in the Twentieth Century*, pp. 75-6; Frederickson, *The Dixiecrat Revolt*, pp. 1-10, .

opposed the Dixiecrat split. He supported expanded civil rights for poor whites and blacks alike, actively sought the abolition of the poll tax, and fought the Bourbon alliance by trying to reapportion the state's legislature, which remained increasingly and absurdly weighted towards the sparsely populated Black Belt. Folsom's innovative grassroots campaign won him the governor's chair, but his progressive stance on civil rights (to say nothing of his administration's infamously egregious corruption and his own often outrageous, drunken behavior) won him few friends among the state's established power brokers. The very same election that brought Folsom to Montgomery, after all, produced the Boswell Amendment – a response to the Supreme Court's *Smith v. Allwright* decision outlawing the all-white Democratic primary. The Boswell Amendment made voter registration so complicated that it effectively disfranchised most blacks and many poor whites who had not managed to claw their way onto voter rolls. Folsom opposed the amendment and boldly continued to oppose such measures throughout his career. His progressive stance on racial matters ultimately doomed the legislative passage of nearly anything he valued most dearly though, namely poll tax abolition and reapportionment.¹¹

Alabama's constitution prohibited governors from holding consecutive terms in office, but the popular Folsom won two non-consecutive terms in office which bookended the lone term of Gordon Persons, whose own time in Montgomery demonstrates further the growing importance of race in Alabama politics. The Dixiecrats in Alabama had been assailed by those who saw their ballot manipulation as an attack on the democratic process; Folsom himself had made hay of accusing the Big Mules and Black Belt planters of being anti-democratic. Like Folsom, Persons was a loyalist and therefore reaped the benefits of a voter backlash against the Dixiecrats' extremism and their complete evisceration of Folsom's populist agenda. Nevertheless, Persons was a staunch segregationist, refusing to put himself out on the limb on which Folsom precariously rested. Tellingly then, Persons had a good

¹¹ Grafton and Permaloff, *Big Mules and Branchheads*, pp. 1-12, 79-111; George E. Simms, *The Little Man's Big Friend: James E. Folsom in Alabama Politics, 1946-1958* (Tuscaloosa: University of Alabama Press, 1985), pp. 22-39.

working relationship with the legislature and was able to achieve most of his modest goals, including initiating prison reform and instituting speed limits and increasing highway expenditures. He had campaigned on the issue of abolishing the poll tax but settled for a watered-down compromise measure which eliminated only the accumulative feature of the tax. Persons also supported the "Little Boswell" Amendment, a back-up plan to continue black disenfranchisement which had been conceived after the original was deemed unconstitutional by a federal court.¹²

Persons was the Governor of Alabama when *Brown* was handed down in the summer of 1954. According to historian Wayne Flynt, the Court's decision – along with the sustained direct action protest and litigation campaign known collectively as the 'Montgomery bus boycott' the following year – completed Alabama's "transition from a political culture heavily influenced by class conflicts to one almost entirely defined by race." Persons' response to the school cases decision represented the so-called moderate political approach to racial matters amid this transition. He had no inclination whatsoever to desegregate anything, but he nonetheless eschewed the kind of race-baiting and vehement defiance that traced its origins to the Dixiecrats and would come to characterize subsequent administrations. Despite pressure from the legislature to call a special session to initiate defiant legislation, Persons insisted on caution, claiming that "no intelligent legislation can be passed until the subject is clarified and until the legislature knows what it is facing." While he resisted the pull of the most reactionary white supremacists, his actions demonstrated the futility of the moderate approach.

¹² Grafton and Permaloff, *Big Mules and Branchheads*, pp. 161-4; Samuel L. Webb and Margaret E. Armbruster, *Alabama Governors: A Political History of the State* (Tuscaloosa: University of Alabama Press, 2001), pp. 206-9; Simms, *The Little Man's Big Friend*, pp. 39-136. See for the invalidation of the Boswell Amendment, *Davis v. Schnell*, 69 U.S. 749 (1949); the suit was brought by Mobile NAACP organizer John L. LeFlore; the "Little Boswell" Amendment provided for a detailed voter registration questionnaire prepared by the Alabama Supreme Court and an anti-communist loyalty oath; see also, Gilliam, *The Second Folsom Administration*, pp. 26-30.

Ultimately, Persons did essentially nothing in response to *Brown*, but this left a vacuum which Alabama's legislators gladly filled as soon as they got the chance.¹³

Within the legislature, leaders were then emerging that represented a new generation of doggedly committed segregationists. Both factions of the Black Belt—Big Mule alliance were preparing to resist desegregation, though each had a slightly different approach, born out of their respective demographic and economic situations. Representative of the Black Belt planters was state senator Sam Engelhardt. Engelhardt claimed to have entered politics solely to keep blacks from governing his home county of Macon and “taking his property.” He had inherited a 6,500 acre cotton plantation in the overwhelmingly black county, and most of his land was worked by poor black tenant farmers. Blacks outnumbered whites roughly four-to-one in Macon County. In Macon and across the Black Belt, the substantial black majorities in the various counties made the white elites there take up what has been called an “angry, do-or-die approach” to maintaining segregation, because threats to segregation represented threats to their “entire fortunes – indeed their entire identities.” If blacks were ever afforded the vote, or were ever given the education that might prepare them for something other than sharecropping, then the political and economic foundations of Black Belt white supremacy would crumble. “That’s why I’m in this thing,” Engelhardt once said of his political career. He would rhetorically ask, “If you have a nigger tax assessor what would that do to you? What would a nigger sheriff do to you? What would a nigger judge do to you?” Making matters more precarious for Engelhardt was that Tuskegee, the Macon County seat, was home to the famed Tuskegee Institute – a prestigious black institution of higher learning established as a teachers’ school in the late Nineteenth Century. Along with a federal Veterans’ Administration hospital, the Institute fostered a stable-if-small black middle class intelligentsia and an active NAACP chapter, making the city a seedbed of grassroots

¹³ Flynt, *Alabama in the Twentieth Century*, see, for quotation on Alabama’s political transition, p. 58; Grafton and Permaloff, *Big Mules and Branchheads*, pp. 161-76; Webb and Armbruster, *Alabama Governors*, pp. 206-9, see, for Persons quotation, p. 209.

agitation against Jim Crow and disenfranchisement. Such threats in Engelhardt's backyard made his defense of white supremacy all the more urgent.¹⁴

Engelhardt would soon emerge as one of the most ardent segregationist in Alabama and the leader of the state's White Citizens' Councils. The senator made no secret of his views on race and on the potential for school desegregation, once arguing publically that "desegregating the schools will lead to rape! Damn niggers stink," he said, "they're unwashed. They have no morals; they're just animals." He continued, "The nigger is depraved! Give him the opportunity to be near a white woman, and he goes berserk!" The logical conclusion was that "the nigger isn't just a dark-skinned white man. He's a separate individual altogether." Such impassioned defenses of biological racism were not uncommon among Alabama's white leadership. Deeply-held beliefs about race such as this were maintained by probably a substantial majority of whites in the state. But among prominent politicians, it was generally only the Black Belters who had the audacity to state such matters publically.¹⁵

The situation was somewhat different for the Big Mules. Representative of the state's industrial and corporate interests was Birmingham lawyer and state senator Albert Boutwell. Boutwell grew up in the Black Belt but moved to the state's largest city after graduating from law school at the University of Alabama. He was first elected to the state senate in 1946, where he quickly became a leader in the anti-Folsom, conservative "economy bloc" and subsequently served as floor leader for Governor Gordon Persons. He was known as a shrewd lawyer, a staunch conservative, and friend to business. As a representative of the growing city of Birmingham, he might have favored Folsom's call for reapportionment, but as a Big Mule, his alliance with the Black Belt planter contingent made this a

¹⁴ Grafton and Permaloff, *Big Mules and Branchheads*, pp. 161-76, "angry, do-or-die" and "taking his property" quotations from pp. 165, 180; McMillen, *The Citizens Council*, pp. 46-7; *Southern School News*, March 3, 1955; see for Engelhardt quotations, Gilliam, *The Second Folsom Administration*, pp. 104-5. See, on the civil rights movement in Tuskegee generally, Robert J. Norrell, *Reaping the Whirlwind: The Civil Rights Movement in Tuskegee* (New York: Knopf, 1985).

¹⁵ J.W. Peltason, *Fifty-eight Lonely Men: Southern Federal Judges and School Desegregation* (New York: Harcourt, Brace and World, 1961), p. 58.

sensitive issue. Of course the two sides saw eye-to-eye on segregation, and Boutwell quickly established his credentials by serving on the segregationist “Interim Committee” in Birmingham, a group of white power brokers that sought to blunt any efforts to desegregate Birmingham’s public facilities.¹⁶

As a leader of his city’s Big Mule contingent, Boutwell was concerned with maintaining “law and order,” the most fundamental tenet of white “moderate” segregationists. Without law and order, the rationale went, business stagnated. This position had been developing in “Bombingham” for years, as black encroachment into white neighborhoods led to continuing dynamite attacks on black homes, and as the black middle class and returning World War II veterans began to attempt to assert their voting rights. This violent response to the black challenges of the 1940s had its own roots in the city’s conservative reaction to the biracial trade unionism of the 1930s and before, which had been violently and often clandestinely suppressed. By the 1950s, though, moderates, many of them veterans themselves, counseled that the violent response of the mostly working class Klan was bad for the city’s image, industrial recruitment, and business in general. Absolute maintenance of the color line was imperative, but there were more legally sound and civilized ways to defend it, some thought. Boutwell represented such interests in the Interim Committee and in the state legislature. Engelhardt and the Black Belt elites also denounced violence, but theirs was nonetheless that “angry, do-or-die approach” that owed much to the violent response of poorer whites and also encouraged such a response at the same time. This set the planters ever-so-slightly apart from the Big Mules, whose segregationist defense has been called “determined but nevertheless distant” and could often be mistaken for real racial moderation. Boutwell and other less-vitriolic segregationists, like Alabama’s U.S. senators Lister Hill and John Sparkman, would remain publically aloof from groups like the KKK and even the Citizens’ Council,

¹⁶ Gilliam, *The Second Folsom Administration*, pp. 103-4.

while at the same time openly supporting the groups' stated cause: vigilant preservation of segregation and white supremacy.¹⁷

One week before the Supreme Court handed down *Brown*, Jim Folsom won the Democratic primary for governor and, in effect, won the governor's office. He had campaigned on a populist agenda again, promising farm-to-market roads, old-age pensions, and a constitutional convention to replace the 1901 document which undergirded the Big Mule—Black Belt power structure. Even Folsom had been forced to temper his message on race, though. He promised not to make blacks attend school with whites, which simultaneously signaled his recognition of anti-integrationism among blacks and, more importantly, his at least tacit support for segregation.¹⁸ Nonetheless, Folsom's second term would demonstrate that men like Boutwell and Engelhardt, who were set to become two of the incoming governor's most powerful foes in the statehouse, were riding the tidal wave of race beyond the beachhead of power in Alabama and into the heartland of white supremacy. Race may have been woven into the state's political culture over decades, but *Brown* had jolted all parties in Alabama into a state of heightened awareness, activity, and urgency that marked the years that followed, if not as a new political era altogether, then as a period of significantly intensified and tightly channeled continuity.

Legislating against *Brown*

The Alabama state legislature passed a resolution in the late summer of 1953, as the U.S. Supreme Court was preparing to rehear the School Segregation Cases. Bracing themselves for a catastrophic ruling, the legislators decried the difficulties that desegregation might bring, while at the

¹⁷ Grafton and Permaloff, *Big Mules and Branchheads*, pp. 161-180, quotations from p. 180; Eskew, *But for Birmingham*, pp. 53-84; Kelley, *Hammer and Hoe*, pp. pp. 119-137. Hill and Sparkman have been described as "reflect[ing] the progressive inclinations of the people back home on domestic issues," and each had been strongly supportive of New Deal and Fair Deal legislation. But, as one historian has concluded, "neither could afford to transgress on one area of absolute conservatism among the voters – race." Each senator chose to "speak softly" on segregation on account of their delicate relationships with their more liberal northern colleagues. See for Hill and Sparkman, Gilliam, *The Second Folsom Administration*, pp. 36-7.

¹⁸ Flynt, *Alabama in the Twentieth Century*, p. 66; Grafton and Permaloff, *Big Mules and Branchheads*, passim; Simms, *The Little Man's Big Friend*, passim.

same time giving frank admission of, and a glimpse into, the institutionalized nature of the system of segregated education in the state. The legislature lamented that:

The employment, seniority and tenure of teachers, the location and design of schools, the number and routing of school busses, the content and arrangement of the curriculum in every school, the standards of instruction, and practically every other aspect of the educational system of the state are based upon the present separation and would have to be drastically revised if the principal of separation should be invalidated.¹⁹

If this sort of public statement of legally segregated fact came as a surprise to anyone, they had not read the 1901 constitution, which stated the matter plainly enough: “Separate schools shall be provided for white and colored children, and no child of either race shall be permitted to attend a school for the other race.” When the Supreme Court flatly declared this arrangement unconstitutional in 1954 with *Brown v. Board of Education*, Alabama’s legislators responded with a barrage of legislation. Some of it condemned the decision, the Court, and the federal government in general, while much of the rest of it was aimed at avoiding any sort of implementation in the state by a variety of means, ranging in potential effectiveness from the probably hopeless to the seemingly foolproof. One former Dixiecrat attorney observed to the Birmingham press that all of these new laws would “have to be appealed to the Supreme Court” if challenged. “And if they are held illegal” he said, “still another batch of new laws can be tried and tested. This can go on for a long time – and what can the Court do?”²⁰

Sam Engelhardt went to work before *Brown* was even decided, introducing school closure and private school bills into the legislature as early as 1951; he even introduced a bill that would have converted all public education to televised instruction to be broadcast into children’s homes. These pre-ruling bills were considered extreme and were rejected, as were two similar private school bills

¹⁹ Senate Joint Resolution No. 894, September 19, 1953, p. 51, quoted in Trial Brief of the United States, January 5, 1967, Lee v. Macon County Board of Education Case File, Frank Minis Johnson Papers, Library of Congress Manuscript Division (Washington, D.C.) [Collection hereinafter cited as Frank Johnson Papers], Container 19, Folder 5.

²⁰ *Southern School News*, October 1, 1954, quoting the Constitution of the State of Alabama; Gilliam, *The Second Folsom Administration*, p. 107.

Engelhardt introduced in the early session of the 1953 legislature. Engelhardt's proposals would have amended the language of the Alabama constitution, eliminating the obvious requirement of a dual racial system. He suggested replacing that system by introducing language allowing for "the establishment, operation, financing and regulation of free private schools." If the parents of ten or more students wished to establish a private school, they could do so by setting up private school corporations. They could then buy or rent real estate, build or otherwise establish schools, and then administer them as they saw fit, most especially by controlling who was admitted to them. These corporations could also apply for "allotments" of funds similar to those already given by the state, only in this case the allotments were per pupil, as opposed to per teacher. But with the School Segregation Cases still under consideration by the Court, legislators outside the Black Belt were not yet prepared to surrender public schools to a privatized system. Engelhardt's bills languished in committee as the 1953 session ended.²¹

When *Brown* was announced in the summer of 1954, the Alabama State Board of Education formally resolved to continue operating its schools as it had in the past, articulating the legal interpretation that most southern politicians had very quickly adopted. On the motion of Persons, who as governor was *ex officio* president, the board acknowledged in a formal resolution that "the ruling of the Supreme Court on the so-called 'segregation' cases has raised considerable doubt and many questions . . . as to the policy to be followed by [school officials] in the school year of 1954-55." But Alabama's constitutional provision for separate schools for the white and black races had "never been stricken by any court in the land," the resolution continued, and therefore the public schools of Alabama would continue to operate under it, "irrespective of any action by any court in any case in which a unit of the public school system of Alabama is not a party." The board concluded that Alabama's public school system was "administered under the State Constitution and the statutes passed by the Alabama

²¹ *Southern School News*, September 1, 1954.

legislature,” to which there had been no challenge and no change. Therefore, it announced, there would be no change in operation the following school year.²²

As many southern educators and politicians had declared or would subsequently declare, *Brown* was the law of the case, not the law of the land. Widely held as it was, incoming state Superintendent of Education Austin Meadows revealed the insecurity of this position when he pledged to actively work to “find a *legal* way to maintain segregation in our schools” (emphasis added). The Montgomery minister and black community leader S.S. Seay articulated the wider implications of this sort of legal denial when he responded to news of the board’s resolution by saying, “We are facing a day of judgment in America, and none of us is making preparations to meet this judgment.” Most in the state legislature knew that more would be needed to stymie the forces of desegregation than a hopelessly untenable legal interpretation, and so they began to make better preparations to meet the judgment.²³

The legislators appointed a committee to study the decision via executive sessions and to propose a course of action. They tapped Albert Boutwell to chair the committee, which also included Sam Engelhardt. Boutwell announced in September, 1954 that his group was recommending to Governor Persons that all sections of the Alabama Constitution pertaining to public schools be rewritten to eliminate any mention of “public,” and that provisions be written-in allowing for the widespread establishment of state-subsidized private schools. This was to be achieved mostly through a single constitutional amendment, which read, “Nothing in the constitution shall be construed as creating or recognizing any right to education or training at public expense, nor as limiting the authority or duty of the legislature to require or impose conditions or procedures deemed necessary to the preservation of peace and order.” Peace and order could be maintained, and “confusion and disorder” avoided, by giving parents the right to choose to “attend schools provided by their own race.” With the constitution thus amended, the committee reasoned that segregated education would be maintained not by law, but

²² *Southern School News*, September 1, 1954; *Birmingham Post-Herald*, July 10, 1954.

²³ *Southern School News*, September 1, 1954; *Birmingham Post-Herald*, July 10, 1954.

by choice, as they figured that most black parents would not risk choosing white schools. In the event that some did, the public schools could simply be abandoned in favor of private schools, for which the state would provide grants-in-aid. In case of legal challenges, school officials could themselves be legally deemed “judicial” officers and supposedly put beyond the reach of civil litigation.²⁴

When it was released in October, 1954, the full text of the Boutwell Committee Report revealed the rationale behind the “peace and order” excuse. The report summarized the likely results of “forced integration” such as that portended by *Brown*. “The recent outbreaks of violence in border states and communities” (that is, in the old “Border States” of the Confederacy where the black population was significantly lower and where desegregation had begun in earnest) “are pale reflections,” wrote the committee, “of the result of a forced integration in this state.” It insisted that “if we are to save our schools and our children from violence, disorder, and tension, it is imperative that prompt action be taken.” The legislature should not shut down every public school in the state, but it should be aware, the committee beseeched, that “some school systems in the state may at any time be faced with an intolerable situation.” It was taken as a given, and given the sanction of reasonable understanding, that white citizens faced with the “intolerable” burden of black students in white schools would resort to violence and economic reprisals. “White employers” the report read, “would be strongly induced to withhold employment from Negro parents who would take advantage of the intended compulsion, leases would likewise be terminated, and trade and commercial relations, now in satisfactory progress, would be affected.”²⁵

If the supposed inevitability of a violent white backlash and campaign of economic reprisal was not enough to convince the legislature to pass the committee’s proposals, the plight of the black student in white schools was added to the list of the unfortunate outcomes of “forced integration.” The Boutwell Report lamented that “Negro children would be harmed, and warped by belligerent

²⁴ *Southern School News*, October 1, 1954, November 4, 1954.

²⁵ *Southern School News*, November 4, 1954.

resentment of their forced acceptance, by innumerable daily incidents emphasizing it, and by the sharp disclosure of a generally lower scholastic aptitude.” Appropriate education could not take place in such an “abnormal and unwholesome atmosphere of tensions and resentment.”²⁶

The ultimate goal of the Boutwell proposal was not the statewide abolition of public schools, nor indeed state-level, absolute defiance of any breach in segregated education. It delegated the authority for school closure to local school authorities. The committee concluded that “the overwhelming majority of the citizens of Alabama,” were “unalterably opposed to the idea of permitting the use of the public school system to coerce racial integration,” and that all whites and the vast majority of blacks would prefer to go to schools for their own race. However, it also allowed that some “might be willing to concede the right of white and Negro families to send their children to mixed public schools.” In the event that this was acceptable to the local community as a whole, it would be allowed, provided there was an adequate “application of tests and standards.” In effect all of this meant that in areas like the Black Belt, where the threat of blacks overrunning whites was highest, any breach of the color line would be undoubtedly seen as an “intolerable situation,” and black applications to white schools would result in school closure and the establishment of white private schools. Where the black population was relatively smaller, applicants could be screened and either let in on very select basis where whites were willing to accept a token number, or summarily rejected where they were not. This was ostensibly a “freedom of choice” plan which would create a three-pronged school system, one white, one black, and one mixed, in which there was “no compulsory mixing of races,” and under which there would thus be no violation of any one’s equal protection.²⁷

When a number of conservatives expressed concern over consideration of a mixed set of schools, even under so-called freedom of choice, members of the Boutwell Committee indicated that none were genuinely intended. Boutwell point man Joe Johnston announced that “there may have been

²⁶ *Southern School News*, November 4, 1954.

²⁷ *Southern School News*, November 4, 1954; Gilliam, *The Second Folsom Administration*, p. 187.

some misunderstanding about the purpose of the bill. It has been reported – incorrectly,” Johnston told the press, “that it is a bill to provide a certain type of school. Its real purpose is to give the legislature more authority to make changes from time to time as the situation requires.” Even in affording the legislature this “authority to make changes,” Boutwell argued, it put the real power “in the hands of local people, even to the extent of providing an alternative system of schools.” When some expressed concern over the drastic measure of school closure, Boutwell assured them that this was a “last resort.”²⁸

Members of the Boutwell Committee, and the great majority of legislators in general, pleaded with Persons to call a special session of the legislature, so that they could pass the committee’s proposals along with any other bills drafted in response to *Brown*, such as those being considered across the South. Persons recommended waiting until the Court issued its implementation decree and submitted the committee’s proposals to advisors. The governor was clearly taking a wait-and-see approach. With his term nearing an end, and with the Supreme Court waiting on incoming Justice John Marshall Harlan to join it before making a decision on implementation, this wait-and-see approach became the do-nothing approach. At a conference of southern governors that fall, which Persons declined to attend, seven governors signed a pledge to study and implement all legal means feasible to “preserve the right of the states to administer their public school systems to the best interest of all the people.” Among the six who attended but declined to sign the pledge was incoming Alabama Governor Jim Folsom.²⁹

Persons left Folsom an increasingly besieged governor’s chair. Folsom was prepared to do all that he could to keep a rash of segregationist legislation from overtaking his own legislative program. But would it be enough for the governor to counsel not just wait-and-see, but ‘let us use moderation?’ Increasingly, over the course of his last four years in public office, Folsom saw events spiral out of his

²⁸ *Southern School News*, November 4, 1954; Gilliam, *The Second Folsom Administration*, p. 190.

²⁹ *Southern School News*, November 4, 1954.

control. The organization of Citizens Councils and the implementation activity of the NAACP, in particular, marked his first years in office and only deepened a crisis that he would have rather avoided altogether. Hope and fear were powerful emotions, however, and each had helped awaken activists in Alabama and had insured that no politician could escape what would become the great question of the next 15 years in Alabama politics: on which side of the racial fence would one stand. There was, indeed, to be no “fence-straddling” anymore on the question of segregated education. With the Supreme Court’s highly anticipated implementation decree still to follow *Brown I*, the forces mobilized by the initial decision continued to plan for the best and the worst.

The NAACP and “Operation Implementation”

From the moment *Brown I* was handed down, the NAACP began organizing an implementation drive. At the direction of the NAACP National Office in New York, the Southeast Regional Office began to reach out to local branches in the late spring and early summer of 1954, encouraging immediate action to capitalize on what it called “our greatest victory.” The Secretary of the southeast office was Ruby Hurley. Hurley had come to the South from the national office in New York in 1952 and had begun to work on fulfilling the NAACP’s goal that the Negro be “Free in ’63,” traveling throughout the region, visiting its over 300 branches to monitor and guide activity, and following up on complaints from local people. She was also responsible for prodding the regions’ branches into maintaining or increasing their memberships and raising money for the organization’s Freedom Fund. By 1954 she had already been the victim of written and telephoned threats to her physical safety. Once *Brown* came down, she nonetheless took on the primary role of overseeing the implementation effort in the South.³⁰

³⁰ Ruby Hurley to Southeast Regional Branches, June 7, 1954, Papers of the National Association for the Advancement of Colored People, Library of Congress Manuscript Division (Washington, D.C.) [Collection hereinafter cited as NAACP Papers], Group II, Box C-222, Folder: Southeast Regional Office Correspondence 1954, [Microfilm available as *Papers of the NAACP*, Ed. John H. Bracy et al. (Bethesda, MD: University Publications of America, 1981-)] [Microfilm location hereinafter cited as *Papers of the NAACP*], Part 25: Branch Department Files,

Hurley attended the NAACP annual conference in Atlanta on May 22nd and 23rd, 1954, at which the association's leaders formulated their implementation plan: to have local branches petition boards of education for recognition of the Supreme Court's decision and for an immediate end to compulsory segregated education. Practiced in litigation above all else, the association knew the petitions would be an important first step. While they were not likely to persuade any school boards to dismantle their dual systems, they would at least pave the way for civil actions against those boards in each case. The NAACP's Legal Defense and Education Fund, Inc. – often called LDF or simply the Inc. Fund – was prepared to provide counsel in such of those cases as it could. LDF attorneys were veterans of the School Segregation Cases litigation effort and knew that the petitioning campaign must be carried out carefully if it were to ultimately become part of a trial record.³¹

The NAACP announced its plan via the Atlanta Declaration. "All Americans are now relieved," it read, "to have the law of the land declared in the clearest language. . . . Segregation in public education is now not only unlawful; it is un-American." The group had "canvassed the situation in each of our states" and was "ready to work with law abiding citizens who are anxious to translate this decision into a program of action to eradicate racial segregation in public education as speedily as possible." It announced the forthcoming petitioning campaign and an accelerated community action program aimed at winning acceptance of the Court's decision. It sought the cooperation of "teachers, parents, labor, church, civic, fraternal, business, and professional organizations" and the U.S. government. The NAACP would thenceforth commit "the fullest resources of the association" to the "great project of ending the artificial separation of America's children on the irrelevant basis of race and color." W.C. Patton, NAACP President of State Conferences and soon-to-be become the state's first full-time Field Secretary, carried

Series A: Regional Files and Special Reports, 1941-1955 (Part 25, Ser. A)]; Elizabeth Gayer to Harriet Crowley, January 21, 1955, NAACP Papers: Group II, Box C-223, Folder: Southeast Regional Office Correspondence 1955, Jan.-April (*Papers of the NAACP*: Part 25, Ser. A).

³¹ Ruby Hurley to Southeast Regional Branches, June 7, 1954, NAACP Papers: Group II, Box C-222, Folder: Southeast Regional Office Correspondence 1954 (*Papers of the NAACP*: Part 25, Ser. A).

the news of the Atlanta Declaration to 200 of the association's local leaders at a Montgomery meeting, which closed with an affirmation of the stated goal of the national organization – that the Negro be “free in 1963.”³²

In June Hurley herself moved on the Atlanta Declaration and told branches that, with the Supreme Court's May 17 decision, they were surely “now in a position to move forward and see [their] goal with clearer vision.” She “admonished” branch leaders to “act promptly in getting petitions signed,” to “have legal counsel or other well qualified persons represent them in conferences with local school boards,” and to work with the state conference “on every step of this.” If they needed any reassurance or encouragement, Hurley reminded them, “Segregation in public education has been declared unconstitutional and the questions to be argued before the Court in the Fall will not change that fact.”³³ Hurley and others knew that whites were trying to claim the decision was simply the ‘law of the case,’ which they all knew to be legally worthless. “We are fully cognizant,” she announced on a radio broadcast, “of the resistance to the Supreme Court decision affecting segregation in public education.” These efforts “to circumvent it,” she said, “will be lost – the law is binding.” She reminded her own local branches that it was their duty to not only try and make their communities “understand the evils of segregation” but to convince the whites in power there that they should “resign themselves to the fact that state laws notwithstanding, segregation in public education is legally dead. When it will be buried,” Hurley wrote, “is up to the people in our communities.” It was the local NAACP's role, then, to “hasten the day of the funeral.” Hurley understood that resistance might mean it would take some time; just how much was harder to ascertain.³⁴

³² *Washington Afro-American*, May 25, 1954.

³³ Emphasis in original and referencing the pending implementation hearings.

³⁴ Ruby Hurley to Southeast Regional Branches, June 7, 1954; *News and Action*, NAACP Southeast Regional Office Newsletter, July, 1954; Ruby Hurley, Statement for Broadcast-WJRD, July 22, 1954; all in NAACP Papers: Group II, Box C-222, Folder: Southeast Regional Correspondence 1954, (*Papers of the NAACP*: Part 25, Ser. A).

To get a sense of what to expect in Alabama when this process of making funeral arrangements actually began, Hurley initiated talks that summer with W.C. Patton. Patton, who had been “working like a house-afire” for “a year and a half,” told her that when branches actually got down to filing petitions, that they should “expect almost anything.” Patton’s ground work had shown him that whites were organizing resistance already, and anyone who picked up a newspaper could see that the legislature was preparing for a fight. Nonetheless, Hurley told the New York office, “I think we are at the point where concentrated effort will pay off” in Alabama.³⁵

The Alabama NAACP State Conference held a subsequent meeting of branch officers and handed out copies of the Atlanta Declaration, petitions, and retainer forms. At the very same time, State Superintendent of Education Austin Meadows was distributing copies of the newly passed Alabama Pupil Placement Law to the state’s local education officials. Just as Meadows understood that local superintendents and boards of education would be the ones administering Alabama’s defense of segregation, so Ruby Hurley knew that the local branches could make or break the association’s implementation efforts. She told the branch officers of the region in September that “the real work must be done by you and the people in your community. Your National Office and your Regional Office cannot do the job for you,” she wrote, “we can only show you the way and help you along.”³⁶

As E.D. Nixon was organizing the filing of a petition to the Montgomery County Board of Education and helping plan the Harrison Elementary enrollment attempt, some NAACP branches in Alabama were preparing to file petitions of their own, as encouraged by the regional office. In addition to the Montgomery action, branches organized and filed petitions with school boards in the fall of 1954

³⁵ Ruby Hurley to Gloster Current, September 10, 1954, NAACP Papers: Group II, Box C-222, Folder: Southeast Regional Correspondence 1954, (*Papers of the NAACP*: Part 25, Ser. A).

³⁶ This assertion by Hurley was certainly true. It was local people on the ground who had to fire the first salvos against the fortress of segregated education. The role of local people in the movement has been aptly documented and analyzed, however, by John Dittmer; see Dittmer, *Local People: The Struggle for Civil Rights in Mississippi* (Urbana: University of Illinois Press, 1994). Ruby Hurley to Branch Officers, September 24, 1954, NAACP Papers: Group II, Box C-222, Folder: Southeast Regional Correspondence 1954, (*Papers of the NAACP*: Part 25, Ser. A).

in the city of Anniston (east of Birmingham), in the industrial Birmingham suburb of Fairfield, and in the small south Alabama town of Brewton. These earliest attempts revealed the dynamics of subsequent attempts and the response they elicited. The grievances were clear: the signatories of the Fairfield petition all had to walk past white schools to get to their assigned schools – which were inferior in any case. The remedies were clear: the petitions, usually bearing the signatures of 20-30 parents of school children, asked for school boards to take “immediate steps” to comply with the Supreme Court’s mandate and to bring to an end compulsory segregated education within the system. The NAACP branches offered to assist the school boards in any way possible in bringing this about; thus, biracial cooperation was a fundamental request. The standard official and unofficial responses also quickly became clear. The Montgomery school board took the ‘law of the case’ approach and reasoned that it need do nothing. After nearly two weeks had passed with no action announced by the Fairfield Board of Education, the chairman of the local NAACP branch stated that he had “hoped to hear from them before this, but we are still acting in good faith,” he said, “expecting to have word from the board.” The Anniston school board announced that it would consider the petition and then proceeded to simply let the matter die there. School officials were generally content in ignoring such requests, as had been expected in most cases.³⁷

If refusing to officially respond to petitions was a seemingly benign response, the behind-the-scenes strategy employed by school officials was both more sinister and more effective. It was first revealed by the response of several signatories to the Brewton petition. The local school board in Brewton turned the petition it received over to the local newspaper, which subsequently published the list of signees. Twelve parents who had signed then denied having done so, and three disavowed any association with the NAACP. Many blacks whom local leaders had convinced to sign petitions were not in a position to withstand the coming barrage of pressure from whites, usually in the form of the threat

³⁷ *Huntsville Times*, Sept 24, 1954, Oct. 15, 1954.

of economic reprisal but also including the threat of violence. The average black parent could not afford to risk losing a job or being unable to obtain credit or being evicted. Many petitioners would later deny having signed or would deny knowing what it was they had signed. NAACP leaders, at least, were in most cases in positions that made them immune to some of this pressure. For example, the president of the Fairfield branch was a local minister, and the leader of the Anniston branch was a dentist. But the parents who signed were not always so lucky.³⁸

In December, 1954, speaking to the NAACP's Southeast Regional Advisory Board, the association's Director of Branches, Gloster Current, declared that the organization would persist in its effort to force implementation on the South despite the beginnings of an economic reprisal campaign organized by the Citizens' Councils. Current told the assembled state conference presidents, field secretaries, and other officers that the NAACP would continue to "use every legal means at its disposal to combat these tactics by bigots and others." It would "not be deterred" by those who would "frighten and intimidate the Negro leaders throughout the South" and who would engage in "frantic efforts to circumvent the Court's ruling." Current then addressed legislative efforts to stave off *Brown* implementation, arguing "Integration will work in Mississippi, Georgia, Alabama, South Carolina, and other states in this region," if and only if "the public officials, including the governors and members of the state legislatures . . . adopt law-abiding, progressive attitudes rather than continually seeking to develop methods designed to delay and frustrate effectuation of the ending of segregated schools." Most southerners were "law-abiding," he said, they simply needed progressive leadership.³⁹

Ruby Hurley echoed Current's sentiments in February of the next year, announcing her region's Third Annual Conference of Branches to be held in Atlanta later that month. Despite the resistance the NAACP had encountered, including "actions by state legislatures, citizens' councils and other groups that

³⁸ *Huntsville Times*, Sept 24, 1954, Oct. 15, 1954.

³⁹ NAACP Press Release, December 12, 1954 and Memorandum from Mr. Moon to Mr. Current, Dec. 9, 1954, NAACP Papers: Group II, Box C-222, Folder: Southeast Regional Correspondence 1954, (*Papers of the NAACP*: Part 25, Ser. A).

are advocating circumvention of the law,” she said, “we will continue to work as we have in the past forty-six years and ultimately, after the tumult and din has died, we will win.” When around 200 delegates converged on Atlanta for the conference, they considered what progress had been made, which was minimal, what problems the organization was facing, which were many, and what steps should be taken moving forward. The association was determined, said Hurley, to force upon the South the recognition that the school cases decision was “a second Emancipation Proclamation” and “the law of all the land.” Accordingly, the delegates released a joint statement announcing their determination to continue the implementation struggle, much as they begun it, per the Atlanta Declaration. The NAACP in the southeast was going to ensure that “boards and school officials” would be “continually pressured by NAACP units” until the task was complete. The association would not be “alarmed,” the statement read, by the “undemocratic and unconstitutional methods” of the state governments of the South.⁴⁰

The plan for the fall of 1955 was to be much as it had been 1954: to have local branches file petitions in their communities and to prepare, as necessary, for litigation. While everyone knew that litigation meant a long fight, the conference nonetheless set the regional goal for implementation of *Brown* – meaning the actual desegregation of schools in southern school districts – for September of that year. This was a hopelessly optimistic date, but branches had to at least seem to be acting in good faith in petitioning school boards, rather than simply announcing petitioning as preparation for litigation. There was some hope that a few progressive white officials would comply in some parts of

⁴⁰ NAACP Press Release, Southeast Regional Office, February 3, 1955; *News and Action*, Newsletter of the NAACP Southeast Regional Office, March 1955; both in NAACP Papers: Group II, Box C-223, Folder: Southeast Regional Correspondence, 1955, Jan.-April (*Papers of the NAACP*: Part 2, Ser. A).

the South. Whether they did or not, the officials reasoned, it was still “the beginning of the end” for segregated schools.⁴¹

The petition drive in 1954 had not had the impact that the NAACP wanted, but Hurley, W.C. Patton, and the local branch officials had reason to be optimistic about 1955. Membership was on the rise in the state, at least. And nothing had occurred which would make anyone believe that the NAACP’s approach was not the best hope to achieve implementation. Many blacks in Alabama thought so, as the number of members of the NAACP in the state jumped from just under 5,000 in 1953 to nearly 8,000 by the end of 1954. Membership gains in early 1955 were not as significant as they had been the previous year, and the actual number of new memberships produced by the state’s forty-plus branches routinely fell sort of lofty regional office expectations. But the numbers continued to rise. By mid-year 1955, the state’s branches could boast more than 14,000 members.⁴²

Brown II was not the ruling that the NAACP had hoped for, or called for in its own brief, but it was not wholly discouraging either. The plan for 1955 had been to continue the petitioning drive, which was by then being called “Operation Implementation.” *Brown II* allowed for such a program to operate, insofar as the NAACP and the lower federal courts understood the ambiguous language of the High Court’s ruling – especially “all deliberate speed” – to mean the substantially same thing. There would be many interpretations of that phrase over the coming years from federal benches, but none of those issued in 1955 was the same as the NAACP’s understanding that it might mean that very fall. Parker’s *Briggs* ruling that July very quickly indicated what the NAACP might be up against in the federal trial

⁴¹ NAACP Press Release, Southeast Regional Office, February 3, 1955; *News and Action*, Newsletter of the NAACP Southeast Regional Office, March 1955; both in NAACP Papers: Group II, Box C-223, Folder: Southeast Regional Correspondence, 1955, Jan.-April (*Papers of the NAACP*: Part 2, Ser. A)..

⁴² *News and Action*, Newsletter of the NAACP Southeast Regional Office, March 1955, NAACP Papers: Group II, Box C-223, Folder: Southeast Regional Correspondence, 1955, Jan.-April; Memorandum from Lucille Black to Gloster Current, June 3, 1955, NAACP Papers: Group II, Box C-223, Folder: Southeast Regional office Correspondence, May-Aug., 1955 (*Papers of the NAACP*: Part 2, Ser. A).

courts. Accustomed to remaining undeterred by singular setbacks, though, the NAACP at all levels continued to put faith in the course theretofore charted.⁴³

The second annual round of petitioning in Alabama began in earnest in August, 1955, and the patterns were much the same as they had been in 1954, except that the number of school boards being petitioned was significantly higher. The NAACP in Mobile presented the school board there with a petition bearing the names of 32 parents of black children. “The May 31 decision,” the petition read, “to us, means that the time for delay, evasion, or procrastination is past. Whatever the difficulties in according our children their constitutional rights, it is clear that the school board must meet and seek a solution to that question in accordance with the law of the land.” Mobile school authorities responded by announcing that “the traditions of two centuries can be altered by degrees only,” and that they would continue to operate a dual racial system. “Any integration now,” the board argued, “is impossible without a disruption of our school system to such an extent to substantially impair its efficiency for an indefinite period.” The state legislature had just passed the Pupil Placement Law, in addition to its consideration of myriad other segregation bills, and school boards across the state were thus encouraged to avoid unnecessary compliance in this fashion. So when NAACP local officials filed identical petitions that week in Gadsden, Butler County, Phenix City, and Sam Engelhardt’s Macon County, the public response – when there even was a one – was the same: terse, evasive, and dismissive. For example, Gadsden officials retorted that they would “not be rushed into any precipitate action” and did not “have time nor inclination to listen to harangues by radical groups of either race or their representatives.” By the end of the month, NAACP branches had filed petitions with the boards of education in Birmingham, Bessemer, Jefferson County, Montgomery, Bullock County, Attalla, Anniston, Roanoke, and Selma. These represented Alabama’s largest cities and smallest towns, the Birmingham

⁴³ Ruby Hurley to NAACP Field Secretaries, July 26, 1955, NAACP Papers: Group II, Box C-223, Folder: Southeast Regional Correspondence, Sept.-Dec., 1955 (*Papers of the NAACP*: Part 25, Ser. A).

district, the Black Belt, and the Piedmont. The NAACP was active across the state and was flexing its muscle despite the rebuffing most had figured they were sure to get.⁴⁴

No sooner had the petitions been filed that fall, though, than black parents began to recant. Nine of the thirty parents in Bullock County who had signed asked the school board to strike their names from the petition and swore in affidavits that they had been “misinformed” as to their purpose. The affidavits indicated that the nine thought they were petitioning simply for “better roads” or “better schools,” not for integration specifically. In Selma five petitioners asked that their names be withdrawn, claiming ignorance of the real reason for the document. Two of the five disavowed any association with the NAACP. In Greenville six more people requested retraction of their names from the NAACP petition to the Butler County Board of Education. Like the Selma parents, the Butler County parents gave various reasons for their recanting, all of which were some way of saying there had been a misunderstanding. One official indicted that “the petition on face did not state what they [had] in mind when they signed it.” The petitioners themselves were supposed to have said that they “signed the petition without knowing what was in it.” In one instance, a man claimed, “I informed the man who brought me the petition that I wanted my community improved and I surely did want a water line run to my place.”⁴⁵

W.C. Patton knew the real reason for the withdrawals. In announcing an investigation into the issue, the NAACP field secretary defended the state’s branches. The petitions were, as a matter of course, thoroughly explained to all who signed, he told reporters. The real reason for the repudiations was “fear.” In Selma the situation was clear enough: when news of their participation was published by the *Selma Times-Journal*, 16 of the 29 signatories to the local NAACP petition were fired, and others were made victims of various other means of economic reprisal. Within days of the publication of the petition, Otis Washington was fired from the Selma Marble and Granite Works, where he had worked

⁴⁴ *Southern School News*, September, 1955; *Birmingham News*, Aug. 4, 11, 16, 20, Sept. 2, 1955; *Montgomery Advertiser*, Aug. 13, 21, 1955.

⁴⁵ *Southern School News*, Oct., 1955; *Birmingham News*, Aug. 4, 24, 1955; *Montgomery Advertiser*, Sept. 9, 1955.

for the past nine years. Ethel Griffin was dismissed from her job as a maid but told by the woman who employed her that she could return if she would withdraw her name. Interior decorator Ernest Doyle had his credit withdrawn and his debts called in by his white creditors. Local farmer Richard Winston was unable to secure his usual annual spring loan from the bank and could not get similar credit from any other bank in Selma. Daniel Stevens was fired from the local YMCA. Local barber H.W. Shannon was kicked out of the building in which he ran his business, without compensation for rent already paid. All of the victims were members of the local NAACP. The situation was much the same in Butler, Bullock, and Houston Counties.⁴⁶

The chairman of Selma's local Dallas County Citizens' Council, Alston Keith, announced that the firings there had been "spontaneous" and that the Council deserved neither "credit nor censure" for the measures. But he left no doubt as to the impetus for such actions. "I don't believe," Keith said, "there would have been unity of action that there was without the educational work of the Citizens' Council." In case anyone did not understand what sort of "educational work" he was referring to, Keith added that the employers who had fired the petitioners, withheld credit, called in debts, and kicked out tenants, all "did just what we have been advocating right along."⁴⁷

The White Citizens' Council, Law and Order, and Bi-racial Liberalism

In September of 1954, the *Birmingham News* announced, "A refined descendant of the Ku Klux Klan is 'riding' again in the South to protect Dixie's schools from the U.S. Supreme Court." This time, the state's flagship newspaper wrote, "there are no bed-sheet robes, no violence thus far, and none of the racial mumbo-jumbo of the night riders of the Reconstruction era. In place of the bullwhips," it continued, "the new 'citizen councils' have substituted 'economic pressure' to handle what they term

⁴⁶ *Southern School News*, Oct., 1955; *Montgomery Advertiser*, Sept. 9, 1955; Affidavits of Ernest Doyle, Richard Winston, Daniel Stevens, S.W. Boynton, and H.W. Shannon, NAACP Papers: Group III, Box A-272, Folder: Reprisals, Alabama, General (*Papers of the NAACP: Part 20, White Resistance and Reprisals, 1956-65, Reel 4*).

⁴⁷ *Southern School News*, Oct., 1955; *Montgomery Advertiser*, Sept. 9, 1955.

‘agitators’ – who think the Supreme Court way rather than the Southern way on segregation.” The *News* captured the fundamental roots, goals, and tactics of the Council, all of which were linked to the Klan and the decades-long struggle to maintain white supremacy in the face of federal intervention. Like the Klan, the Council was a white supremacist organization whose goals were the defense of segregation and white domination and the time-honored duty to ‘keep the Negro in his place.’ The Council differed from the Klan in that it jettisoned “bed-sheet robes, violence, and mumbo-jumbo” for a tactical approach fit for mid-twentieth century success.⁴⁸

Southern resistance to *Brown* in the 1950s was perhaps most visibly channeled through the state legislatures, but as one observer of the resistance movement wrote, a "militant minority . . . were unable to sit idly by while their legislators, often with considerable success, endeavored to place impediments between the nation's law and the regions' schools." These men aligned themselves with "some 90 different private groups newly organized to resist the Second Reconstruction," the most powerful of which, by far, were the Citizens' Councils. The Councils "in the course of a few short years would claim among [their] members governors, congressmen, judges, physicians, lawyers, industrialists, and bankers, as well as an assortment of lesser men who crowded membership rosters and packed municipal auditoriums to dedicate themselves to the preservation of ‘states’ rights and racial integrity.” The Council movement began in Mississippi in the summer of 1954, but it quickly spread to Alabama as the NAACP made clear its intention to press for implementation. Across the South, the best indicator of the intensity of white resistance to desegregation was the ratio of blacks to whites in a particular community or county. So it is not surprising that white organization took hold in Alabama in the heart of the Black Belt.⁴⁹

⁴⁸ *Birmingham News*, September 20, 1954; *Facts*, Newsletter of the Anti-Defamation League of B’nai B’rith, September, 1954, in *Facts on Film*, 1954-1958, Miscellaneous Materials.

⁴⁹ McMillen, *The Citizens’ Council*, pp. 5-6, 10-12.

When white men in Selma organized the state's first Council in November of 1954, a spokesman told reporters that, unlike the KKK, the Council was "not anti-Negro; we only want segregation maintained. And we are not vigilantes. We will operate openly and violence is the furthest thing from the minds of the council members." The Council would instead use economic reprisal; it was the heart of the Council's strategy of resistance from the beginning. "The white population in this county controls the money," the spokesman said, "and this is an advantage that the council will use in a fight to legally maintain complete segregation of all races." Specifically, the white men of the Selma Citizens' Council would "make it difficult, if not impossible, for any Negro who advocates desegregation to find or hold a job, get credit or renew a mortgage." Councilors would form committees which would investigate blacks who might be suspected of "agitation" and decide whether or not to apply the "pressure." Most blacks in Dallas county were probably "all right," the man conceded. Thus it was the Selma Council's "utmost desire to continue [the] happy relationship" between black and white, "but on a segregated basis."⁵⁰

Councils sprung up throughout the Black Belt in late 1954 and early 1955. The vehemence with which these white men would defend segregation, as well as their deepest concerns, were revealed in some of the harangues spit forth from the podiums at the organizational meetings of these Councils. At the Marengo County organizational meeting, after Walter Givhan had warned that miscegenation and the assassination of the president were the ultimate goals of the NAACP, the president of the neighboring Council in Perry County, a Dr. Lawrence Crawford, told the gathered that the Council was the only organization through which good white men could "keep the Negro out of our schools, out of our churches, and out of the bedrooms of our white women." Another man took the podium at the same meeting to declare that if any black person tried to desegregate a school in his hometown that "there [was] going to be blood spilled on the campus." John Givhan (Walter's brother) proposed dealing

⁵⁰ *Southern School News*, Jan. 6, 1955.

with a potentially insolent black tenant farmer as such: “knock the black nigger in the head with a goddamn brick and kill the black bastard.” A Mississippi organizer at the meeting interrupted the senator’s brother to say, “The next morning after the Citizens’ Council organizes here, the nigger in Marengo County will be a different nigger.”⁵¹

Featured speakers often came from outside the state, generally leaders from Mississippi, but sometimes segregationist luminaries from other states. For example, the former Governor of Georgia, Herman Talmadge, addressed an audience of councilors in Selma which included Sam Engelhardt, Walter Givhan, and Albert Boutwell. Talmadge managed to invoke the Lost Cause of the Civil War and the threat of white slavery when he pledged resistance to the “scalawags and carpet-baggers of the modern era” who would “sell the South down the river.” Mississippi Circuit Judge Tom Brady delighted councilors at the same meeting when he argued that the Supreme Court could not “by a mandate shrink the size of the Negro skull which is one-eighth of an inch thicker than a white man’s,” and that the court could not “straighten the Negro’s hair or uplift the Negro’s nose – only God can do that.” Biological racism was at the core of Citizens’ Council ideology, and the inherently inferior black man was a threat not just to segregated education but the white race in general, as he had been since Reconstruction. By the summer of 1955, Councils had been formed in eight counties of the Alabama – the Cradle of the Confederacy – to protect the schoolhouses, churches, and bedroom doors of the state from just such a threat.⁵²

The Councils were initially assailed by a number of Alabama newspapers, most of them in cities north of the Black Belt. The Councilors were called “Ku Klux Klansmen in top hat and tails” and derided for their closed-door meetings. Even some Black Belt papers, including the *Montgomery Advertiser* and the *Selma Times-Journal*, occasionally questioned the Council’s use of economic reprisal, though

⁵¹ *Southern School News*, Jan. 6, July, 1955; McMillen, *The Citizens’ Council*, pp. 43-5; Gilliam, *The Second Folsom Administration*, p. 136.

⁵² *Southern School News*, Jan. 6, July, 1955; McMillen, *The Citizens’ Council*, pp. 43-5.

generally on the grounds that it was unwise economically, not because it was morally wrong. Within a matter of months, however, as the power of the Council grew and as citizens across the state began to sympathize with the movement, the critical voices fell silent. Black activism undoubtedly contributed to this change, as threats to segregation and white supremacy became more immediate and more real, and as more whites began to consider collective defensive action an attractive option. As one historian has described, “Events became too turbulent, blacks too active, the Council too influential, and the public that bought the newspapers and placed advertisements too committed to the Council approach for early critics to hold out.”⁵³

Early indications of this sort of change became clear as the NAACP petitioning campaign took off again in August of 1955 and the Council movement reaped the rewards, with ten more Alabama Councils organizing by year’s end. White men across the state answered the call when the Council asked, “The NAACP organized – why not you?” Leaders formed four regional councils and an Alabama Association of Citizens’ Councils with a headquarters in Montgomery, and they tapped Engelhardt as Executive Secretary. Although probably somewhat inflated, the Councils’ declaration of its own strength in early 1956 reflected its rapid growth: it was claiming 26 councils in 17 counties with around 40,000 members. Engelhardt would boast later that year of 100 councils. Though this number was likely quite generous, there was no doubt that the NAACP’s continuing petition campaign, and a growing awareness of the Supreme Court’s decisions and the NAACP’s intentions to implement them in general, gave rise to a swift blossoming of the Citizens’ Council in the state.⁵⁴

Indicative of the way the Council infiltrated small town Alabama is a case described by investigative journalist and future Pulitzer Prize winner David Halberstam for *Commentary* magazine.

⁵³ Gilliam, *The Second Folsom Administration*, pp. 132-5, see for quotation, p. 135.

⁵⁴ McMillen, *The Citizens’ Council*, pp. 44-5; *Southern School News*, October, 1956; White Citizens’ Council Advertisement, “Time for all White People to be Counted,” in NAACP Papers: Legal Department Case Files, Group V, Series B, Box 34, NAACP v. Alabama (*Papers of the NAACP*: Part 23, Legal Department Case Files, 1956-65, Reel 4).

Halberstam called the town Clifford, a southwestern Black Belt town of around 15,000 people which the reporter ostensibly renamed to protect blacks (or perhaps himself) from reprisal. Clifford experienced a bout of white anxiety when *Brown* came down in 1954. By 1956 NAACP implementation activity in the state had brought that anxiety to the fore and spurred a decided few into action. When the Supreme Court followed up on *Brown* with its first decision striking down segregated public facilities, including city pools, the mayor of the town called an urgent meeting to determine a course of action should any blacks try to desegregate Clifford's public pool. Local insurance salesman Royce Vansett spoke first at the meeting and declared that the problem was the NAACP, which was "making a play for the young niggers – they don't care about the old ones, but they're teaching the young ones a lot of these radical ideas and holding meetings with them." After tossing around possible solutions, like building a separate pool for blacks or throwing the leader of the local NAACP chapter in the river, the city leaders turned to state legislator and local attorney Reid Walles. Walles suggested, "What we need here is a Citizens Council." Walles said the Councils were "doing fine work all over the South" and had been quite effective in "forming boycotts and other pressures against niggers, nigger-lovers, and a few politicians that won't go along with us." Walles warned the men that they "may not worry about it now, but in five years," he said, "if your kids are playing and going to school with burr-headed niggers and the niggers are taking over the town and molesting your women, well, don't blame Reid Walles." Intermarriage was what the NAACP really wanted, according to Walles, and if the men of Clifford did not want "white girls going off to dances with some big black buck and dancing to jungle music with him," then they ought to let Walles call in "a couple of good friends" who were "big men in the Councils. Why don't we have them down here to talk to us," he offered, "so we can organize?"⁵⁵

Once Councils were established, organizers employed a number of methods to attract new members, not least of which was dissemination of propaganda. Illustrative of such propaganda was a

⁵⁵ David Halberstam, "The White Citizens' Council's: Respectable Means for Unrespectable Ends," *Commentary*, October, 1956.

leaflet passed out to white miners outside of Birmingham, near the aptly named industrial suburb of Bessemer, in early 1956. The sheet purported to feature a speech made by a “Professor Roosevelt Williams of Howard University” to an NAACP meeting in Jackson, Mississippi. This Williams had supposedly told his fellow association members that “the negro is the white man’s superior,” as clearly evidenced by the unparalleled success of “Jackie Robinson . . . Nat King Cole . . . Ralph Bunche [and] Duke Ellington.” Accordingly, the NAACP demanded “the abolition of all state laws which forbid intermarriage of the different races.” It was clear, according to Williams, that “the white woman is dissatisfied with the white man, and they along with us,” he continued, “demand the right to win and love the negro man of their choice, so they can proudly tell the world he is my man . . . a man in every respect.” It was an enunciation of the white man’s greatest nightmare, and every word of it was fabricated by the Council. It was later revealed, as admitted by the Councilmen in Mississippi who first circulated it, that no such person as Roosevelt Williams even existed, nor was there any such meeting of the NAACP at which such words were spoken. But the miners in Jefferson County did not know that. The bottom of the pamphlet carried the simple message: “If you wish to help prevent this aim of NAACP contact Citizens’ Council, P.O. Box 6221, Tarrant, Alabama.”⁵⁶

With the proliferation of Councils in 1955 and into 1956, in Alabama’s cities, suburbs, and small towns alike, it became clear that the carefully focused vision of Sam Engelhardt and other Bourbon leaders was not shared by all who signed up for the Council’s mission of defending segregated education and white supremacy. Local Councils, once organized, did not always limit their proposed actions to economic reprisal, nor did they always confine them within the bounds of “law and order.” At the organizational meeting of the Council in the lower Black Belt’s Butler County, in October of 1956, a speaker asked how many of the 800 men in attendance had never graduated high school. He then

⁵⁶ William Thomas, President, Bessemer NAACP Branch, to Roy Wilkins, Feb. 7, 1956, Citizens’ Council Leaflet attached, NAACP Papers: Group III, Box A-282, Folder: White Citizens’ Councils and the Ku Klux Klan, 1956 (*Papers of the NAACP*: Part 20, White Resistance and Reprisals, 1956-65, Reel 13); see for exposure of the speech as a fraud, *Columbus Ledger-Enquirer*, Sept. 2, 1956 or *Atlanta Constitution*, Sept. 9, 1956.

suggested to the 600 or so that raised their hands that “some of you men . . . might have to go back for some reading, writing, and arithmetic. If negro children get into our schools,” he said, “you might have to convince them that they shouldn’t be there.”⁵⁷

In the cities and industrial suburbs especially, the Alabama Council’s respectable Bourbon vanguard had a difficult time neutralizing a working class element whose ranks often blurred into those of the more plebian associations like the Klan. The most influential leader of this latter cadre was a would-be radio personality, one-time pamphleteer, and soon-to-be primary speech writer for George Wallace: Birmingham’s Asa Carter. Carter was the president of the Birmingham Regional Council, to which councilors were drawn mostly from the city’s working class suburbs like Tarrant and Fairfield. Whereas Engelhardt’s councilors were, for all their vitriolic talk, highly concerned with keeping their tactics within the realm of “law and order,” and whereas Boutwell and his Big Mule types were even more concerned with the same, Carter and his brood drew no such permanent distinction. Carter as a Councilor was simultaneously, and throughout his segregationist career, affiliated with the Klan, most especially the Birmingham-area Ku Klux Klan of the Confederacy. Carter and his Klan affiliates were responsible for a number of violent acts, some of which were high profile in nature. In the spring of 1956 alone, they were known to have participated in and encouraged the attempted stoning of desegregation pioneer Autherine Lucy at the University of Alabama and to have attacked Nat King Cole on stage at a concert in Birmingham. Carter’s Klan cronies later castrated a randomly chosen black man in Birmingham as a message to the activist black minister Fred Shuttlesworth, and Carter himself once shot one of his fellow Klansmen for insubordination.⁵⁸

“Ace” Carter’s differences with the more reputable Council went beyond his propensity for violence and his obvious association with the Klan, though. Some within his own regional council were taken aback by his extremist statements, including the assertion that Rock and Roll was “sensuous negro

⁵⁷ McMillen, *The Citizens’ Council*, pp. 44-5; *Southern School News*, October, 1956.

⁵⁸ McMillen, *The Citizens’ Council*, pp. 49-56; Carter, *The Politics of Rage*, pp. 105-109.

music" that "promoted communism" and that threatened the "entire moral structure of man, of Christianity, of spirituality in Holy marriage," and "of all the white man has built through his devotion to God." Carter subsequently led what might be called a campaign against rock music, calling for boycotts of Elvis Presley and Fats Domino records and organizing the attack on Cole. Carter also called for the impeachment of Governor Folsom over the vote of the regional council's board of directors. Carter shared with Engelhardt and the others deep fears of "mongrelization, degradation, atheism, and communistic dictatorship." He accused the Alabama Association of Citizens' Councils (AACC) of meeting these threats, though, with restraint and with engaging in "compromise," "evasion," and "political chicanery." A frustrated Carter broke away from Engelhardt's state organization and formed his own Alabama Citizen's Council, whereupon the AACC changed its name to the Citizens Councils of Alabama. While Ace Carter's outfit became the outcast of the two, and while his influence in organization and agitation was confined to the Birmingham area, he would find the statewide, and even nationwide, pulpit he so desperately desired when he became one of George Wallace's closest advisors. The extremist wing of the Council was thus marginalized by the Bourbon wing in the late 1950s, but Carter kept its message alive, and would soon bring it to hundreds of thousands of receptive Alabama voters.⁵⁹

Meanwhile, the White Citizens Council was not the only white supremacist group organizing in Alabama in response to the School Segregation Cases decisions. Almost immediately upon the Supreme Court's announcing the first decision, a group of white small businessmen in Mobile had formed an organization they called simply The Southerners. The group retained prominent segregationist Birmingham judge Hugh Locke to draft its constitution and announced its "dedication to segregation and

⁵⁹ McMillen, *The Citizens' Council*, pp. 52-55, see for quotations, pp. 54-5; see on Ace Carter, generally, Dan Carter, *Politics of Rage*, pp. 105-9; see also Newman Douglas, Laura Browder, and Marco Ricci, *The Reconstruction of Asa Carter*, Television Documentary, Directed by Marco Ricci (Corporation for Public Broadcasting, 2010). Ace Carter later left Alabama, disappeared, resurfaced in Texas under an assumed name – "Forrest" Carter – and began claiming to be a half-breed Cherokee Indian. He began writing novels and children's books. His *Education of Little Tree* garnered critical acclaim, while his *Gone to Texas* was adapted as the major Hollywood motion picture, *The Outlaw Josey Wales*, starring and directed by Clint Eastwood. See a review of the documentary film on Carter at *Anniston Star*, Aug. 28, 2011.

states' rights." In Birmingham local businessmen Olin Horton and William H. Hoover organized the more ambitious and more successful American States' Rights Association, Inc. (ASRA). Hoover owned a local insurance company and personally financed the group's activity in its infancy, including bankrolling the reprinting of neo-Nazi literature. Hoover and Horton announced that "for the first time" a group had been organized to "offer resistance to those organizations and individuals who enjoyed free-wheeling in their assaults on segregation laws and customs," which were "seeking to indoctrinate our school children with socialism, communism and race integration, through school textbooks for the avowed purpose of conditioning the children for citizenship in a world government." They accordingly insisted on "the return to the states of complete control of state-owned institutions, such as schools and colleges, election machinery and segregation." The ASRA subsequently published pamphlets on venereal disease affliction, illegitimate birth, and incarceration, all by state, which revealed that blacks were disproportionately represented in each category. The organization disseminated this information along with the conclusion that "the larger the concentration of negro population, the higher the incidence." The ASRA also sponsored the radio program on which Ace Carter aired his anti-communist, anti-black, and anti-Semitic commentary before being kicked off the air. In membership these groups were perhaps relatively insignificant, but the subsequent careers of their founding fathers suggest otherwise. Locke would go on to serve in the Alabama legislature and on Governor George Wallace's personally appointed school segregation council. Hoover became a trail blazer of the Birmingham metropolitan "white flight" movement and founded what is today the area's most populous and prosperous suburban white haven, the City of Hoover.⁶⁰

⁶⁰ *Facts*, Newsletter of the Anti-Defamation League of B'nai B'rith, September, 1954, in *Facts on Film*, 1954-1958, Miscellaneous Materials; see for reports on venereal disease, illegitimate birth, and incarceration, Memorandum to Members, American States' Rights Association, Inc., February 10, 1956, in *Facts on Film*, 1954-1958, Miscellaneous Materials, American States' Rights Association, and Memorandum to Members, American States' Rights Association, Inc., Undated, *Facts on Film*, 1954-1958, Miscellaneous Materials, White Citizens' Councils; see for ASRA and Ace Carter's radio program, Ruby Hurley to Gloster Current, NAACP Southeast Regional

The NAACP and other organizations like the Anti-Defamation League were keenly aware of the diversity of white supremacist reaction to the *Brown* decision and the subsequent implementation drive taken up by local NAACP-affiliated activists. By the end of 1955, the NAACP felt as if it had weathered a storm, though, and it sought to galvanize support for a continuing effort. The association's Southeast Regional Advisory Board issued a report calling Operation Implementation the "number one objective of the NAACP in this region." Ruby Hurley assured her local branches that although "white citizens' councils and their counterparts" had been gaining strength in Alabama and across the South and applying pressure to black activists, the regional organization was "investigating every case of intimidation that comes our way." She acknowledged that "any thoughts that the Deep South would accept with grace and dignity the fact that the bonds of slavery were being loosened for and shaken off by its Negro citizens were dispelled completely before six months of 1955 had passed." But she continued to insist that the NAACP and its affiliates had "been holding the line remarkably well," and she expressed the hope that all would "keep the faith and continue to hold fast to our ideal of full freedom so that we can carry on with the fight until we win – and win we must." Hurley insisted that her office and the national office were "working out plans of action to protect our people and counter-attack these pressures." In the meantime, she reminded the local branches, "it is only good sense to spend your money with your friends and withhold it from your enemies."⁶¹ The NAACP was prepared for a fight and was willing to encourage direct action, in the form of a region-wide, unannounced economic boycott, in order to directly engage in it.⁶²

White supremacist organizers were equally prepared. Indeed, by early 1956 they were in hyper-drive. Whites' defense of their social arrangement had been accelerated by the NAACP's ongoing

Secretary's Report for the May Meeting of the Board, April 28, 1955, NAACP Papers: Group II, Box C-225 (*Papers of the NAACP*: Part 25, Ser. A, Reel 5).

⁶¹ Emphasis in original.

⁶² *News and Action*, NAACP Southeast Regional Office Newsletter, Sept., 1955, and NAACP Press Release, "Schools No. 1 Object of Southern NAACP," Dec. 15, 1955, both in NAACP Papers: Group II, Box C-223, Folder: Southeast Regional Correspondence, Sept.-Dec., 1955 (*Papers of the NAACP*: Part 25, Ser. A).

implementation campaign. It had been made all the more urgent by the Montgomery bus boycott and by Autherine Lucy's enrollment at the University of Alabama. Lucy had applied to the university, been rejected on account of her race, and had filed suit in federal court with the help of the NAACP, obtaining an injunction allowing for her enrollment. Meanwhile, activist teachers and ministers had organized a boycott of the city of Montgomery's segregated and oppressive bus line and were challenging the city's bus segregation laws in federal court. The Citizens' Council reaped the benefits of both of these actions. Montgomery city officials themselves, including Police Commissioner Clyde Sellers and Mayor T.A. "Tacky" Gayle, joined the Council that January. The chairman of the city's revenue board, L.R. Grimes, joined as well and publicly announced his feeling that "every right-thinking white person in Montgomery and the South should do the same. We must make sure," he said, "that Negroes are not allowed to force their demands on us."⁶³

In February, in the midst of the bus boycott and just days after a Klan-inspired mob drove Autherine Lucy from the Alabama campus in Tuscaloosa, the Montgomery-based Citizens' Council hosted a massive rally at the State Agricultural Coliseum. Ten thousand "shouting, cheering, flag-waving people" gathered there to hear what were described by newsmen as "blood curdling . . . tirades" about what Governor Folsom himself would days later call the actions of "professional outside agitators." It was not simply the boycott and the Lucy crisis that had everyone up in arms. Mississippi's U.S. Senator James Eastland was a featured speaker at the rally, and he cut to the chase when he assured the aroused gathering what he knew. "The good people of Alabama," he said, "don't intend to let the NAACP run your schools." This was not simply a reference to the University of Alabama; Eastland meant the public elementary and secondary schools, and the Councilors knew it.⁶⁴

⁶³ *Southern School News*, Feb., 1956; see for the bus boycott generally, Thornton, *Dividing Lines*, pp. 53-96; see for the Lucy crisis generally, Clark, *The Schoolhouse Door*, pp. 17-22.

⁶⁴ *Southern School News*, March, 1956; Jan Gregory Thompson, *A History of the Alabama Council on Human Relations, from Roots to Redirection, 1920-1968* (Ph.D. diss., Auburn University, 1983), pp. 39-41, "tirades" quotation from p. 41.

The very next day, blocks away from the huge Citizens' Council rally, a small gathering of Alabama's black and white liberals gathered at the state's black teacher's college, Alabama State, for a symposium on "resolving community conflicts" through biracial committees. The organizing association was the biracial Alabama Council on Human Relations (ACHR), itself born of the old Alabama Committee on Interracial Cooperation (ACIC). The ACIC had gladly accepted the call of the Southern Regional Council (SRC) in 1947, when it offered an associational relationship under the emerging regional group's growing umbrella. The newly christened Alabama Council on Human Relations was, like its parent regional council, "composed of liberal-minded Southerners white and Negro, who believe that the South needs a more positive and courageous approach to its social, civic, economic, and racial problems." Its members were decidedly liberal, especially as compared with the doggedly obdurate southern white majority. The meeting at Alabama State Teacher's College (ASTC) could hardly have contrasted more starkly with the Citizens' Council rally at the arena, perhaps if the ACHR had been advocating a socialist revolution.⁶⁵

But the ACHR was center-left from the beginning; it was never radical. As longtime ACHR member and Montgomery-based civil rights activist Virginia Durr observed in retrospect, the ACHR was "composed of extremely conservative liberal people, you know, people who were fine – the professors, the blacks in it were all middle class blacks – and it was a very fine group of middle class people who did believe in all the right things." Its members, black and white, were wary of any accusations of communism and sought to, for the most part, change the system of white supremacy from within the system. Blacks in the ACHR tended to be educators and attorneys, and among its members were the president of ASTC, H. Council Trenholm, as well as longtime Birmingham civil rights attorney Arthur Shores and the emerging, young Tuskegee attorney Fred Gray. White members were often liberal educators or outspoken clergymen from the Episcopal and Methodist Church. For some whites,

⁶⁵ Thompson, *A History of the Alabama Council on Human Relations, 1920-1968*, pp. 1-29, 39-41; see, for symposium quotation, p. 41; see, for "liberal-minded southerners quotation, pp. 14-15.

membership was simply a way to define themselves by what they were not: the average, ignorant, hard-headed, conservative white segregationist. As a professor of history from Auburn University put it, joining the ACHR was an opportunity to show these people that "some white people . . . could sit down to a table, for God's sake, with somebody of the opposite color and eat . . . without any obvious, immediate ill-effects." Another member later recalled that for many, white and black, the ACHR was "a counter-movement against anti-black citizens' groups, KKK, racists in the churches and in society in general."⁶⁶

The meager gathering of 300 at the ACHR Montgomery meeting at the same time as the huge Council rally across town represented the glaring difference in strength of following between the two organizations. The ACHR would never command anywhere near the following of the Councils, nor would it exert anywhere near the influence. The ACHR continued to push for biracial cooperation, though, throughout the 1950s and into the 1960s. It played an important role in mediating the bus boycott in Montgomery and helped establish a Mayor's Committee on Human Relations in Mobile. Its members continued to be active in monitoring school desegregation efforts throughout the state, despite becoming targets themselves of state harassment, private threats of violence, and public ostracization. But the ACHR's milquetoast approach spoke neither to more immediatist black activists in the movement, nor to the thousands of average white supremacists who had no interest in promoting "greater unity in the State in all state-wide and racial development," reducing "race tension," and "develop[ing]and unify[ing] leadership in the South on new levels of regional development and fellowship," as the ACHR construed its mission.⁶⁷

By championing law and order, the Citizens' Council, and even unaffiliated legislative leaders like Boutwell, won over many whites who might otherwise have been repulsed enough by the violence of

⁶⁶ Thompson, *A History of the Alabama Council on Human Relations, 1920-1968*, pp. 1-29, 33-49; see, for Durr quotation, p. 15; see, for history professor quotation, p. 33; see, for "counter-movement" quotation, p. 39.

⁶⁷ Thompson, *A History of the Alabama Council on Human Relations, 1920-1968*, pp. 33-44, quotation from p. 33.

the Klan to consider biracial cooperation. By 1956 the need for more feasible segregationist resistance had been underscored by the events of the first two years after *Brown I*: the violent disturbances at Tuscaloosa during Lucy's attempted enrollment; increased Klan activity in general; the success of the Montgomery boycott; the organization of white liberals in the ACHR; and, above all, the ever-looming threat of desegregated public elementary and secondary schools. Councilors gathered in Birmingham in April to hear Georgia white supremacist Charles Bloch speak about the continuing need for more Councils and affiliated associations, like his own States' Rights Council of Georgia. Speaking of the Klan assault on Nat King Cole which Carter had organized just one week prior, Bloch said "it is not my province . . . to discuss the incident that occurred here last Thursday night." But he did tell the men such "incidents" did "nothing to help the South in trying to solve [its] problems." They only gave "extremists all over the nation" more "excuses for agitation." Bloch reminded the councilors that they must use "all *lawful means* to bring about a reversal" of the unconstitutional *Brown* decisions and that they must "prevent the use of force in their implementation" of that reversal. Bloch repeated himself just so the audience would understand that he meant "*lawful means*." The answer for white southerners was to organize against "festering sores on the body of the nation such as the NAACP." These organizations had created all the "chaos and confusion," on which they then thrived. They feared "above all things, counter-attacking, opposing organizations" like the Citizens' Council, which along with its sister organizations like the American States' Rights Association, could continue to effectively pursue effective, "lawful means" to maintain segregation and white supremacy.⁶⁸

⁶⁸ Charles J. Bloch, "The Need for States Rights Councils and Citizens Councils" [*sic*], Prepared for Delivery in Birmingham, Alabama, April 14, 1956, Published by the States' Rights Council of Georgia, Inc., Atlanta, Georgia, Undated, in *Facts on Film*, 1954-1958, Miscellaneous Materials, White Citizens' Council.

Local blacks had jumped at the opportunity presented by the NAACP to effectuate some sort of implementation of *Brown*. They participated in the regional petitioning drive and sought cooperation from local school boards. School boards ignored these petitions, and white activists engaged in economic reprisals against the signatories. The implementation effort, along with the Lucy crisis and bus boycott, swelled the ranks of the Citizen's Council and other white supremacist activist groups, even as the NAACP's own ranks grew and new members looked forward to the promise of *Brown*. Meanwhile, white leaders in positions of power, many of them councilors themselves, were mounting a legislative campaign of concentrated resistance against the decision. Jim Folsom tried to moderate the segregationist drive, even reaching out to organizations like ACHR. But Folsom became increasingly isolated in the governor's mansion as the state's capitol became the epicenter of an organized effort to keep Alabama's schools segregated as long as possible.

CHAPTER 2: THE FALL OF JIM FOLSOM, THE RISE OF JOHN PATTERSON, AND THE BANISHMENT OF THE
NAACP, 1955-59

When Jim Folsom took office in January of 1955, he organized the first black inaugural ball in Alabama history. The event was held at Alabama State College for Negroes, one of the nexuses of organizational activity during the Montgomery bus boycott. The usual all-white affair was held the same night, across town at the large state Agricultural Coliseum, the site of the recent mass rally of the White Citizens' Council. Folsom said he was simply reaching out to the people he called "our Negro brothers and sisters," as part of his administration's "separate-but-equal policy." The "brothers and sisters" had helped put him in office, even if the contribution was relatively small. Folsom was one of a very few white Alabamians who thought the black vote ought to fully reflect the black population. He saw himself as a latter-day populist, leading Alabama's poor blacks and whites together into a better day when the Big Mules and Black Belt planters would no longer dominate state politics. For Folsom it was never to be. He was subsequently assailed by both segregationists and blacks alike for having held the segregated balls: by whites for legitimizing black political power and thumbing his nose at custom; and by blacks for making a humiliatingly public display of Jim Crow. It was a microcosm of frustrations to come.¹

Such were Jim Folsom's attempts at moderation. White supremacist organizational fervor matched insistent black activism following the Supreme Court's mandate in *Brown II*, and the governor's plain talk and common sense appeals to compromise fell flat. He dismissed the Citizens' Council as the re-incarnation of the Dixiecrats, whom he considered to be anti-Democratic in both the upper and lower case "d" sense of the word. He routinely tried to veto the segregationist bills pouring out of the legislature. He even reached out to the Alabama Council on Human Relations (ACHR) and attempted to

¹ *Southern School News*, February 3, 1955.

form a biracial committee to study ways to handle crises, like the one looming over the public schools. His attempts at biracial cooperation were a dismal failure. A confident and already powerful Citizens' Council laughed at his disregard. And the legislature overrode his vetoes, forcing him to temper his own stance on racial matters before his run for representative to the Democratic Convention.² By the time Folsom left office for the last time, a new group of committed segregationists politicians was not merely on the rise, but on the verge of dominating state politics for the next decade. Its most foundational commitment was to ensure that no black child ever attended school with a white child in the state of Alabama.

As resistance to integrated education was building to a crescendo across the South in 1956, Alabama Attorney General John Patterson positioned himself in the vanguard of the hardline segregationist advance. And nothing represented the popularity of concerted defiance of the Supreme Court and black integrationists better than Patterson's efforts to destroy the National Association for the Advancement of Colored People (NAACP) in Alabama. Patterson heard the increasingly loud wail of segregationists as they engaged in a lively call and answer with the likes of Sam Engelhardt and Albert Boutwell, and as they repudiated the great Alabama populist, Folsom. Patterson found his spot in the defiant ensemble after consulting with his friend Lindsay Almond of Virginia, himself a proponent of massive resistance. The Alabama lawyer thought he had found a technicality which would allow him to run the NAACP out of the state for good. It nearly worked. Patterson was able to utilize Alabama's discriminatory and hostile state court system to harass the association into judicial submission for the better part of a decade. If he failed to permanently banish the organization, he succeeded beyond his wildest dreams in alerting Alabama voters to the clarity of his own booming segregationist voice. Patterson's crusade against the NAACP made him the quintessential massive resistance candidate and won him a seat in the governor's chair in 1958.

² At the time governors could, and did, run for such slots, even while in the gubernatorial office.

As Patterson was campaigning on absolute defiance of outside interference, on the maintenance of law and order, and on perpetual segregation of the races in Alabama schoolrooms, massive resistance in Arkansas and Virginia was making national headlines. The Little Rock crisis and the closure of schools in Virginia led the federal courts to try and shout their pronouncements more loudly than the South's segregationists. Some saw these rulings as a death knell for massive resistance and the beginning of South-wide implementation of *Brown*. But in Alabama, rather than seriously question the logic of massive resistance or begin to look towards some form of compliance and implementation, segregationists closed ranks and renewed their defiant chorus. As the new governor took office in 1959, and as the NAACP languished in exile, the state of Alabama looked more poised than ever to defy the School Segregation Cases decisions and maintain segregated education forever, even if John Patterson himself knew this to be impossible.

The Segregationist Rise, 1955-56

Folsom called the legislature into special session soon after taking office. He had previously announced that he'd rather that Alabama were left out of the school segregation matter altogether. He had expressed opposition to the recently proffered Boutwell Committee proposal, which provided the state legislature with the constitutional authority to delegate school closure powers to local school officials. It was assumed that in cases where school desegregation imposed an "intolerable burden" upon whites, that school closure would pave the way for a nominally private system of white schools. Folsom argued, "If we deed our schools to private individuals, they could make apartment houses out of them; if strings are attached, the maneuver won't hold up in court." But he had been determined to call a special session, nonetheless, so that the legislature could consider issuing a road bond to fund his farm-to-market road program. The road bond dominated the session that winter as segregationist legislation remained in the back of everyone's mind. State senator Sam Engelhardt was preparing a

number of proposals but told the press that Folsom was holding he and others hostage on the road bond. He announced that Folsom threatened to use the governor's spot on the state's registration board to appoint voter registrars in Engelhardt's Macon County who would proceed to "register ever damn nigger in the county" if Engelhardt did not support him on the road bond issue.³

Three days after threatening the governor, Engelhardt introduced a resolution denouncing the *Brown* decision and vowing to uphold the state's constitutional provision for segregated education. The resolution channeled the "law of the case" interpretation becoming increasingly popular among southerners. The school segregation ruling was "not binding on the state of Alabama or on the people of this state and not to be respected by an official of this state." Not only was the decision unconstitutional, the Court's conclusion that legally segregated education had been detrimental to black children was, Engelhardt reasoned, "unqualifiedly false and completely untrue." In Alabama at least, "the remarkable progress made by colored children in segregated schools," especially when compared to that of black children outside the South, demonstrated plainly enough the "fallacy" of the Court's determination. Segregation had produced "great economic, cultural and social benefits to all of the people of this state," the resolution declared, and "any weakening or reversal of that policy would bring about violence, disorder, breaches of the peace, riots, bloodshed, and ill-feelings." Taking the Birmingham industrialist, or Big Mule, law-and-order line then, Engelhardt argued that "regrettable action of this kind" would be "extremely difficult, if not impossible, for civil authorities to prevent" if segregation were ever breached. Accordingly, the resolution allowed legislators to "declare [their] unqualified allegiance to this provision of the Alabama constitution (requiring segregation)." Engelhardt could not miss a chance to introduce a jab at Folsom along the way, calling within the resolution for "the

³ *Southern School News*, Oct. 1, 1954, Jan. 1, Feb. 3, March 3, 1955; Gilliam, *The Second Folsom Administration*, pp. 140-8.

chief executive of this state to make known in a most appropriate manner a fixed determination to uphold, support and defend this provision in our organic law in every lawful way.”⁴

In the early 1955 special session, Engelhardt’s western Black Belt counterpart, Walter Givhan, also introduced a petition to the U.S. Congress to limit the U.S. Supreme Court’s and the U.S. Circuit Courts of Appeals’ jurisdiction. According to the Dallas County Citizens’ Councilor, The High Court had demonstrated, “through numerous opinions and decisions,” that it had lost respect for the separation of powers and, more importantly, for states’ rights. While Engelhardt’s more substantive resolution was sent to committee for consideration, Givhan’s resolution passed immediately and unanimously. Some may have been reluctant to stand by the state’s constitutional mandate for segregation, fearful of the legal ramifications of such a course. But everyone could agree that the Court had overreached.⁵

Folsom called two more special sessions of the legislature that winter and spring, to consider old age pensions, which he succeed in securing, and statewide reapportionment via a constitutional convention, which he wanted so badly but would never get. Meanwhile, the legislators waited for the regular biennial session in May and on the Supreme Court’s pending implementation decree before acting further on preserving segregated education.⁶ When the regular session convened, and when the implementation decision came down, the lawmakers could then consider the Boutwell Committee proposal, Engelhardt’s similar private school proposal from 1953, and at least two other plans that had already been announced. One plan was crafted by Engelhardt as an alternative to the Boutwell Committee recommendations and his earlier proposals, should his colleagues think privatization to be

⁴ *Southern School News*, March 3, 1954.

⁵ *Southern School News*, March 3, 1954.

⁶ Between 1939 and 1975, the state legislature only met once every two years, beginning in May of every other year. Special sessions were, thus, commonplace. A constitutional amendment in 1975 made regular sessions an annual affair; see Table of “Legislative Sessions” Meeting Schedules, at Alabama Department of Archives and History Online, <http://www.archives.alabama.gov/sessions.html>, accessed Aug. 26, 2012.

too drastic; the other was the official policy pursued by state Superintendent of Education Austin Meadows.⁷

Engelhardt's fallback plan was actually borrowed from a student who had proposed it at the American Legion's state Youth Legislature convention. The senator took the plan to a group of attorneys, some of them working with the Boutwell Committee, and refined it. In essence it called for the establishment of a "modern school placement system." If the legislators were unwilling to do away with compulsory public education, then perhaps they would allow local school districts to appoint school placement boards, which could be given broad, almost unlimited, and certainly ambiguous powers to place students in certain schools. The placement boards would assign students in their districts "to the school and class in which they can reasonably be expected most fully to develop their talents and in which each pupil will be taught in accordance with his ability to learn." The boards could consider aptitude and intelligence tests, a family's distance from particular schools, a student's "educational background," his "morals, health, and personal standards," the wishes of the student's parents, whether or not a student would be separated from "long-established ties of friendship" and placed in "hostile surroundings," and finally whether a particular assignment would "cause or tend to cause a breach of the peace, riot, or affray."⁸

The "avowed purpose" of the Engelhardt Placement Plan was to ensure that "pupils can be so grouped that the less advanced pupil shall not be penalized by being placed in the class with pupils who are more advanced or capable of learning at a more rapid rate, and conversely, that exceptionally bright and able pupils shall not be held back to a level below their ability to learn." The desired effect would be to maintain absolute segregation in schools, as it was widely believed that blacks would score roundly lower than whites on aptitude and intelligence tests. Black schools were underfunded compared with their white counterparts and were staffed by black teachers educated in these

⁷ *Southern School News*, April 7, 1955; Gilliam, *The Second Folsom Administration*, pp. 148-56.

⁸ *Southern School News*, February 3, 1955; Gilliam, *The Second Folsom Administration*, pp. 175-6.

underfunded schools. And their pupils were, in the main, from significantly more troubled socio-economic backgrounds than white students. In the case of black students who had risen above these circumstances to excel and who ambitiously sought entrée into a white school to enjoy the best education available to them, placement boards could simply apply any one of the carefully selected factors which the board was given to consider. If the student lived closer to a white school, somehow had a solid socio-economic and educational background and home environment, was considered to be of good health, morals, and personal standards, and would be leaving no friends behind, then certainly in each and every case the inevitably hostile reaction of some in the white community and the potential for a “breach of the peace” would be all a placement board needed to deny the student placement at a white school.⁹

The Engelhardt and Boutwell plans were so obviously disingenuous and evasive that the plan proposed by Superintendent Meadows’ seemed, to some, to be more realistic. Meadows and other educators and politicians in the South believed that the Court would not force the issue on “separate but equal” and that somehow the dual system could stand if only black facilities were brought up to the standard of white facilities and expenditures were equalized. Part of the rationale was that blacks themselves would not force the issue if their own schools were not so obviously inferior. Meadows’ equalization plan, of course, would cost a lot more money than any of the others. He called for a 150 million dollar bond issue to fund the proposed facilities equalization program (bond issues were the convenient way to raise money because the state’s tax structure was permanently saddled by limitations in the 1901 constitution).¹⁰ Folsom came out in support of the bond issue, saying that the state needed to do something to get black students out of the “shotgun shacks” that served as their schoolhouses in many counties. He told a crowd of educators to avoid listening to the “noise” made by those “guided by prejudice and bigotry,” undoubtedly referring to Engelhardt and Boutwell’s ilk. The

⁹ *Southern School News*, February 3, 1955; Gilliam, *The Second Folsom Administration*, pp. 175-6.

¹⁰ For more on the tax system and the 1901 constitution, see CH 18 and Epilogue, *infra*.

governor argued for “wisdom and tolerance and objective thinking” instead of school closure. Accordingly, he also endorsed an additional 36 million dollar increase in school expenditures; to fund this, Meadows proposed repeal of the constitutional cap on the state’s 3 percent sales tax and repeal of the federal income tax deduction on state income taxes. Having just financed the governor’s road and welfare plans, many legislators were reluctant to support the increased spending and debt. More importantly, few legislators, particularly of the Bourbon variety, wanted to see black and white education equalized. In any case, all were awaiting the Supreme Court’s long-anticipated implementation decree. Would the Court really force integration upon the South?¹¹

On April 17, 1955, the Supreme Court handed down what came to be known as *Brown II*, its statement on how implementation of the seminal decision should proceed. After *Brown I*, the Court had asked for briefs on the issue from what were deemed to be the interested parties, beyond the parties to the five original cases themselves. This included the U.S. Justice Department (DOJ) and the attorneys general of all the southern states. Alabama did not submit a brief in the fear that such a move would indicate a recognition that *Brown I* was the ‘law of the land’ and would therefore jeopardize its own ‘law of the case’ claim. Other states pleaded for a compromise, arguing that the decree should only apply to the five cases before the Court, or that in the alternative, the South should be given some time to adjust. The NAACP argued for the plaintiffs, as did the DOJ, that implementation should proceed forthwith. They wanted the Court to make the decision applicable to the whole of the South and for the Court to issue clear guidelines and a fixed date for the beginning of desegregation, perhaps as soon as 90 days from the date of the pending decision.¹²

Brown II represented a compromise. The justices knew that they lacked firm backing from the Congress or the president and that they need not issue a ruling that the Court could not enforce. So

¹¹ *Southern School News*, May 4, 1955, June 8, 1955; see, for Folsom “noise” quotation, *Southern School News*, Sept., 1955.

¹² Wilkinson, *From Brown to Bakke*, pp. 17-18; Patterson, *Brown v. Board of Education*, pp. 82-3; *Southern School News*, Oct. 1, 1954.

they decided to “soften the blow” of *Brown I*. The implementation decree thus applied the ruling to the entire South but effectively remanded the issue to the lower federal courts for further litigation. Just as importantly, the Court provided very minimal, ambiguous instructions on how the trial courts were to then proceed when subsequent litigation was initiated, and it declined to set a firm timetable for school boards or the lower courts to follow. The justices insisted that local school officials should be allowed to decide the particulars of desegregation within their own districts free from court orders, provided that they made a “prompt and reasonable start” and continued acting “in good faith” to achieve desegregation with “all deliberate speed.” The district courts could allow for additional time before ordering relief to any plaintiffs that came forward if such conditions, vague as they were, were met, and if compelling reasons for delay existed, like necessary adjustments in administrative structure, adjustments to transportation systems, or redistricting. “By issuing a flexible decree allowing for a gradual and deliberate, step-by-step integration,” one Court scholar wrote, “it was hoped that southern moderates would be encouraged to take the initiative.” If initiative was indeed what the Court had hoped for, it was to be sorely disappointed for many years to come.¹³

The reaction among most political observers in Alabama was described by one reporter as “restrained rejoicing.” This was certainly the case in the Black Belt, where leaders seemed to be assured by the decision that desegregation would not actually ever occur in Alabama. Givhan called it “a decided victory for the South . . . brought about by the constant fight the southern people have put up, bringing to the attention of the American people that integration wasn’t feasible and never would have worked, and that the southern people under no condition would have stood for it.” Other Black Belt public officials echoed Givhan’s sentiment. Engelhardt reasoned that “segregation will never be feasible,” and that regardless of the Supreme Court’s pronouncements, “no brick will ever be removed from our segregation walls.” State senator Roland Cooper of the Black Belt’s Wilcox County said that he

¹³ See for “court scholar,” Wilkinson, *From Brown to Bakke*, pp. 17-18, quotation from p. 18; see also Patterson, *Brown v. Board of Education*, pp. 82-85.

could not “foresee where desegregation would be feasible or local conditions would warrant it in 100 years in Wilcox County.”¹⁴

Despite the friendly ruling and rejoicing, no one advocated abandoning the legislative courses already charted. Meadows said that he believed the “overwhelming majority of Negroes realize that segregation is what the people of Alabama want, and I believe they are friendly enough to cooperate What this state needs,” he argued, “is school buildings and equipment.” Accordingly, he reiterated his call for the bond issue, which he claimed would ensure that “a majority of Negroes will agree to stay in their schools.” Only about five percent, Meadows thought, would still “gripe” if black schools could be brought to standard with white schools. Folsom agreed and reaffirmed his stance that he was “not, repeat not, in favor of turning the public school system over to private hands,” referring to the Engelhardt and Boutwell proposals. Boutwell announced that it was “necessary that the people of Alabama realize that the Supreme Court’s decision affects the children of Alabama now.” His committee’s proposed bill would allow local authorities to decide how to proceed, just as the Court had appeared to allow. Engelhardt’s placement bill would do the same, and as a somewhat restrained measure, it began to look more attractive in light of the Court’s seeming retreat, especially since similar plans had been adopted by then in Florida and Mississippi.¹⁵

When the regular biennial session of the legislature convened, it was an altered version of the Engelhardt placement bill that became Alabama’s first substantive attempt to evade any implementation of the School Segregation Cases decisions. The Senate Education Committee, chaired by Boutwell, removed the provision for a placement board, which was deemed to be an unnecessary legal liability, and instead gave local school boards the authority to place students in schools. Otherwise, the Engelhardt bill was left mostly undisturbed, save for the addition of still more factors for boards to consider when placing students in particular schools. Race was not explicitly among those

¹⁴ *Southern School News*, June 8, 1955.

¹⁵ *Ibid.*

factors, but its presence was easily detected. Ultimately, an identical bill originating from the House passed first and was unanimously approved by the Senate in July. Folsom would not veto it, but he refused to sign it. He told the press that he could “never get all excited about our colored brothers. They’ve been here three hundred years and I estimate they’ll be here another three hundred years or more.” I find them to be good citizens,” Folsom said, and “if they had been making a living for me like they have for the Black Belt, I’d be proud of them instead of cussing and kicking them all the time.” The bill became law without the governor’s endorsement.¹⁶

Thus, the Pupil Placement Law became the state’s preferred way of avoiding desegregation, which it would do successfully for another eight years. Folsom opposed it on populist grounds, arguing that it would “let rich folks send their kids all to one school and the poor folks to another school,” and that in any case it was “merely a restatement of the present law.” Birmingham’s African American news daily, the *Birmingham World*, called the plan “legally worthless and morally defective,” suggesting that it could be successfully challenged in court. Most white political observers in Alabama applauded the law, though, calling it “a skillfully wrought piece of legal machinery,” which “offer[ed] an excellent chance for maintaining the present legal high standards of public schools in Alabama.” The law, after all, had been drafted by the best lawyers in the legislature, along with the unofficial assistance of a special committee on constitutional law appointed by the president of the state bar, the segregationist judge Walter Jones. It was, many thought, “100 percent bombproof.” A local news columnist also suggested that the placement law would have to be “bombproof” to withstand the “heavy bombardment that should be normally expected in the next months and years.”¹⁷

Pupil placement became popular among southern legislators, and placement plans were adopted in other southern states. In addition to giving school boards broad authority for assignment,

¹⁶ *Southern School News*, July 8, 1955, Aug., 1955, Sept., 1955; *Birmingham News*, Aug. 3, 1955; see, for full text of the Pupil Placement Law, *Race Relations Law Reporter*, February, 1956, pp. 235-7.

¹⁷ *Birmingham World*, June 14, 1955; Gilliam, *The Second Folsom Administration*, p. 181.

placement laws generally forced those few blacks that most knew would try and apply for placement in white schools to navigate a labyrinthine application and appeals process designed to either trip them up on technicalities, intimidate them, or to frustrate them to the point of giving up their quest. More generally, placement laws took the burden of initiating desegregation out of the hands of school boards, where *Brown II* had assumed it would remain while authorities worked with “all deliberate speed,” and put it back permanently in the hands of black students and their families. Finally, pupil placement removed the legal liability for segregation from the state to the local level, making it more diffuse and therefore more difficult to challenge, should legal challenge come. Placement law supporters in Alabama argued, “The more law suits, the more congestion, the more widespread the litigation, the better for all concerned.” As one legal scholar observed at the time, “Pupil placement laws are by far the best device segregationists have yet discovered to keep Negroes out of federal courts and to make civil rights litigation expensive, time-consuming, and frustrating. And it can all be done with the veneer of legality.”¹⁸

The Alabama legislators had every reason to be optimistic about pupil placement’s future in the courts, given the judicial reactions to *Brown II*. The Supreme Court had put the fate of school desegregation in the hands of the judges of the Federal District Courts and Courts of Appeals, who have been described as “fifty-eight lonely men.” All of them were white, most of them were Democrats, the vast majority of them were from and of the South, and a great many of them were avowed segregationists. Exemplary of such men on the federal bench in the South was Judge Wilson Warlick of North Carolina, who once said “I’m a states’ rights individual, and I always have been. If I had anything to do with the schools in North Carolina, I wouldn’t let the federal government have any part of it.” Some such judges began immediately to issue rulings favorable to segregationists.¹⁹

¹⁸ Wilkinson, *From Brown to Bakke*, pp. 83-4; Peltason, *Fifty-eight Lonely Men*, “legal scholar quotation” from p. 78.

¹⁹ Peltason, *Fifty-eight Lonely Men*, pp. 7-8.

Judge John Parker, also a North Carolinian, sat on the bench of the Fourth Circuit Court of Appeals. A respected jurist, Parker wrote an opinion that July in one of the remanded original *Brown* cases, *Briggs v. Elliot*, which became the preferred judicial interpretation of *Brown* for years to come. What was ultimately and derisively dubbed the “Briggs Dictum” was Parker’s own narrow construction of the High Court’s ruling. Writing for a three-judge panel, Parker saw fit to “point out” just “exactly what the Supreme Court has decided and what it has not decided.” Parker wrote of the Court:

It has not decided that the federal courts are to take over or regulate the public schools of the states. It has not decided that the states must mix persons of different races in the schools or must require them to attend schools or must deprive them of the right of choosing the schools they attend. What it has decided, and all that it has decided, is that a state may not deny to any person on account of race the right to attend any school that it maintains. . . . Nothing in the Constitution or in the decision of the Supreme Court takes away from the people freedom to choose the schools they attend. The Constitution, in other words, does not require integration. It merely forbids discrimination. It does not forbid such segregation as occurs as the result of voluntary action. It merely forbids the use of governmental power to enforce segregation. The Fourteenth Amendment is a limitation upon the exercise of power by the state or state agencies, not a limitation upon the freedom of individuals.²⁰

Not only did this become a favored citation for a number of federal judges deciding subsequent school desegregation cases, it provided segregationists with a judicially sanctioned rationale – individual freedom of association – for segregated private schooling. In the trial courts of all but the most progressive jurists, it meant that “anything other than outright defiance stood a decent chance of approval.” And in the minds of segregationist lawmakers, it gave hope that their efforts to avoid implementation, most especially passing pupil placement laws, might prove to be effective in avoiding desegregation. By year’s end the lower courts would invalidate a number of states’ compulsory segregation laws, but the Briggs Dictum interpretation made it possible for courts to stop with this action. Whereas some of the more egregious placement laws were struck down eventually, the more

²⁰ Wilkinson, *From Brown to Bakke*, p. 82, quoting *Briggs v. Elliott*, 132 F.Supp. 776 (ED, SC, 1955), 777; the Briggs Dictum was discredited, and given its name, by Judge John Minor Wisdom in 1966, writing for the Fifth Circuit Court of Appeals in *U.S. v. Jefferson County Board of Education*, 372 F.2d 836; Wisdom wrote that the “most quoted” portion of the opinion was “pure dictum.”

carefully crafted, like Alabama's, would be upheld. Parker himself would uphold North Carolina's placement law the following year, writing in his opinion that "somebody must enroll the pupils in the schools. They cannot enroll themselves; and we can think of no one better qualified to undertake the task than the officials of the schools and the school boards"21

Not all of Alabama's lawmakers were content to rest with the successful passage of the Placement Law, though. The legislature passed several other segregationist bills before the regular session ended that summer. Representatives from the Black Belt's Wilcox County pushed through a bill that gave the county school board the authority to terminate, without notice, teachers that it had reason to believe were advocating integration, or who belonged to any organization advocating desegregation. The point of such a bill was to allow the school board to fire anyone who worked with the NAACP. Folsom pocket vetoed it. The Wilcox representatives introduced another anti-NAACP bill establishing an egregious licensing fee and membership fee to be assessed against organizations soliciting in the county. Folsom vetoed this bill as well, only to see his veto subsequently overridden. Engelhardt tried to push through a teacher-termination bill for Macon, similar to the one proposed for Wilcox, but Folsom craftily waited until three minutes before the adjournment of the session to veto his Black Belt rival's approved proposal. Senator Albert Davis of Pickens County, on the fringe of the northwestern Black Belt, proposed a statewide version of these "teacher tenure" laws, or laws that allowed for the disregard of tenure in firing teachers suspected of endorsing integration. The statewide measure languished, as the legislators were wary of passing statewide laws which could be more easily assailed in court.²²

²¹ Wilkinson, *From Brown to Bakke*, p. 82-84, quotation from 84, quoting *Carson v. Warlick*, 238 F.2d 724, 728 (4th CCA, 1956); exemplary of state's whose placement laws were struck down are Virginia and Louisiana, see *Bush v. Orleans Parish School Board*, 138 F.Supp. 336 (SD, LA, 1956), 242 F.2d 156 (5th CCA., 1957); *Adkins v. School Board of City of Newport News*, 148 F.Supp. 430 (ED, VA, 1957), 246 F.2d 325 (4th CCA, 1957); *Patterson, Brown v. Board of Education*, pp. 54-5; see for invalidation of compulsory segregation laws in Arkansas, Florida, Kentucky, Missouri, North Carolina, Oklahoma, and Texas, *Race Relations Law Reporter* 1.1, Feb., 1956, p. 4.

²² *Southern School News*, August, 1955.

In addition to proposing anti-NAACP legislation, Senator Davis spearheaded an anti-Supreme Court legislation drive. He introduced a resolution, which had been originally proposed at a Dallas County White Citizens' Council meeting, calling for the impeachment of every justice on the Supreme Court. The resolution charged the Court with relying on "pseudo-scientific authority" in fashioning the *Brown* decision and compared it to the Soviet Supreme Court and to the German body that upheld Nazi racist laws. Without any reasonable means proposed for initiating actual impeachment proceedings against the federal court, though, the bill was buried in committee. Engelhardt then stepped in and proposed a similarly condemnatory resolution endorsing the call of James Eastland, U.S. Senator from Mississippi, for an investigation into Communist Party influence on the Supreme Court and on the *Brown* decision specifically. Engelhardt's resolution maintained the denunciation without the call for impeachment. It passed easily.²³

State superintendent Meadows' bond issue proposal was approved by both houses and awaited general statewide referendum in December of that year. The regular session then ended that summer without the passage of any of the Boutwell Committee's proposals. They seemed moot and even a little drastic in light of *Brown II*, the Briggs Dictum, and the successful passage of Alabama's Pupil Placement Law. Most segregationists felt the institution was quite secure. Others were not so sure, and the "freedom of choice" bill continued to lurk just beneath the surface of temporarily calm waters. Alabamians waited to see what would be the fate of segregated education, aware that any event that upset the tranquility would rock the legislators back into action.²⁴

That fall of 1955, the Southern Governors' Association annual conference was held in Point Clear, on Mobile Bay in south Alabama. The crisis set off by the School Segregation Cases decisions seemed settled enough at the time that the governors, including Folsom, roundly agreed that race would not be an issue in the pending 1956 elections. Folsom himself was not up for re-election, though

²³ *Southern School News*, July, 1955.

²⁴ *Southern School News*, November, 1955; *Montgomery Advertiser*, Sept. 1, 1955.

if he had been, he might have discovered the error of such an assumption. The vigorous pursuit of bulwarks for segregated education by the legislature that summer, and the unanimity with which the legislators passed the placement bill, the condemnatory resolution, and the anti-NAACP teacher tenure laws, demonstrate the effect that *Brown* was having and would continue to have on politics in Alabama. Folsom acknowledged at a press conference that he and Alabama's U.S. Senators Hill and Sparkman constituted probably the most liberal gubernatorial-senatorial combination in the entire South. Speaking to his vetoes of segregationist legislation, he said it was "hard to take a stand like this," especially when newsmen, many of them in the room, had been so hard on him. The people of Alabama knew where he and the senators stood, Folsom said, "yet we have all been reelected. What accounts for it," he asked. The governor knew that there were enough voters in Alabama that did not prioritize the defense of white supremacy to such a degree as to let it dictate their political choices. Not yet anyway. Very soon the time would come, though, when Hill and Sparkman would have to adapt, along with everyone else, lest they become what Folsom did in subsequent years: an afterthought. By the time he was eligible to run again in 1962, according to one historian, Folsom's "style of class-based liberalism had outlived its time."²⁵

Folsom's Demise, 1955-58

If *Brown II* and *Briggs* had been encouraging for segregationists in 1955, some legal developments that fall reignited a sense of urgency in Alabama's lawmakers. Since 1952 the NAACP had been working with two black women from Alabama seeking admission at the state's flagship institution of higher learning – The University of Alabama. In August of 1955, Federal District Judge Harlan Hobart Grooms granted an injunction to the plaintiffs, forcing the University to consider the applications of the two young women without considering race. Grooms' decision was subsequently upheld by the Fifth

²⁵ *Southern School News*, November, 1955; Flynt, *Alabama in the Twentieth Century*, p. 66.

Circuit Court of Appeals and the Supreme Court. The university ultimately found a way to reasonably deny one of the two but was forced to agree to admit Autherine Lucy. Though Lucy would not enroll until the following spring, her admission and the federal injunction that allowed it stung segregationists badly. They might have seen it coming. The NAACP had been having success in higher education cases around the country for over a decade.²⁶ But the thought of a Negro attending the educational pillar of white supremacy – the place through which most of Alabama’s successful politicians and nearly all of its lawyers passed before entering their professional lives – was completely anathema. And higher education was one thing. If the Lucy decision was a blow to segregationists, it also invigorated and encouraged those already engaged in an impassioned defense of segregated elementary and secondary education. Indeed, it stimulated nearly everyone: segregationists in the legislature, those organizing the Citizens Councils and other organizations, and the NAACP itself, which was already working with willing local blacks to begin to make *Brown* a reality in all of Alabama’s public schools.²⁷

As the Lucy crisis and the ongoing Montgomery bus boycott grabbed Alabama’s attention, lawmakers quarried the fear and insecurity of whites and used it to buttress racial separation in schools and white supremacy in general, despite the continuing resistance of Big Jim Folsom, who would find himself completely marginalized by year’s end. The ideology of the White Citizens’ Council was the guide lawmakers used in their work. There was no clear line separating private activists in the Citizens’ Council and the state’s lawmakers, and many, like Engelhardt and Givhan, were active in both. And while some political leaders, like Albert Boutwell, would never formally join the Council, they continued to pursue similar, if not identical goals. By the end of the year’s legislative sessions, Citizens’ Councilors and many unaffiliated white Alabamians alike could applaud a legislative assertion of “states’ rights” and a vigorous defense of segregation, as the entire South began to mobilize a region-wide political

²⁶ See especially, *Sweatt v. Painter* 339 U.S. 629 (1950) and *McLaurin v. Oklahoma State Regents* 339 U.S. 337 (1950).

²⁷ *Race Relations Law Reporter* 1.1, February, 1956, p. 13; Clark, *The Schoolhouse Door*, 17-22.

challenge to the *Brown* decisions. Other states would often take their cue from Alabama, where Big Jim was rapidly becoming a caricature of a bygone era.

When Alabama voters roundly rejected the school bond amendment proposed by State Superintendent of Education Austin Meadows in the scheduled December, 1955 referendum, it was seen as more of a repudiation of Folsom than anything else. Folsom had thrown his weight behind the proposal, aimed as it was at equalizing black school facilities to forestall actual attempts to desegregate white schools. For Folsom it was better to first get the black children out of the “shotgun shacks” that constituted many of their schoolhouses, and then to wait and see if further action was necessary. For most legislators, it was clearly more popular to make a defiant stand against outside interference first and to live up to Alabama’s motto: “we dare defend our rights.” For Meadows it was a way to ensure that even the white schools had enough money. He continually reminded voters and legislators that schools, in general, could not long remain open without a rush of funding. Newsmen regarded the devastating defeat of the amendment as “a protest against Folsom, and/or a protest against additional taxation,” noting that Folsom’s roads program had already resulted in a new gasoline tax, and that he had burned even more political capital in securing costly old-age pensions. The fight over school funding could not be divorced from race. And according to one editorial, Folsom had already “fritter[ed] away” much of the “goodwill and confidence” that he had remaining. One scholar of the Folsom era concluded that the vote represented a “massive show of no confidence” in the governor. With Meadows reeling for a way to fund his operation, the governor and the legislature entered 1956 much as they had the previous year: Folsom desperately wanted a constitutional convention, but nearly the entire legislative body was much more interested in shoring up segregated education.²⁸

Folsom called the legislature into its fourth special session of his second administration in January with the expressed and limited mandate of considering the constitutional convention. He had

²⁸ *Southern School News*, Jan., 1956; Gilliam, *The Second Folsom Administration*, p.217.

even joked that such a convention would allow the legislators to defy the federal government and write into the constitution all of the segregation provisions that they wanted. Big Jim was subsequently forced to sit and watch as the lawmakers overrode his call with a two thirds vote, proved that no convention was necessary, passed a convoluted constitutional amendment for expansion of the senate instead (which was voted down in referendum), and proceeded to focus almost entirely on buttressing segregated schooling. What the *Atlanta Journal* called “the loudest Rebel cry from Virginia to Mississippi” emanated from the Alabama state capitol that winter when the legislature adopted the first of the South’s so-called nullification resolutions. In nearly unanimous votes, both houses of the legislature passed the “interposition” resolution, which declared the Supreme Court’s school segregation rulings “null, void, and of no effect” in Alabama.²⁹

The doctrine of nullification via interposition had been initially resurrected in Virginia. Virginia’s U.S. Senator Harry Byrd called for “massive resistance” of the Supreme Court’s school cases decision, while an influential Richmond newspaper editor published a series of editorials arguing for a return to “fundamental principles” in formulating such a resistance. Both men drew upon the post-bellum doctrine proposed by the defeated Confederate President Jefferson Davis. Davis argued that the war had been fought, not over slavery, but in defense of “states’ rights.” A static interpretation of the Constitution undergirded this and subsequent understandings and allowed southerners to argue that the Union was composed of a tightly constrained federal government and the sovereign states. State sovereignty in this confederated arrangement allowed states to “interpose” their authority between their citizens – in this case local school officials – and a federal government which was reaching beyond its strictly enumerated powers. Massive resistance, then, was a way to continue fighting the Civil War, an attempt to replace crass racism and racial politics with the veneer of constitutional law, and a legitimate effort to force the federal government to back down, just as it had during Reconstruction.

²⁹ *Southern School News*, Feb., 1956; Grafton and Permaloff, *Big Mules and Branchheads*, pp. 189-90 Gilliam, *The Second Folsom Administration*, p.316; see for “Rebel cry,” *Atlanta Journal*, Jan. 20, 1956.

Many southern lawmakers thought that if states went so far as to close their schools, for example, or to test the will of federal judges to hold state officials in contempt, then the federal government would acquiesce to the nullification of *Brown* in much the same way that it had retreated from Prohibition. By the end of 1955, interposition had been whole-heartedly endorsed by the Citizens' Council and was being mulled in every southern state. And in the spring of 1956, it was Alabama which led the way, just as it had done with pupil placement.³⁰

Alabama's interposition resolution, drafted by Engelhardt crony and freshman representative Charles McKay, decried the "threats of coercion and compulsion against the sovereign states" which constituted a "deliberate, palpable, and dangerous attempt by the [Supreme] court to prohibit to the states certain rights and powers never surrendered by them." The legislature rationalized that the state of Alabama had never surrendered under the Fourteenth Amendment its right to maintain segregation, and that only a constitutional amendment that declared as much in "plain and unequivocal language" would force the legislature to retract its declaration that Alabama was "not bound to abide" by decisions of the Supreme Court to the contrary. The lawmakers pledged to "take all appropriate measures honorably and constitutionally available to us to void this illegal encroachment upon our rights, and to urge upon our sister states their prompt and deliberate efforts to check further encroachment by the federal government, through judicial legislation, upon the reserved powers of the states." Alabama thus sought to interpose its sovereign authority between the federal government and its citizens. Folsom called the resolution a "two-bit" effort, "a bunch of hogwash," and "claptrap" from the "descendants of the landed gentry who are trying to maintain the antebellum way of life." The governor likened it to "a hound dog baying at the moon." Folsom might have been bitter, but he knew a futile effort when he saw one. He allowed the bill to become effective without his signature and told reporters that he had washed his hands of the matter. He sardonically added that he was "for

³⁰ Wilkinson, *From Brown to Bakke*, pp. 82-3, 98-9; Bartley, *The Rise of Massive Resistance*, pp. 126-31; for a collection of essays on the nuances of massive resistance, see, Webb, *Massive Resistance*.

nullification [only] if a [constitutional] convention adopts it," otherwise it was "simply a piece of paper." It was nonetheless a piece of paper that legislators understood would be widely popular among their constituencies.³¹

As the legislative special session entered February, Autherine Lucy's enrollment at the University of Alabama sparked three days of rioting. Students were involved, but the ordeal had been prepared, encouraged, and initiated by local factory workers and Birmingham Klansmen affiliated with Klan leader and Citizens Councilor Ace Carter. On February 6 the disturbances reached the point where Lucy had to be spirited away from campus as a rock-throwing mob broke windows out of the vehicle she was travelling in. This episode gave the University an excuse to subsequently bar Lucy from classes, supposedly for her own safety. Folsom had gone fishing in Florida to celebrate the passage of the doomed constitutional amendment on senate expansion. He was roundly criticized for his failure to return when news of the riots in Tuscaloosa broke. His biographers have determined that "he was so drunk he was not capable of comprehending news even if it were conveyed to him accurately." Folsom had escaped as much to celebrate, though, as he had to symbolically and defeatedly relinquish control of the special session to segregationists. He had promised legislators that his administration would back off of the Boutwell Committee proposals if they would support the senate expansion amendment. This retreat came only after the governor's floor leader, Speaker of the House Rankin Fite, attempted to summarily adjourn the session, to the outrage of even some administration supporters. Fite was forced to reconvene and issued a mea culpa. Folsom had also been feeling the heat, from legislators and whites in general, for another of his racial gaffes. He had entertained New York congressman Adam Clayton Powell, a black man and an activist Yankee at that, at the governor's mansion. Powell had enjoyed an audience with the governor, as an equal, to discuss the national publicity afforded the

³¹ *Southern School News*, Feb., 1956; *Birmingham News*, Feb. 2, 1956; see, for the full text of the resolution, *Race Relations Law Reporter*, April, 1956, p. 437-8. President Eisenhower similarly dismissed the notion when he answered a query about the move by saying that "no one in any responsible position anywhere has talked nullification"; see Gilliam, *The Second Folsom Administration*, pp. 324-7.

Montgomery bus boycott. It simply proved beyond any doubt that Jim Folsom was a lost cause for segregationists. They agreed to give him his convoluted constitutional amendment if he would allow them to pass the Boutwell bills, particularly the “freedom of choice” bill.³²

Two days after Lucy had been rescued from the Tuscaloosa mob, the state House of Representatives on February 8, 1956 passed the Boutwell Freedom of Choice Plan by a vote of 99-1; it had previously passed the Senate 33-0. The Birmingham *News* acknowledged what was widely understood: that this was “the second of two major legislative pieces [the first being the Pupil Placement Law] calculated to assure racial segregation in schools.” Boutwell himself told reporters, “We need both the placement bill and the freedom of choice amendment, because the placement law might not work in every case and it might not hold up in court.” As adopted the plan disestablished compulsory public education by removing the pertinent language from the state’s organic law. It gave the legislature the authority to abolish public schools as a last resort to avoid unwanted racial “mixing,” while ostensibly allowing for such mixing as was desirable to those who attended the affected schools. The plan also made school officials judicial officers, which according to Boutwell was supposed to make them “immune from personal liability lawsuits and harassment from radical agitators.” It gave the legislature the authority to require the state’s attorney general to defend any suits brought against the state, county, or city boards of education. On the whole, Boutwell admitted, the plan was intended to “give the legislature the authority to prevent the forced mixing of the races in our elementary and high schools.” Evidently, forced race “mixing” was an outcome no one wanted, at least no white person as represented in the legislature. The lone dissenting vote, Jefferson County’s Charles Nice, Jr., told reporters that it was the potential for school closure alone which he considered abhorrent and “filled

³² Grafton and Permaloff, *Big Mules and Branchheads*, pp. 194-8; *Atlanta Journal Constitution*, Jan. 26, 1956; Grafton and Permaloff wrote of the Powell visit that “this apparently simple event took on enormous symbolic importance and was credited with contributing heavily to Folsom's defeat in his bid for a third term in 1962,” see *Big Mules and Branchheads*, p. 194; see for the Lucy crisis generally, Clark, *The Schoolhouse Door*, pp. 17-22.

with danger.” The provision for student “choice” of racially segregated or “mixed” schools, Nice said, was “a very commendable attempt to solve our problem.”³³

Folsom returned from Florida after a few days binging and was forced to address the late disturbances and the Boutwell bill’s passage. On February 12 the governor belatedly condemned the mob action at Tuscaloosa, saying he would “use every power at [his] command to prevent mob rule from running any branch of the state government,” and “let me specify,” he said, “any branch.” He subsequently singled out the NAACP for having encouraged the riots, arguing that “professional agitators and outsiders” had “pushed too hard, and had “come with their own cameramen and newsmen” for the purpose of making a spectacle. Ruby Hurley denied that the NAACP had brought any of its own newsmen or cameramen. Folsom could not veto the Boutwell Freedom of Choice Plan even if he had wanted to, because it was in the form of a constitutional amendment, but he did later sign an enabling act that allowed lawmakers, who had overlooked a technicality, to make the plan functional. Folsom knew that in light of the events at Tuscaloosa, the boycott in Montgomery, and the activity of the NAACP, that the voters of Alabama would overwhelmingly pass the Freedom of Choice amendments in their scheduled August referendum. Any resistance would not only be futile but would only add to the list of political damages he had suffered over the last several months. In signing the enabling bill, he called Boutwell’s plan “a down to earth proposition we can all work with.”³⁴

Folsom may have conceded defeat in the legislature, but the governor continued to communicate with the state’s few white liberal leaders in an effort to create some kind of genuinely moderate course of official action. Folsom usually sent a representative, for example, to the meetings of the Alabama Council on Human Relations. The ACHR in response reached out to the governor, proposing that he create a bi-racial governor’s commission to study the issue of racial tension and to

³³ *Birmingham News*, Feb. 8, 1956; *Montgomery Advertiser*, Feb. 8, 1956; *Atlanta Journal*, Feb. 12, 1956.

³⁴ *Southern School News*, March, 1956; *Atlanta Journal*, Feb. 12, 1956; Gilliam, *The Second Folsom Administration*, pp. 319-20, “down to earth” quotation from p. 320.

advise the governor on racial matters, especially crises like the Lucy enrollment riots. Folsom accepted the proposal. He called for a special conference with 150 of the state's newspaper editors and publishers. It was a more moderate group than the one that normally met in the House chambers where the parley was held, but it was certainly not a group that was roundly supportive of desegregation. With television cameras rolling, he disarmed the potentially hostile newsmen by announcing, "Anybody with sense knows that Negro children and white children are not going to school together in Alabama any time in the near future . . . in fact not for a long time." The governor then used a segregationist parable to demonstrate the need for the biracial commission, telling the story of an old black man "whose forebears hadn't been too long out of the jungle." Folsom said the man saw white men and black men use separate bathrooms and surmised that when whites drove through a green light, he ought to wait and proceed on the red. The newsmen were receptive to the governor's proposal, couched as it was as the most moderate of solutions. Folsom appointed Birmingham *Post-Herald* editor James Mills head of a committee charged with producing a bill which could be presented to the legislature for the creation of the commission itself. Mills accepted Folsom's call but argued that the work should proceed only if the committee were to "operate within the framework of traditions that [were] deep-rooted in our state. He proceeded to nominate a known Citizens' Councilor and a Ku Klux Klan spokesman to the committee.³⁵

Emory Jackson, the founder of the first Alabama State Conference of the NAACP and the editor of the black daily the Birmingham *World*, was the lone black newsman invited to the governor's conference. Jackson told the New York *Times* "If [the commission] is going to be interracial, it ought to be interracial, but it has already gotten off all wrong." Obdurate segregationists also condemned the effort. The editor of the Alabama *Journal* argued that the commission would have "no hope of getting

³⁵ *Southern School News*, March, 1956, see for Folsom 'school children' quotation; Gilliam, *The Second Folsom Administration*, pp. 328-30; see, for Mills quotation, Gilliam, p. 329, and for "segregationist parable," Gilliam, p. 330.

anything done,” because the NAACP did not want “anything settled” and did not want “an understanding.” The NAACP itself was not much more supportive. W.C. Patton questioned the committee appointment process, controlled as it was by whites. Patton argued that the “best results can be obtained when [blacks] select their own leaders,” because they would not “accept proposals agreed on by other Negroes who have been ‘brainwashed.’” Everyone, including the ACHR, worried whether Folsom would simply appoint his old “cronies” if and when the actual commission was created. The Citizens’ Council and its legislative leaders mounted a concerted opposition. When the governor called the second special legislative session of 1956, primarily to consider what to do about the education funding crisis, the Mills committee bill was introduced and quickly abandoned by the administration. It died amid widespread disapproval throughout the state and either staunch opposition or indifference in the legislature itself. Mills identified the fundamental issue when he told Folsom, “If the Negro citizens of our state can see no value in the effort if the commission accepts the reality of our segregated society, then it cannot achieve what you had in mind.” Indeed, Mills wrote, “If this is the attitude of a majority of Negroes in Alabama I see little hope of avoiding even greater tensions and eventual violence.” The legislature was clearly only interested in shoring up segregation at that point, while black activists in the press, in the NAACP, and in the vanguard of an emerging direct action movement, were no longer willing to consider any proposals that did not seek to move beyond segregation with “deliberate speed.”³⁶

As Alabama’s legislative body was settling into a comfortable consensus on massive resistance, Deep South congressional leaders in Washington were building a more tenuous region-wide consensus of their own. In March southern congressmen, including 19 of 22 senators and 82 of 106 representatives, signed a “Declaration of Constitutional Principles” denouncing the school desegregation decisions and pledging a legal battle to resist their enforcement. This so-called “Southern Manifesto”

³⁶ Gilliam, *The Second Folsom Administration*, pp. 330-3, see for Jackson, Patton, and Mills quotations, pp. 330, 332; Sims, *The Little Man’s Big Friend*, p. 184; *Birmingham News*, Feb. 28, 1956.

was, according to one historian, “a dramatic announcement of the quickening pace of resistance politics,” but its near-unanimity had been somewhat difficult to achieve. Congressional leaders from the states of the peripheral South forced the declaration – originally conceived by Strom Thurmond and Harry Byrd as an endorsement of interposition – into a much milder form. Even toned down, the manifesto called the *Brown* decisions “encroachments on the rights reserved to the states and to the people, contrary to established law, and to the Constitution.” The congressmen wished to “commend the motives of those states which have declared the intention to resist forced integration by any lawful means.” All of the senators and representatives who refused to sign were from outside the Deep South. Many had been compelled initially to resist but were brought into the fold through the recruitment of Byrd, Thurmond, and other deep southern leaders. They were won over by the refashioning of the argument to focus on states’ rights and resistance to “forced integration” and through the fear that refusal to sign, as the neutral observer the *Southern School News* put it, might “put them on the side of the [NAACP], at least in the minds of the voters back home.”³⁷

Meanwhile in Alabama, the Lucy crisis continued to heighten awareness of segregated education’s susceptibility to attack from the NAACP. Lucy’s attorney – prominent NAACP affiliate Arthur Shores of Birmingham – had accused the University of Alabama’s board of trustees of conspiring to create the mob action surrounding Lucy’s enrollment. In late February, the university expelled Lucy for making “false, defamatory, impertinent, and scandalous charges” against the board. The trustees also expelled one Leonard Wilson, a pre-law student from Selma who had helped organize the student wing of the riots. Wilson was an officer in the Tuscaloosa chapter of the Citizens’ Council and had been publically arguing that the university needed a “house-cleaning” and daring the board to expel him. Selma Citizens’ Council leader Alston Keith called Wilson’s challenges “intemperate,” but the actions of Councilors elsewhere indicated solidarity with the young segregationist. The Montgomery chapter of

³⁷ *Southern School News*, April, 1956; Bartley, *The Rise of Massive Resistance*, p. 116.

the Council called for an investigation into “possible subversive activities” in the state’s colleges. And the statewide Association of Citizens’ Councils was preparing a questionnaire even then to send to all administrators and faculty members at the state’s white colleges to determine their views on segregation. The Citizens’ Council questionnaire was similar to one the Council had circulated among political candidates in the state, which included questions like, “Will you give your wholehearted support to the action which has already been taken by the legislature of Alabama toward maintaining segregation”; “has the NAACP or any other organization dedicated to the breakdown of Alabama policies on segregation made any financial contribution directly or indirectly to your campaign”; and “Do you believe in the Citizens’ Council of Alabama movement?”³⁸

At the same time, the March special session of the state legislature considered a number of mini-manifestos denouncing anyone suspected of assaulting the pillars of white supremacy, especially the NAACP. One proposal called for an investigation into possible Communist infiltration of the NAACP. Another sought the delivery to the legislature of all the names on a petition delivered to the University of Alabama in February urging Lucy’s re-admission after the riots. The legislators actually passed the most outrageous bill of all those considered: the Black Belt’s E.O. Eddins introduced a proposal which called on the U.S. Congress to provide federal funds to “finance apportionment of Negroes among the several Northern and Western states.” Eddins wanted the federal government, in other words, to sponsor the “emigration of Negroes” – the large majority of which were “untrained, unskilled, and uneducated” – to “areas where they are wanted . . . and can be assimilated.” Folsom dismissed the effort, arguing, “If all the Negroes were moved away every one of those folks who have been raising so much sand would starve to death.” Planters like Engelhardt had inherited vast plantations, and “a lot of them” Folsom said, “wished they had slaves on them now.” These “untrained, unskilled, and uneducated” blacks in the Black Belt fields were not slaves, but their removal would nonetheless ruin a

³⁸ *Southern School News*, April, 1956.

lot of white men, who had kept those blacks untrained, unskilled, and uneducated for the planters' own benefit. Whether or not the legislators realized that their scheme might actually come to fruition and bring about the downfall of the planters, they repealed the resolution towards the end of the session. One bill that was passed and remained in effect called on the Supreme Court to modify the School Segregation Cases decisions and gave notice to the Court that the white people of Alabama had a "deep determination" to steadfastly resist desegregation. "No decree by any court," the resolution reasoned, "can change the feeling of the people of the South." For once the legislators were absolutely right.³⁹

If the feeling of the majority of white people of Alabama had not already been indicated by the actions of the state's elected representatives, then the election that May of delegates to the Democratic National Convention made it very clear. Up for election was the sitting governor himself, Folsom. During his first gubernatorial term, Folsom had spoken out against the Dixiecrat split, trying to argue that the politicians leading it were depriving the people of Alabama of their rightful democratic choice in leaving Truman electors off of the ballot. This had contributed to his defeat in the 1948 convention delegate election. By his second term, he had been forced to come around to at least mildly endorsing segregation, but he still refused to be fully co-opted by the hardline segregationists who had taken control of the legislature. In refusing to sign the Citizens' Council's political questionnaire, Folsom said that his views on segregation were well enough known. "I was and am for segregation," he told the press, but he was not about to "swear allegiance to the leadership of any group that's trying to tear up the Democratic party in Alabama." He charged the Citizens' Councilors with being the "same faces, rank and serial number and issues that led to the Dixiecrats in 1948." Folsom might have done well in his convention delegate bid to either wholeheartedly endorse massive resistance like everyone else, or to at the very least not remind the voters of his loyalist stance in 1948. Along with all but one of his slate of candidates, Folsom was annihilated in the 1956 convention delegate election. The governor himself was

³⁹ *Southern School News*, April, 1956; Gilliam, *The Second Folsom Administration*, pp. 333-4, see for Folsom quotation, p. 333.

defeated 3 to 1 by Citizens' Councilor and interposition resolution author Charles McKay. It was the worst defeat of his political career. McKay had exploited Folsom's soft position on race, telling voters that the governor was, despite his supposed support for segregation, "still a friend of the Negro" and one of the "foremost supporters of the NAACP" and all of the "things it stands for." The politics of race had gotten the better of Jim Folsom, and he would never play a prominent role in Alabama politics again.⁴⁰

As Folsom's star fell from the Alabama sky, so rose the stars of Albert Boutwell, Sam Engelhardt, and a number of other young segregationists who knew how to rally Alabama voters, and how to take advantage of the old Black Belt – Big Mule alliance that had dominated state politics for so long. Their message of "law and order" and their absolute commitment to segregation in public education had brought the Alabama voters two years of segregationist legislation passed by the Alabama legislature. Most importantly, they had provided Alabama whites with their first real defenses against integrated education: the Pupil Placement Law and the Boutwell Freedom of Choice Plan. And Alabama's segregationist electorate felt reasonably sure that these legislative bulwarks for segregation could be successful, as they made clear by rewarding the segregationist bloc and repudiating Folsom in the 1956 delegate election. Despite Folsom's attempts to provide some other rallying point for whites, his constant struggle to veto legislation or denounce it, and his attempts at biracial cooperation, the arch-segregationists shone brighter. They captured the gaze of Alabama's white voters by emanating defiance of outside interference, dedication to racial purity, and maintenance of the status quo at nearly all costs, all within a legalistic constellation that appeared much more attractive than the doomed, crude, and violent efforts of the KKK and the dim, defeatist, and disjointed efforts of the governor. As

⁴⁰ *Southern School News*, April, 1956, June, 1956.

Folsom faded away, these men filled the void, under the leadership of a young man who made his name by fighting for law and order – Attorney General John Patterson.⁴¹

John Patterson, Walter Jones, and the Banishment of the NAACP

Jim Folsom's relationship with the legislature in his final two years in the governor's office was characterized by his "sending wayward punches whistling though the air," as one biographer has described it. As the governor continued his futile call for a constitutional convention and his effort to stymie the forces of hardline-segregation, legislators continued to introduce segregationist bills at a torrid pace, so many in fact that the two houses had to form a fourteen member "super-segregation committee," with Boutwell at the helm, to screen the bills and weed out the more bizarre. Despite the screening, bills such as one that necessitated a man obtaining a women's permission to sit next to her on a public conveyance still made it to Folsom's desk, where they were often pocket vetoed. Sam Engelhardt continued his crusade, introducing a ludicrous bill to Gerrymander the city of Tuskegee so as to exclude from the city limits nearly all blacks; this bill would ultimately meet with federal court invalidation in the landmark case of *Gomillion v. Lightfoot* (1960). Sensing that his plan would be struck down, Engelhardt also introduced another bill to abolish Macon County and have surrounding counties absorb it. Almost pathetically, Folsom tried to leverage the senator's proposals against his old stand-by, saying, "If we are going to have something like that, then I think the other 13 [Black Belt] counties should have the same opportunity, and we can do that by having a constitutional convention." As Alabama's legislators debated the merits of this variegated segregationist legislation, Folsom simply kept

⁴¹ Michael Klarman describes this process, whereby committed segregationists muscled out would-be moderates, in a regional context, in Webb, *Massive Resistance*, pp. 21-38.

on swinging. Even then the man who would soon unify Alabama's government and lead it in an assault on the forces of integration was beginning to plot his course.⁴²

Alabama Attorney General John Patterson was as much a symbol of the future of Alabama politics as Big Jim Folsom was of its past. Like a great many of his peers in Alabama, he was a veteran of World War II, enlisting in the Army in 1940 and serving with an artillery unit in North Africa, Italy, France, and Germany. He went on to receive a commission and return to fight in Korea, retiring as a major in 1949. Like many of his young colleagues in state politics, he obtained a law degree from the University of Alabama. Upon graduation and completion of his military service, he moved to Phenix City, Alabama, a popular playground for rowdy soldiers from the U.S. Army base at Ft. Benning, across the Chattahoochee River in Columbus, Georgia. Patterson practiced law alongside his father, who had made a career in the Alabama legislature out of combating organized criminal elements, especially those in Phenix City – Alabama's "Sin City." The elder Patterson ran for state attorney general and was subsequently murdered during the campaign by the very organized criminals he was pursuing. John was thrust into the election by his father's friends in the Democratic Party and courageously ran on the same platform as had his father: stamping out crime. Patterson won the sympathy and admiration of Alabamians, and their votes. He began his term as attorney general in 1955 and immediately became a foe of Folsom's administration, attempting to expose the rampant graft and general malfeasance that was widely understood to characterize it by that time. Patterson was riding a rising political tide, though, and neither organized crime nor ethics reform were to capture the passions of Alabama's white voters quite like the issue of race.⁴³

⁴² Grafton and Permaloff, *Big Mules and Branchheads*, pp. 204-6, see for authors' quotation p. 204, and for Folsom quotation p. 206; see for the circumstances leading to the Gomillion v. Lightfoot challenge, Norrell, *Reaping the Whirlwind*, pp. 118, 123-4.

⁴³ Webb, *Alabama Governors*, pp. 210-215; Gene Howard, *Patterson for Alabama: The Life and Career of John Patterson* (Tuscaloosa: University of Alabama Press, 2008), passim.

Patterson would later recall that “like everyone in politics at that time,” he knew exactly “what was on the minds of the people.” Early in his term as attorney general, he attended a conference of attorneys general in New Hampshire, which was national in scope but nonetheless involved much discussion of the School Segregation Cases decisions. There Patterson befriended Lindsey Almond, the attorney general and soon-to-be governor of Virginia. Almond imparted to Patterson his understanding that in massive resistance lay massive rewards. As Governor Almond would lead his state in a futile fight to close its schools to avoid integration. And as attorney general he helped lead the regional legal crusade against the great pariah of white supremacy, the NAACP. During Patterson’s several subsequent visits to Virginia, Almond told him how he had assailed the NAACP through the use of old barratry and champarty laws – laws designed to curb the solicitation of litigants. The association was practiced at litigation though, quite obviously, and was able to parry a number of these challenges. Patterson would have to devise another strategy to thwart the NAACP’s activities in Alabama. But he took from Almond the idea that the association was an ideal adversary for practical and political purposes.⁴⁴

In the summer of 1956, Patterson, along with assistant Gordon Madison, state Senator Albert Boutwell, and Birmingham attorney Joe Johnston, hosted a secret meeting of southern state officials and prominent constitutional lawyers. The group met in Birmingham to devise a possible common strategy for massive resistance to school desegregation in the South. Patterson later admitted that the group “knew that school integration was inevitable.” There was simply “no way the states could preserve segregation as a way of life,” he said, “it was the law of the land that had been reinforced too many times in the federal courts.” But the group’s consensus also included an understanding that each state should undertake a delaying action. Patterson argued that those at the meeting “believed, to a

⁴⁴ Howard, *Patterson for Alabama*, pp. 94-100, see for quotation p. 97.

man, that time would help resolve the enormous resistance to an integrated society and lessen the probability of violent resistance."⁴⁵

Certainly, men like Boutwell were concerned with preventing violence. Law and order was the guiding light for respectable, thoughtful segregationists. A delaying action to preserve law and order would help the state maintain a modestly progressive image and not ruin its ability to recruit new industry. The Boutwell Committee plan and Engelhardt plan were part of such a strategy, insofar as they decentralized decision making, making for a diffuse target in the case of litigation. This was not all, though. A delaying action, specifically an all-out war against the NAACP, would resonate with white voters across the state. Not only was the NAACP the primary threat to peace and order, segregation, and white supremacy in the state of Alabama, it was an "outsider" organization, and a hated, Yankee-dominated outsider organization at that. Patterson knew, as did certainly Boutwell, that showing Alabamians that you lived the state's motto, "we dare defend our rights," could carry you a long way in the new Alabama, whether or not you knew that defense was ultimately futile.⁴⁶

On June 1, 1956, Patterson began his assault. He announced that the "good relations that have traditionally existed in our state between the White and the Negro races have been jeopardized by acts of irresponsible groups and individuals." Alabama and the South in general were facing "grave problems," he said, which could only be met soundly by "right-thinking people" in the absence of "disrupting outside forces, such as the NAACP, seeking to widen the breach." The attorney general declared that after a "diligent investigation," he was "convinced that the acts of the NAACP in Alabama [were] against the best interests of the people of this state, both Negro and white." Accordingly he asked Montgomery Circuit Judge Walter Jones for a permanent injunction, restraining the association from conducting any business in Alabama on the grounds that it had not registered with the state as a "foreign corporation." This legal approach to destroying the NAACP was conceived in Louisiana. It was,

⁴⁵ Howard, *Patterson for Alabama*, pp. 99-101, see for quotation p. 100.

⁴⁶ *Southern School News*, Nov., 1958.

ironically, a resurrection of an old anti-Ku Klux Klan statute which many of the southern states had adopted when the Klan's violent extralegal tactics had fallen out of fashion in the decades before *Brown*. Not only had the NAACP "failed to meet [the] statutory requirements" to register and pay a fee, it had, Patterson argued, "engaged actively" in acts which tended to lead to "a breach of the peace." Patterson alleged that the NAACP Legal Defense Fund had paid Autherine Lucy to bring suit and that the NAACP itself organized the "illegal boycott" in Montgomery. He made no mention of the implementation campaign, but it was understood what banning the NAACP would do. The Lucy crisis and the bus boycott were all but decided; the possibility of school desegregation loomed. Patterson knew the voters of Alabama could not, he said, "stand idly by and raise no hand to stay the forces of confusion." After all, he argued with some sense of irony, the NAACP was only "trying to capitalize upon racial factors for private gain and advancement."⁴⁷

There was never a doubt in anyone's mind which way Judge Walter Jones would rule. Jones was an aging and respected jurist among Alabama's whites. His father had been governor, and he himself was the president of the Alabama Bar Association. He was also an ardent and outspoken segregationist, a white supremacist of the first order, and the judicial embodiment of the ideology of the White Citizens' Council. He wrote a regular column that appeared in the *Montgomery Advertiser* under the title "Off the Bench," in which he praised the historical achievements of the white race, extolled the virtues of racial separation, and condemned the U.S. Supreme Court. He used the column, generally, to explain his understanding of how white supremacy worked and how it ought to be maintained, namely through the preservation of states' rights. Jones once called the notion that the Supreme Court could interpret the Constitution an "evil idea" which could "only lead to the final destruction of what is left of boundary lines [drawn] by the states which created the federal government." He also argued that the

⁴⁷ *Birmingham News*, June 1, 1956; *Charlotte News*, June 1, 1956; see, for the full complaint and order, *Alabama ex rel. Patterson v. National Association for the Advancement of Colored People*, *Race Relations Law Reporter* 1.4, Aug., 1956, p. 706.

white race was being “unjustly assailed all over the world” and subjected in Alabama to attacks by “radical newspapers and magazines, communists and the federal judiciary.” Jones exemplified the southern hatred of Yankee outsiders, arguing that “columnists and photographers” had been sent to the South “to take back to the people of the North untrue and slanted tales” as part of a “massive campaign of super-brainwashing propaganda.” According to the judge, southern whites were also under attack from “those who wish an impure, mixed breed that would destroy the white race by mongrelization.” These “integrationists and mongrelizers do not deceive any person of common sense,” Jones wrote in his column, “with their pious talk of wanting equal rights and opportunities.” Their “real and final goal,” he argued, was “intermarriage and mongrelization of the American people.”⁴⁸

Jones had quickly established himself as a solid friend of the Citizens’ Council. A prominent Mobile attorney asked the judge in late 1954 to denounce the Citizens’ Council movement in the name of the bar. The attorney argued that that bar would be “wanting in basic Christian duty” if it failed to “crush” the councils by denouncing the use of economic sanctions. “Most of us favor segregation,” he admitted, but he argued that many were nonetheless opposed to the denial of “work, credit, or basic human needs simply because some Negro exercise his right to advocate peaceably what he thinks ought to be done.” Jones responded by claiming that “those who oppose segregation” were using “all legal means within their power,” including “forces of such social, political, and economic pressures as they can mobilize,” in order to destroy segregation. This was within their rights, Jones wrote, but it was also within the rights of those who favored segregation to do the same. “Neither side to this controversy can expect to be unopposed by counter measure,” Jones reasoned, “so long as measures taken by either side are within our constitutional framework.” The judge ignored the reference to Christian duty and the moral imperative implicit in the reference to “basic human needs” and approached the matter as strictly legal. According to Jones, the activities of the Citizens’ Council were no different than those of

⁴⁸ *Montgomery Advertiser*, Nov. 26, 1956; *Jackson Daily News*, May 20, 1957; *Montgomery Advertiser*, Feb. 26, 1958.

the NAACP, in that they were lawful exercises of Constitutional rights. By 1956 the judge had evidently changed his legal opinion of one of those groups' activities, and it was not the Citizens' Council. He obstinately refused to recuse himself from the NAACP case despite having at one point declared publically that he intended to "deal the NAACP and its counterpart the Montgomery Improvement Association [the civil rights organization born of the bus boycott] a blow from which they [would] never recover."⁴⁹

Jones' gave Patterson exactly what he wanted. He issued a decree granting a temporary restraining order pending the NAACP's reply. The association was restrained from "conducting any further business of any description," and from organizing further chapters, from soliciting membership or contributions, and from collecting dues. Importantly, it was also restrained from "filing . . . any application, paper or document for the purpose of qualifying to do business" in Alabama. Citizens' Councils across the state expressed excited approval. Sam Engelhardt called it "a step forward towards our goal of race harmony in the South" and an acknowledgment that the NAACP was "against the law as it should have been in the past." The NAACP's New York office denied organizing the bus boycott and funding Lucy's enrollment. The board of directors also announced that the organization would "not be intimidated" by the injunction and that it had instructed its attorneys to move for a hearing on the merits of the complaint. According to the board, the injunction was very clearly an attempt to "ban and destroy the NAACP" in "direct violation of the American traditional and constitutional principle of freedom of association," on account of the association's "successful and continuing campaign to eliminate racial discrimination and segregation." It was clear enough, the board argued, when the injunction appeared to prevent the very action – applying for a license and paying a fee – which would logically be required for the NAACP to resume activities, per the complaint itself.⁵⁰

⁴⁹ *Southern School News*, Jan. 6, 1955, Aug., 1958.

⁵⁰ *Alabama ex rel. Patterson v. National Association for the Advancement of Colored People*, *Race Relations Law Reporter* 1.4, Aug., 1956, p. 706; *Southern School News*, July, 1956.

The state NAACP complied with the order to cease operations, but the NAACP Legal Defense and Education Fund went to work immediately preparing a defense. The LDF filed a motion to dissolve the injunction in addition to its answer to the complaint. These were filed by the assistant director of the LDF, Robert Carter, along with Birmingham's prominent, veteran black attorney, Arthur Shores, and the soon-to-be-famous Fred Gray, a young black attorney from Montgomery. The "Inc. Fund," as the LDF was often called, consisted of a small group of attorneys based out of New York, but it always worked with local, NAACP-affiliated counsel. Shores was one of those. He was one of the first black attorneys in the state of Alabama and a long-sticking thorn in the side of Birmingham's white establishment, and he had most recently served as Autherine Lucy's counsel. Gray was 26 years old and fresh out of law school. He had attended Case Western Reserve University in Cleveland on Alabama's dime. Indeed, each of the few blacks who had wished to seek a graduate or professional degree not offered at one of the state's three black state-supported colleges (Tuskegee Institute, Alabama A&M, and Alabama State) received grants to study out of state, per a 1930s federal court order insisting upon some semblance of "equal" in "separate but equal." Perhaps fittingly, Gray returned to Alabama in 1954 vowing to "destroy everything segregated [he] could find." He started his law practice in Montgomery and began attending local NAACP meetings, where he became close with E.D. Nixon and youth director Rosa Parks. These associations made him a natural choice to serve as counsel for the plaintiffs in the case that would ultimately result in the invalidation of the city's bus segregation laws and end the Montgomery bus boycott – *Browder v. Gayle* (1956). The U.S. District Court in Montgomery ruled in favor of the plaintiffs in *Browder*, in fact, just days after Patterson filed his complaint in state court against the NAACP. Gray had to thus simultaneously prepare for the inevitable appeal of *Browder* in the federal court system, while preparing to defend the NAACP itself in the infinitely less-hospitable state court system.⁵¹

⁵¹ *Montgomery Advertiser*, June 7, 1956; *Birmingham News*, June 10, 1956; Gray, *Bus Ride to Justice*, pp.

Carter, Gray, and Shores argued in a motion to dissolve and answer to the complaint that the NAACP had been operating in the state for decades and had never been asked to pay this registration fee. If Patterson wanted to enforce it now, they claimed, there was an adequate remedy for the state to pursue short of filing this suit. But the attorney general had not even notified the association that it was in violation of any law. In any case, they argued, the injunction was violative of the association's First and Fourteenth Amendment rights. The NAACP was dedicated to "help[ing] secure federal statutory and constitutional rights and due process of law for Negroes," and it was the clear purpose of the injunction, the attorneys correctly asserted, to "bar these activities." As such, the injunction "interfere[d] with the freedom of speech and freedom of assembly of the NAACP and its members and their right to petition for redress of grievances as secured by the Fourteenth Amendment." It was a seemingly convincing argument that cut to the core of the attorney general's complaint. Walter Jones did not think so.⁵²

Before the hearing of the case on its merits, and before Jones announced any decision on the NAACP's motion, Patterson asked the court to order the production of a list of NAACP records, specifically those that would supposedly prove its illegal involvement in the Lucy case and in Montgomery. The attorney general wanted the association to produce copies of its branch charters, membership lists, bank records, and any correspondence relevant to the bus boycott or to Lucy's enrollment. Jones immediately granted the motion for production and ordered the NAACP to comply. NAACP state Field Secretary W.C. Patton might have been willing to produce relevant correspondence, bank records, and charters, but under no circumstances was the state NAACP willing to hand over membership lists. Patton in fact hid the records in a small, non-descript Birmingham office not known to be affiliated with the NAACP (a move which later appeared quite shrewd when Attorney General Patterson illegally raided the offices of the black activist Tuskegee Civic Association). NAACP executive

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⁵² *Birmingham World*, June 30, 1956; *Birmingham News*, June 27, 1956.

secretary Roy Wilkins explained to the press why his field secretary refused to comply with the court's order and why the national organization supported him in this, telling reporters that "in too many instances the officers of state and local governments are, to all intents and purposes, one and the same with the leadership of the white Citizens' Council." Wilkins knew that NAACP members in Alabama had already been "subjected to economic pressure and personal threats and acts of violence for no cause other than their membership in the NAACP." The association could not, he said, "in good conscience, risk exposing [its] loyal members to such reprisals." Wilkins was right. Patterson did not need the membership lists to make his case, but he knew that their production would be a strong deterrent for members across the state considering continuing activism, with or without the NAACP. Exposure would, it was hoped, force the average NAACP member back into quiet submission by threatening Citizens' Council action like that which befell the signers of the original school petitions. In Wilkins' words, the state of Alabama wanted to "impose unemployment, denial of credit, threats and intimidation, as well as physical violence upon our members in that state." He said the NAACP would thus "protect [its] members at any cost." The cost, it turned out, would be quite high.⁵³

Carter, Gray, and Shores, assisted by Washington D.C. attorney and *Brown* veteran Frank Reeves, offered to produce all but the membership rolls, but this was not enough. When the deadline for production had passed, Jones held the association in "willful contempt" for its "deliberate refusal" to abide the court's order. The court could not, Jones wrote, "permit its orders to be flouted," nor could it "permit a party, however wealthy and influential, to take the law into his own hands, set himself up above the law, and contumaciously decline to obey the orders of a duly constituted court made under the law of the land and in the exercise of an admitted and ancient jurisdiction," lest there be "no government of law." Jones fined the NAACP \$10,000 and ordered the fine increased to \$100,000 if it

⁵³ *Southern School News*, Aug., 1956; *Birmingham News*, July 6, 1956; *Montgomery Advertiser*, July 6, 9, 1956; see for Patton and records, Howard, *Patterson for Alabama*, p. 100-2, 106; see, for Wilkins' 'Alabama wants to impose' quotation, *Oklahoma City Black Dispatch*, Aug. 3, 1956.

were not paid within five days. Contrary to the judge's assumption that the organization was "wealthy and influential," it was perpetually strapped for cash and would have had a very difficult time paying such a fine, even if it were inclined to do so. The state and local branches certainly could not come close, and the national organization was not much better off. Carter and the other attorneys tried to persuade Jones to half the fine and reiterated their offer to turn over all but the membership lists. Jones was not moved, nor was the state Supreme Court, which denied the association's request for a stay. The fine increased to \$100,000 on July 31. This was a knockout blow and a perfect example of the impossibility of black activists finding redress in the state court system of Alabama. Two weeks later, the state Supreme Court denied the association's petition for a writ of *certiorari*, as a blackfaced effigy was hung a few blocks away bearing the name "NAACP" alongside another one, white, emblazoned with "I talked integration." The organization's attorneys knew they would have to try and find relief in federal court, otherwise the NAACP was, indeed, finished in Alabama.⁵⁴

The contempt fine officially handcuffed the NAACP in Alabama for years. Without purging the citation, it could not litigate Patterson's complaint on its merits, and it therefore could do nothing about the injunction Jones had issued. The organization appealed to the U.S. Supreme Court, which agreed in May of 1957 to hear its argument. In 1958 the Court reversed and remanded the contempt citation and fine, only to have the state's high tribunal claim that the NAACP was in contempt for different reasons and maintain the fine and injunction. In 1959 the federal court again ordered the state court to hear the case on its merits, and the state court simply ignored the order. Finally, NAACP attorneys brought suit in federal trial court seeking an injunction against Patterson's successor, McDonald Gallion, which ultimately resulted in yet another mandate from the U.S. Supreme Court to the Alabama Supreme Court in 1961. The latter finally heard the NAACP's appeal in 1962 and found in favor of the state. The NAACP

⁵⁴ Alabama ex rel. Patterson v. NAACP, Decree of July 25, 1956, *Race Relations Law Reporter* 1.5, Oct., 1956, p. 917; *Southern School News*, Aug., 1956; *Montgomery Advertiser*, July 31, 1956; see, for effigies, *Memphis Commercial Appeal*, Aug. 5, 1956.

then appealed this judgment to the U.S. Supreme Court, which in 1964 held it to be unconstitutional and ordered the state to lift the ban. Thus, through political maneuvering, judicial foot-dragging, and outright intransigence on the part of state officials, the NAACP was kept from operating in Alabama for eight years.⁵⁵

Patterson's attack on the NAACP was an immediate and resounding success. He had accused the organization of soliciting and financing the Lucy litigation and with financing and directing the bus boycott, neither of which was entirely true. The Lucy case was no more a case of barratry or solicitation than any of the others the NAACP litigated, and it had roundly escaped censure for those. The boycott was the result of much more than NAACP coordination, including the organizational efforts of local teachers at Alabama State Teachers College, and the inspirational leadership, famously, of a group of preachers which included Martin Luther King, Jr. The real and continuing threat the NAACP posed in Alabama was in its Operation Implementation designs. The crises in Tuscaloosa and Montgomery had raised the stakes, but the looming crisis involving the white schoolroom, according to the Citizens' Council, led straight to the white woman's bedroom. Patterson knew he could make his name as a bona fide leader in the emerging super-segregationist bloc by going after the organization that posed such a threat, and he did. He had risen to prominence by pursuing his father's murderers. His attempt to expose the corruption in the Folsom Administration endeared him to many conservatives and to anyone anti-Folsom, which was a large crowd by then. But his embrace of race vaulted to him the top. He significantly raised his profile when he assisted Sam Engelhardt in his efforts to redistrict Tuskegee by attacking the TCA. And he finally established himself as the favorite for the governor's chair in 1958 by defeating and ousting the NAACP in 1956.⁵⁶

⁵⁵ Alabama ex rel. Patterson v. NAACP, Summary of Developments and Decree of the Supreme Court of Alabama, Aug, 27, 1964, *Race Relations Law Reporter* 9.3, Fall, 1964, pp. 1392-3; Gilliam, *The Second Folsom Administration*, provides a concise and substantially similar summary of these developments, pp. 423-36.

⁵⁶ Howard, *Patterson for Alabama*, pp. 122-40.

Patterson campaigned for governor on providing a vigorous defense of segregation. He obviously had impeccable credentials. In June of 1957 he touted those credentials and conveyed his message to the graduates of the Jones School of Law (founded by and presided over by none other than Walter Jones, who ran classes for the night school out of his chambers and his home). He told the young lawyers that the U.S. Supreme Court had become “a super-legislature” and had not simply interpreted but had “amended the Constitution” with the School Segregation Cases decisions and had thus caused more “strife between the races” than the South had seen since the Civil War. A campaign ad that ran in state newspapers declared Patterson’s “creed” which he said he would hang on the wall of his office. The creed listed ten points of guidance, or pledges, number three of which was to “enact strong segregation laws – drafted by the ablest lawyers who can be found – to keep the southern way of life on every front.” A supporter later told Patterson’s biographer that Patterson “verbalized what people were thinking and talking about among themselves about the school integration issue. They didn't want it to happen,” he said, “and when Patterson told them it wasn't going to happen in Alabama, they believed him.”⁵⁷

In a record voter turnout, Patterson won 32 percent of the initial vote in the Democratic primary – which was still the only real contest in the solid Democratic South – forcing a runoff with then up-and-coming state Circuit Judge George Wallace. He handily defeated Wallace in the runoff in which the judge accused the attorney general, correctly, of successfully courting the assistance of the Ku Klux Klan. The charge had backfired when Wallace was himself unexpectedly endorsed by the NAACP. Wallace famously attributed his defeat to having been “out-niggered” by Patterson, and this has been seen as

⁵⁷ *Montgomery Advertiser*, June 13, 1957, June 1, 1958; Howard, *Patterson for Alabama*, see, for ‘supporter’ quotation, p. 122. Jones founded Jones Law School in 1928 as a Montgomery alternative to the University of Alabama for those who were already working. Jones himself was president and faculty, and he tapped local attorneys to teach classes. The school was acquired in 1972 by the University of Alabama and ultimately by Alabama Christian College – now Faulkner University – which operates the school today; see “History of Thomas Goode Jones School of Law,” at Faulkner Law online, <http://www.faulkner.edu>, accessed Aug. 1, 2012.

steeling Wallace's own resolve to engage in race-baiting demagoguery. Patterson easily won the subsequent general election, as expected, and prepared to take office in January of 1959.⁵⁸

The Impact of the Little Rock Crisis, 1957-59

Patterson quickly confirmed to voters that he would engage in massive resistance to avoid any breach of segregated education, even as the efficacy of massive resistance came into serious question elsewhere in the region. Before taking office, Patterson was forced to respond to developments in Little Rock, Arkansas. Litigation and demonstrations there had led to a standoff between Arkansas Governor Orval Faubus and the federal government over the desegregation of all-white Central High School. The crisis had become national news and had given credence to law-and-order segregationists' claim that integration would only lead to violence and should therefore be avoided at all costs. Patterson said, "I don't believe the people of this state will ever tolerate integration of the schools, and if the federal government were ever to attempt to bring integration upon us by force, there would be chaos and disorder" which could only lead to "the destruction of our school system as we know it today." Integration was simply "unthinkable." Patterson's former assistant, MacDonald Gallion, was waiting to take Patterson's place as the attorney general. Referring to a federal judge's order to forestall the integration at Central High, he said that he was "gratified to see a federal judge shake the mystic cloak of dominance from Washington and the NAACP, and for a change act with some degree of common sense in dealing with the practical aspects of the integration problem." In light of the developments in Arkansas, Gallion announced, it was "hardly unthinkable" that the *Brown II* implementation order be suspended indefinitely.⁵⁹

The situation in Arkansas alarmed white Alabamians. The NAACP in Little Rock had secured cooperation from the local school authorities and had nine black students prepared to desegregate

⁵⁸ Carter, *Politics of Rage*, pp. 84-95; Howard, *Patterson for Alabama*, pp. 140-58.

⁵⁹ *Montgomery Advertiser*, June 22, 1958.

Central High in the fall of 1957. Faubus called out the state's National Guard to prevent the students' entering the school but was forced to back down by President Dwight Eisenhower, who not only federalized the Guard but called in the 101st Airborne Division of the United States Army. This was the type of "disorder" that many whites thought the NAACP fostered, and it was more proof that the federal government was again trampling upon states' rights and forcing an unwanted social reorganization upon the South as it had done 100 years prior. The Alabama Citizens' Council announced a spike in memberships, with Sam Engelhardt arguing that the episode had given the Council a "flying start." Newspapers across the state reported a significant rise in reports of bombings, floggings, and cross burnings.⁶⁰

Many Birmingham *News* readers reacted with indignation, specifically to the federal intervention. One Birmingham man argued that Eisenhower's response was a "sinful and shameful act" by which he had "turned his back on his own race to protect Communist followers with Army troops and guns and bayonets." Another reader wrote of "perilous days of imminent danger of complete military dictatorship." Another reader from Birmingham lamented the "orders of a misguided president to enforce a law which if carried to its ultimate conclusion" would ultimately result in "the destruction of the magnificent progress which has been made in the South. If integration laws are enforced," he wrote, "it will make for the white people of the South a world different from anything they have hitherto known."⁶¹

South Alabamians reacted with similar dismay. A Linwood woman asserted that "the Southern white people and Negroes were living very peaceably when that awful decision of the Supreme Court disturbed the peace of the whole nation it seems." A man from the town of Red Level was appalled that the president, who had sworn "that he would abide by, uphold and protect the Constitution," had

⁶⁰ *Southern School News*, Nov., 1957; *Southern School News*, Dec., 1957; see, for developments in Little Rock, Patterson, *Brown v. Board of Education*, pp. 109-113.

⁶¹ *Birmingham News*, Oct. 9, 1957.

indeed “allowed the Supreme Court to invade or take over the Constitutional work of Congress” and had thereby become “party to the most unconstitutional act that I know anything about. Not being content with that,” the man wrote, the president “acknowledged that the prejudice decision [sic] of the Supreme Court was a law and proceeded to enforce it as such. When Eisenhower ordered the troops to Little Rock,” he argued, “he did it in violation of the Constitution, which made it a criminal assault and invasion of the sovereign state of Arkansas.” Another man made the connection with Reconstruction that many whites in the South understood so well. All Alabamians should advise their congressman, the man cautioned, to “take a close look at the next appropriations to our military establishment in order to be sure that no funds so appropriated will be used to furnish federal troops with bayonets to enforce arbitrary decisions of carpetbagger judges.” A Tallassee woman called Little Rock “the South’s Pearl Harbor.”⁶²

One Birmingham *News* reader argued that the Little Rock affair demonstrated “dramatically the extent to which the federal government operating under a social philosophy transmuted into political action during the past 25 years is willing to go to require conformity to that philosophy,” one “facet” of that being “a constant and relentless drive to build up the rights of minorities.” It was unfair, the reader urged, that the same consideration was not given to the “minority of the states of the union,” which favored continued segregation. The reader then cut to the core of the constitutional question presented in the immediate wake of *Brown*. “The integrationists contend that the action of the Supreme Court is final and that its decision is the law of the land,” he reasoned, “on the other hand the segregationists hold that the action of the Supreme Court is not necessarily final and that it cannot create laws of the land in violation of the Constitution itself.” The latter was, of course, the rationale

⁶² *Montgomery Advertiser*, Oct. 6, 8, 29, Nov. 1, 1957.

behind the interposition and nullification resolutions produced by the various states, including Alabama.⁶³

The Supreme Court attempted to shut the door on this reasoning when it decided *Cooper v. Aaron* near the end of 1958. The suit was an attempt by members of the Little Rock school board to delay desegregation in light of the “disorder” of the first year. Faubus had continued in his defiant stance and had joined with his state’s legislature in attempting school closure in lieu of integration, in much the same fashion as officials in Virginia soon would do. This, the Court decided, was the reason for the disorder – the actions of state officials, not the initial good faith efforts of the school board to implement the *Brown* order. The Court ordered the desegregation of Little Rock schools to proceed as planned and took the opportunity to assert its role as arbiter of the Constitution. The justices explicitly held that states could not interfere with that role by interposing their authority between state citizens and the federal government. *Cooper v. Aaron* was thus an attempt to put interposition and nullification to rest and to serve notice that the *Brown* decisions could not be ignored simply because state governments disagreed with them. But it did not even bring an end to the crisis in Little Rock, where schools remained closed throughout the 1958-9 school year and where Faubus remained hugely popular for his defiant stance.⁶⁴

Rather than convince white Alabamians that massive resistance was futile, the events in Little Rock and the *Cooper v. Aaron* decision simply added intensity to their siege mentality. It emboldened their calls for defiance of outside agitators and for the preservation of states’ rights. “The paratroopers are in Little Rock,” wrote one man from Troy, “and be their stay long or short, every one that is old enough to tote matches knows two facts: the white man will continue in Alabama,” and “suppressed anger’ will continue to turn to ‘tenfold hate.’” The “NAACP sharpies,” he wrote, had convinced many

⁶³ *Birmingham News*, Sept. 29, 1957.

⁶⁴ Freyer, *The Little Rock Crisis*, pp. passim; Wilkinson, *From Brown to Bakke*, pp. 90-3; Bartley, *The Rise of Massive Resistance*, pp. 237-69; see also Freyer, *Cooper v. Aaron*, passim; *Cooper v. Aaron*, 358 U.S. 1 (1958).

that defiance was un-Christian, but he argued that, on the contrary, “hardly a Christian tenet” existed that had not been “preserved in the ‘brines of defiance.’ Heaven stands in the corner with defiance,” he claimed, and so with Alabama. Another Troy man exemplified the belief that resistance remained imminent and potentially successful when he offered some advice to his “colored friends. . . . If I were a colored man,” he mused, “and one of my children wanted to go to a white school, I would take him behind the house and give him or her what Patty gave the drum. And if one of those agitators came to see me,” he claimed, “I’d give him what David gave Goliath.” Alabama’s black folks should “forget the Supreme Court ruling and keep your way of life, and you will keep your good white friends. If you don’t,” he warned, “you are going to lose the goose that feathered your nest.” A man from Dothan displayed the Cold Warrior mentality of many Alabama whites when he wrote plainly that “the statement that white and black school integration is inevitable is a communist lie designed first to discourage and then kill opposition to it.” The events in Arkansas, a “soft” border state, “would have never occurred,” he argued, had only “everybody who shudders at race mixing . . . presented to the politicians of the North a solid, implacable wall of resistance to the outrage proposed.”⁶⁵

In reference to the Federal District Court that approved the Little Rock school board’s intended delay, a Birmingham man argued that, regardless of Supreme Court action in *Cooper v. Aaron*, Alabamians needed to “stand firm.” The blacks of Alabama were “satisfied and [did] not want integration,” he wrote the *Birmingham News*, “everybody is satisfied except the NAACP and the Communists, the rabble rousers.” The Supreme Court’s ruling was only pandering to those groups, according to another Birmingham man. The Court wanted to “hasten the destruction of our great white heritage on the altar of ‘Social Equality’ between races as far apart intellectually, culturally, and socially as black and white.” An Ensley man echoed these sentiments, declaring flatly that “a vast majority of white people do not accept the latest decision of the Supreme Court on integration because many of our

⁶⁵ *Montgomery Advertiser*, Oct. 5, 8, 10, 1957.

best judges and prominent lawyers contend there is no federal law to support such a decision.” Of course, “another main reason” for not accepting the decision was the fact that “one of the main objectives of the NAACP is intermarriage with white people.” Fortunately, according to yet another Birmingham man, “more Negroes realize the suicidal course followed by the NAACP, in attacking state sovereignty and the attempted weakening of our basic government, is also the means to their own destruction.”⁶⁶

Meanwhile, massive resistance in Virginia suffered a blow similar to that meted out by the Supreme Court in *Cooper v. Aaron*. Lindsay Almond had been elected governor in large part on his pledge to engage in massive resistance, and he had dutifully acted on the state’s recently passed school closure laws by forcing the shut-down of schools in Charlottesville and Norfolk which were threatened with desegregation. When black activists in Virginia challenged the action with a suit in federal court, a three-judge federal panel ruled in *James v. Almond*, in January of 1959, that the school closures were unconstitutional, and it ordered the schools re-opened. A Decatur man lamented to the *Birmingham News* after the decision was announced that John Patterson and George Wallace had, during the recent campaign, both “made the same promise all over this state to close schools rather than mix races in our public schools,” and this was “the law of the land, and true to our Constitution.” But the Virginia decision cast serious doubt on Patterson’s ability to keep that promise. Patterson himself acknowledged the ruling, reasoning that there might need to be a “reappraisal of Alabama’s segregation laws” and that the state “may have to enact some new laws very soon. It is going to be tough to maintain segregation,” Patterson said, but “people must be prepared to make some sacrifices.”⁶⁷

The sacrifice on everyone’s minds at the time was, as Patterson asserted, to “alter or abandon our public schools system and establish a private system of education.” The Virginia decision shifted the

⁶⁶ *Birmingham News*, Sept. 5, 22, Oct. 4, 27, 1958.

⁶⁷ Wilkinson, *From Brown to Bakke*, pp. 82-3; Bartley, *Massive Resistance*, pp. 270-92; *James v. Almond*, 170 F.Supp. 331 (ED, VA, 1959); *Birmingham News*, Jan. 30, 1959; *Southern School News*, Feb., 1959.

thinking of some Alabama segregationists to this notion of doing away with public education entirely and replacing it with segregated private schools for whites. Not every segregationist in Alabama was open to such a course, which had received a cold reception in the legislature when Sam Engelhardt introduced it six years prior. But the renewed dialogue represented the refusal of whites in the state to accept that either *Cooper v. Aaron* or *James v. Almond* ought to be taken as an indication of segregation's impending demise in the state of Alabama or of the inevitability of *Brown* implementation of any kind. After all, Alabama's Pupil Placement Law was in place and had, indeed, been recently upheld by a federal court. If it were to ever fall to a subsequent court challenge, Alabama could then look seriously at a private school plan. Thus, segregationists had reason to be optimistic when John Patterson strode into Montgomery, regardless of what had occurred in Arkansas or Virginia.⁶⁸

During the Little Rock crisis, an Auburn man told the *Montgomery Advertiser* that the will of the southern people was strong enough to resist the designs of the NAACP and the Supreme Court and to stand firm, and he couched that resistance in terms of the militant tradition of Confederate veterans. Every white southerner could understand such a reference and need only look to the nearest town square for a memorial dedicated to Confederate soldiers who fought valiantly for the Lost Cause. The "invasion of Arkansas," he reasoned, was a plot masterminded by U.S. Attorney General Herbert Brownell, Vice President Richard Nixon, and "the NAACP and certain radicals," but he argued that "40,000,000 white people in the South will not change their way of life to suit Brownell, Nixon, [U.S. Supreme Court Chief Justice, Earl] Warren, [Justice Hugo] Black, and his buddies on the Supreme Court." This man's father was one of the Confederate soldiers, he wrote, "that escorted Jefferson Davis from the

⁶⁸ *Southern School News*, Feb., 1959.

Old Exchange Hotel when he took the oath of office in Montgomery,” and that martial heritage had continued in his family. He was ready for a fight, and so was white Alabama. Little Rock be damned.⁶⁹

At John Patterson’s inaugural, the very day the Supreme Court was deciding *James v. Almond*, and just four months after it had announced *Cooper v. Aaron*, the incoming governor stood on the star whereon Confederate President Jefferson Davis had taken that oath of office 100 years prior. He swore on the same Bible to uphold the 1901 Constitution of the state of Alabama. At the direction of the incoming governor, no blacks participated in the festivities. There were no black high school marching bands, as in years past. There was certainly no black inaugural ball. Judge Walter Jones administered the oath of office. The incoming lieutenant governor was Albert Boutwell. The recently elected head of the Alabama Democratic Executive Committee and Patterson’s incoming highway director was Sam Engelhardt. Patterson protégé MacDonald Gallion stood by as the incoming attorney general. Gallion had called his nomination to that post “a public mandate to carry on an all-out fight to maintain segregation,” which he said he would “focus on above everything else.”⁷⁰

The arch-segregationists were triumphant. Massive resistance to school desegregation was to be the guiding principle of all three branches of the state government – the ideology of White Citizens’ Council their foundational belief. The Little Rock crisis had only made the nerves of southern whites more sensitive to the continuing threat of integrated education, carrying with it all the baggage of war, Reconstruction, and worst of all, miscegenation. With Patterson and the new guard in office, segregationists could be certain that Alabama would live up to its motto and ‘defend its rights’ against outside agitators who would disrupt the peace and good order of the state. As one Montgomery *Advertiser* reader wrote, Jim Folsom “didn’t care to take part in anything toward keeping our schools,

⁶⁹ *Montgomery Advertiser*, Oct. 21, 1957.

⁷⁰ *Montgomery Advertiser*, Nov. 4, 1958; *Southern School News*, Sept., 1958, Feb., 1959.

churches, parks, and public places segregated,” but Alabama would have “a real 100% governor after January, 1959. Let’s give Patterson our full cooperation and support.”⁷¹

Jim Folsom’s brand of politics in Alabama was dead. The School Segregation Cases decisions had awakened Alabama and had jolted committed integrationists and segregationists into concerted, organized action, and politically active liberals like Folsom had been marginalized in the process. The milquetoast integrationists in the ACHR and within the fractured white churches remained on the periphery from whence they had come. The NAACP’s own aggressive implementation drive had resulted in the organization’s banishment from the state. The victorious John Patterson stood alone on the emblem of Confederate heritage and told the white people of Alabama, “Federal courts have decreed that we must send our children to integrated schools contrary to our customs and traditions.” If this were to actually happen in Alabama, the governor declared, “turmoil, chaos, and violence would result in the destruction of our public school system.” There was, he said, “no such thing as a little integration,” and so there could be no compromise. “If we compromise or surrender our rights in this fight,” Patterson told them, “they will be gone forever, never to be regained or restored.” The governor swore an oath to the people, using the language of “mixing” that all understood carried deeper meaning than classroom seating. “I will oppose with every ounce of energy I possess” he declared, “and will use every power at my command to prevent any mixing of the white and Negro races in the schools of this state.” And he did.⁷²

⁷¹ *Montgomery Advertiser*, Nov. 4, 1958; *Southern School News*, Sept., 1958, Feb., 1959.

⁷² *Southern School News*, Feb., 1959; Howard, *Patterson for Alabama*, pp. 158.

CHAPTER 3: FRED SHUTTLESWORTH, THE ACMHR, AND THE INITIATION OF LITIGATION, 1956-59

When Montgomery Circuit Judge Walter Jones granted the injunction barring the NAACP from any activity in the state of Alabama on June 1, 1956, a Jefferson County sheriff's deputy marched into the Masonic Hall on Fourth Avenue North in Birmingham to inform the NAACP members meeting there that they were thereby "outlawed." One member asked in dismay, "then what can we do?" The deputy smugly replied, "You can't do nothing." The newly tapped membership chairman of the NAACP branch presiding over the meeting then quickly retorted, "That isn't so. There's never a time when a man can't do anything," he said, "You aren't going to stop people from trying to be free." The brazen response came from the Reverend Fred Shuttlesworth – the young, fiery, and fearless pastor of Bethel Baptist Church. It was not rhetorical. Shuttlesworth was about to embark on a direct action and litigation campaign for civil rights in the city of Birmingham that made the old guard of the city's NAACP look exceedingly cautious by comparison.¹

Shuttlesworth organized the creation the Alabama Christian Movement for Human Rights (ACMHR) in order to keep black activism channeled in Birmingham in the aftermath of the NAACP banishment. As part of a persistent working class movement for civil rights in which he and ACMHR resisted middle class black calls for caution, he then pushed hard for school desegregation, meeting stiff resistance from school and city officials, from violent segregationists, and even from the federal judiciary. With the help of willing attorneys and determined local activists, though, he continued to press the issue in federal court, ultimately providing the model for challenging the dual educational system in Alabama.

¹ Andrew Manis, *A Fire You Can't Put Out: The Civil Rights Life of Birmingham's Reverend Fred Shuttlesworth* (Tuscaloosa: University of Alabama Press, 1999), p. 93.

Replacing the NAACP

Birmingham attorney Arthur Shores called a meeting on June 2, 1956 to inform the city's NAACP activists that they were, indeed, enjoined and that all activity had to cease. Several of the city's established black leaders – themselves ministers and pillars of the middle class black community – acceded to Shores' warning. But Shuttlesworth was the emerging leader of a more urgent (some said reckless), younger, working class element. He protested and argued that the fight must continue. A small group of other leaders agreed with Shuttlesworth and organized themselves into the ACMHR. They drafted a Declaration of Principles, in which they disavowed any notion that they were influenced by "outside agitators" or that they had any intention of being "rabble rousers" intent on disrupting law and order. They were hopeful of immediate compliance, without further litigation, with the Supreme Court's *Brown* rulings, and they wanted "a beginning Now!" The group then announced plans in the Birmingham *World* to hold a mass meeting, telling the city's blacks that "the action of the [state's] attorney general makes it more necessary that Negroes come together in their own interests and plan together for the furtherance of their cause," that is, they must seek "a way to continue the freedom fight in Alabama" in the absence of the NAACP. Shuttlesworth himself told the press, "The only thing we are interested in is uniting our people in seeing that the laws of the land are upheld according to the Constitution of the United States."²

The more cautious middle class establishment tried to talk Shuttlesworth down, but the organizational meeting of the ACMHR was held as planned on June 5 at Sardis Baptist Church. It drew around 1,000 enthusiastic local blacks, who shouted down calls from conservative ministers to avoid any further action. They eagerly approved the ACMHR Declaration of Principles and gave Shuttlesworth their devoted attention. The 160 pound reverend was practiced at the art of the mass meeting speech/sermon. He began by calmly denying what everyone understood to be true – that the ACMHR

² Manis, *A Fire you Can't Put Out*, pp. 94-6; Thornton, *Dividing Lines*, p. 197; *Southern School News*, July, 1956.

was a successor to the NAACP in Birmingham. He then acknowledged that “the Citizens’ Council won’t like this,” the mobilization of Birmingham’s blacks in spite of the injunction, but he said, “I don’t like a lot of what they do” either. He reminded those gathered in the 88 degree heat of the church that it was the desire of the “enemies of freedom to kill our hopes and keep us from fighting.” But, Shuttlesworth said, “they can’t outlaw us all.” The black people of Birmingham were ready to go to jail if necessary, he thought, and this meant that the time for caution was passed. He assured them, though, in a rousing crescendo that at once revealed his courage, determination, leadership, and hubris, that “if anybody gets arrested, it’ll be me; if anybody goes to jail, it’ll be me; if anybody suffers, it’ll be me; if anybody gets killed, it’ll be me.” The diminutive preacher would indeed be arrested, spend plenty of time in jail, suffer greatly, and come quite close to being killed for his subsequent actions – including his attempt to desegregate Birmingham’s public schools.³

The 1956 school year was too near for ACMHR to mount any effective challenge that fall, but by the summer of 1957, the organization was ready to pick up the work of the NAACP. The latter organization had been banished in large part due to two successive years of petitioning local school boards to implement *Brown*. Just as the NAACP understood the petitioning campaign to be a preparation for likely litigation, so did ACMHR proceed.⁴ Anticipating a challenge in federal court to the Alabama Pupil Placement Law, Shuttlesworth organized signatories to petition the Birmingham Board of Education in the summer of 1957. Whereas the NAACP branches had somewhat vaguely petitioned school boards for general compliance in 1954 and 1955, however, the ACMHR petitioned the

³ *Southern School News*, July, 1956; Manis, *A Fire You Can’t Put Out*, pp. 96-8; Thornton, *Dividing Lines*, pp. 197-8. The three sources have different accounts of the number of people present, with the *News* claiming “some 500,” Manis claiming ‘well over the capacity of 850,’ and Thornton claiming “over 1,000.”

⁴ Scholars have traditionally associated Shuttlesworth and his organization closely with direct action, partly because of the reverend’s fearlessness, and partly because of ACMHR’s work with the SCLC during the now famous 1963 Birmingham campaign. But, historian Mills Thornton has argued that Shuttlesworth and ACMHR were fully committed in the 1950s to the same strategy employed by the NAACP, at the core of which was litigation. It was not until a great many frustrations took their toll on Shuttlesworth that he steered the organization towards direct action. In the late 1950s, any such direct action that the minister undertook in the name of ACMHR was understood to be a prefatory maneuver to open the way for litigation. Thornton, *Dividing Lines*, p. 204, 216.

Birmingham board for the admission of particular students to particular schools. The petitioners asked that 13 black school children, from nine families, be assigned to the schools nearest their homes – in this case all-white Phillips High, all-white Woodlawn High, and all-white Graymont Elementary. It was a direct challenge to the Pupil Placement Law, which established proximity as one of the potential determining factors in assignment of students to particular schools.⁵

The board of education received the nine petitions, including one signed by Shuttlesworth and his wife on behalf of their two children, on August 20, 1957. Two families subsequently bent to pressure and asked that theirs be withdrawn and returned. Shuttlesworth himself followed-up the petitions a week later with a letter to the superintendent of education, asking for instructions “relative to the enrollment of our children in school at the proper time.” We understand,” he wrote, “that the school term begins on [September] the 4th. In the absence of board action and policy, special or otherwise, before the date of school opening, we are compelled to ask your direction.” The petitions presented to the board had been, the reverend argued, “valid applications to the schools named therein,” and he and the other parents were “concerned as to whether we are to present our children at these schools on the fourth, or whether we are to remain un-enrolled pending board action.” He added that “the urgency of these matters would, we think, require immediate official direction.” The superintendent, Dr. Frazer Banks, did not think so. Banks replied that it was school board policy that “when an application for transfer is made, the child continues in the same school he has been attending or to which he has been promoted pending a final decision on the request for transfer.” Such a decision, he wrote, would not come before the petitions were presented formally at the next meeting of the school board, on September 6.⁶

⁵ *Southern School News*, Sept., 1957; *Birmingham News*, Aug. 29, 1957; Thornton, *Dividing Lines*, p. 204, 216.

⁶ *Southern School News*, Sept., 1957; *Birmingham News*, Aug. 29, 1957.

Two days before the scheduled start of the 1957-58 school year, a group of Birmingham Klansmen associated with Ace Carter's local outfit kidnapped a randomly chosen black man – J. Edward "Judge" Aaron – from a rural Jefferson County road, with the intention of sending Shuttlesworth a message. The men took Aaron to their Klan "lair," where they beat and interrogated him, asking if he thought his children were good enough to go to school with their own. They told him to tell the reverend Shuttlesworth to cease and desist in his attempt to integrate the city's schools. Tell him to "stop sending nigger children and white children to school together," they said, "or we're gonna do them like we're gonna do you." Then, at the direction of "Cyclops" Joe Pritchett, Klansman Bart Floyd set out to ritualistically prove his worthiness for Klan office by getting "nigger blood on his hands." He told Aaron to bow before them and asked would he prefer to die or to be castrated. Aaron evidently chose life, as Floyd then pistol whipped him and proceeded to sever his scrotum. After pouring turpentine into the wound, the Klansmen threw Aaron back into the car trunk, drove him into the countryside, and left him on the side of the road. He was soon spotted by motorists, covered in blood from waistline to ankles. After being picked up by the police and taken to the hospital, he delivered the message.⁷

Three other Klansmen subsequently attended the September 6 meeting of the Birmingham Board of Education, wearing buttons emblazoned with a lynched black person. At the meeting, the school board began to make the first use of Alabama's placement law, as expected. The legislature had allowed for a tedious and potentially lengthy administrative process to take place in each case of potential transfer, so the Birmingham board did not have to make any "final" decision on the transfer of the petitioning students at the meeting itself. It needed only to set the wheels of evasion in motion, in the hopes that the petitioners would either slip up on a technicality somewhere, get tired of waiting, or

⁷ Thornton, *Dividing Lines*, p. 216; Manis, *A Fire You Can't Put Out*, pp. 145-7; *Southern School News*, Dec., 1957.

otherwise back down. They were already under frightening pressure, as evidenced by the terrorist activity of the Klan.⁸

Fred Shuttlesworth was not going to wait. Rather than take his daughters to all-black Parker High on the morning of September 9th, 1957 he decided to drive them to Phillips. This was planned action, one more step towards litigation. Shuttlesworth had actually contacted the news media beforehand and alerted them to his intentions. He issued a statement, arguing that the Birmingham Board of Education had “embarked on a policy of negative evasion.” Shuttlesworth said that the superintendent had proposed to “continue this through ‘routine’ channels [such as] interviews, studies, tests, social factors, reports to the board, etc.” Shuttlesworth said, “[It]in effect means ‘never’ without actually saying it.” They had no alternative, he concluded, “to presenting [their children] for immediate enrollment” at the schools to which they had petitioned for transfer. “They need time,” he argued, but “our children need schooling.”⁹ The statement continued:

From the start, official tone here, and elsewhere in the South, has been one of defiance of the United States Constitution and judicial process, and of utter contempt for any Negroes who would seek rights guaranteed by the United States Constitution and due process of federal laws. In their failure to recognize the law of the land and to make at least some steps towards eventual compliance, the stage is ripe for tension, confusion, and violence, which they claim to fear. Hence these threats and intimidations of Negroes and these brutally vicious attacks upon innocent Negroes at night by robed white Klansmen. The seeds of mayhem are always sown long before the act. It is gratifying that someone was apprehended at last.¹⁰ But neither official nor blood thirsty riders can stop our quest for first class citizenship. This we seek by good will if possible; by law if necessary.¹¹

Media members and a crowd of angry segregationists gathered outside the school in advance of the Shuttlesworth family’s arrival, which did not come until two hours after the school day had begun. Shuttlesworth got out of the car and was immediately set upon by a gang of 15-20 furious whites, which

⁸ Thornton, *Dividing Lines*, p. 216; *Southern School News*, Oct., 1957.

⁹ *Birmingham News*, Sept. 9, 1957.

¹⁰ Aaron’s assailants had been arrested and charged, although they were released from prison in the early 1960s, having served only a small fraction of their 20 year sentence; see Thornton, *Dividing Lines*, p. 216-17.

¹¹ *Birmingham News*, Sept. 9, 1957, see for full text of statement.

proceeded to knock him down and beat him with brass knuckles and a bicycle chain. Others moved on the Shuttlesworth car, where the reverend's daughters, his wife, and two other children sat, horrified, as the mob broke out a windows and tried to extricate them. Police stationed at the school were in no hurry, but they were able to eventually pull the attackers off of Shuttlesworth long enough for him to escape and speed off in the car. It was later revealed that incoming police commissioner Eugene "Bull" Conner had deliberately interfered with a backup call by calling in a bogus stolen car report at the same time. Shuttlesworth and his daughter Ruby ended up in University Hospital with what turned out, somehow, to be only minor injuries. In his anger and frustration that night, Shuttlesworth vowed to return to Phillips "whether they kill us or not." But he knew that the endgame was to file a suit, and so he obeyed the police commissioner's order that all persons without children presently enrolled should keep off of school property. He then resumed waiting for the superintendent to begin the "placement" process.¹²

Shuttlesworth's brazen, and some said insane, attempt to enroll his children at Phillips had reverberations throughout Alabama. With the threat of subsequent desegregated enrollments looming, disorder reigned at Phillips and Woodlawn High the following day. Woodlawn students held an impromptu demonstration at the school's flagpole and boycotted classes in protest. Some threw rocks at passing black school busses and cars with black passengers, while others marched about the school grounds waving Confederate battle flags. Phillips High was evacuated that morning after a woman called in a bomb threat. Another bomb threat resulted in a lockdown at Phillips that afternoon. In the days that followed, Attorney General John Patterson met with Superintendent Banks and the president of the school board and promised the full support of his office to the cause of preserving segregation in Birmingham's schools. One of Alabama's U.S. congressional representatives, George Andrews, called upon the whites of the state to "call the bluff" of blacks threatening school desegregation. "There is

¹² *Southern School News*, Oct., 1957; *Birmingham News*, Sept. 9, 1957; *Christian Science Monitor*, Sept. 10, 1957; see also Manis, *A Fire You Can't Put Out*, pp. 145-61, and Thornton, *Dividing Lines*, p. 216-17.

trouble, and there will be more trouble,” Andrews said, “because the people just don’t want to integrate their schools.” The choices, he argued, were to “integrate and have trouble and bloodshed, or close your schools.” And if it came down to that, Andrews’ choice was clear: “close the schools.” The Birmingham Council on Human Relations issued a typically conservative response that might as well have come from the Citizens’ Council. The group admonished Shuttlesworth’s attackers to “pause and consider the implications and ultimate ends of their efforts.” They should know, the ACHR reasoned, that “violence and the threat of violence can never be justified as a method of supporting anything in a democracy based upon law, be it segregation, desegregation, or other causes.”¹³

In October Banks made good on his promise to move forward with the applications of the petitioning Birmingham students, but the ultimate outcome was a foregone conclusion. Per the Pupil Placement Law’s suggested machinery, the remaining students were given intelligence, comprehension, and psychology tests. The pressure from segregationists and the placement law’s tedium had driven off all but Shuttlesworth’s daughter, Ruby, and three others. After the administration of the tests, Banks undertook a survey of around 5,000 parents of children at all-white Graymont, Phillips, and Woodlawn, to ascertain the parents’ views on Negroes in white schools. The impact of a prospective student’s enrollment on the existing student body was a legitimate consideration under the placement law. Banks knew that the vast majority of the parents queried, when asked to “answer yes or no and write any opinion they may have” as to whether blacks should be allowed into their schools, would answer strongly in the negative. This would collectively constitute one more reason to deny the petitions. The specific questions were hopelessly leading, meant to touch nerves, and designed for effect. Or as Shuttlesworth himself said, they were “suggestions of the answers the board wanted to receive and not

¹³ *Birmingham News*, Sept. 10, 1957; *Southern School News*, Oct., 1957.

an effort to begin creating community sentiment toward a non-racial school system.”¹⁴ The board asked:

1. If these [four] Negro children should be admitted to this school would you be willing for your child to stay? 2. Would you be willing for your child to take part in classes? Athletics, play, recreation? Social affairs? Music groups, clubs, and similar organizations? 3. Do you believe there would be serious disorders from the pupils in the schools? 4. Do you believe there would be serious disorders from people not connected with the school? 5. Do you believe there would be tension or controversy which would seriously interfere with the studies of the pupils? 6. Would you ask that your child be transferred to another school? 7. If your transfer could not be given, would you refuse to have him or her attend the present school?¹⁵

The school board would have ample evidence from parents themselves. It would suggest that most parents would be unwilling to have their children attend the affected schools or participate in these activities with Negroes, that the result of the transfer of these four children would be widespread withdrawals of students, and that the schools and community would erupt in violence and disorder in any case. This was how the placement law was designed to work.¹⁶

Shuttlesworth v. Birmingham Board of Education

Throughout the fall of 1957, some state leaders began to quietly worry about the placement law’s ability to withstand the looming legal challenge. Placement laws had recently been struck down by federal courts in other states – Louisiana’s in 1956 and Virginia’s that fall, 1957.¹⁷ But these were more egregious than Alabama’s. Other, more subtly crafted placement laws had been upheld by federal

¹⁴ *Southern School News*, Nov., 1957, Dec., 1957. Jan., 1958; *Washington Post*, Nov. 22, 1957.

¹⁵ *Southern School News*, Dec., 1957. A similar questionnaire circulated by the Birmingham superintendent, then Theo Wright, in the summer of 1959, when no petition or attempt was even pending, revealed much about the fears of segregationist parents and school authorities in the years before the Civil Rights Act of 1964 outlawed segregated public accommodations. It asked, among other things, “Would you be willing for your child to sit at the same table in the lunchroom with them? Would you be willing for your child to use the same water fountain, wash basin, and restrooms with them? Would you be willing for your child to be in school sponsored plays with them?” See, for this later survey, *Birmingham News*, Aug. 2, 1959.

¹⁶ *Southern School News*, Nov., 1957, Dec., 1957; *Washington Post*, Nov. 22, 1957.

¹⁷ See *Bush v. Orleans Parish School Board*, 138 F.Supp. 336 (SD, LA, 1956), 242 F.2d 156 (5th CCA, 1957); *Adkins v. School Board of City of Newport News*, 148 F.Supp. 430 (ED, VA, 1957), 246 F.2d 325 (4th CCA, 1957), cert. denied, Oct., 1957.

courts elsewhere. For example, John Parker, the author of the *Briggs* Dictum and one of the judges who affirmed the striking of the Virginia law, upheld North Carolina's placement law as part of a panel of the Fourth Circuit Court of Appeals in 1956.¹⁸ Albert Boutwell tried to reassure the doubters. He noted that the Virginia statute took placement power away from local school boards and put it into the hands of a statewide placement board, whereas Alabama's and North Carolina's laws assured that the power of placement rested with the local authorities. Also, part of Virginia's system was a statute mandating that funds be cut-off to any integrated school; Alabama had enacted no such statute (though there had been efforts to do so). Some privately remained apprehensive, especially since a test of Alabama's law was expected at any time.¹⁹

It came on December 18, 1957. Jacksonville, Florida attorney Ernest Jackson filed a class action suit in federal district court against the Birmingham Board of Education, on behalf of Shuttlesworth, his daughter Ruby, and the three other remaining families. The complaint alleged that the board had "not rendered an opinion admitting or denying the request for assignment" in the August petition, "although the petitioners [had] requested on numerous occasions for final determination of their rights to attend schools located within the closest proximity of their homes" The plaintiffs sought an injunction against the board's use of the placement law and a determination that said law was unconstitutional. It was clearly designed to "freeze" blacks in their all-black schools, they argued, and to perpetuate a segregated system and, therefore, deprive them of their right to equal protection of the laws under the 14th Amendment. The plaintiffs offered the Alabama Interposition Resolution – which declared the *Brown* decision "null, void, and of no effect" – as proof of the state legislature's true intentions. They also submitted a letter from State Superintendent of Education Austin Meadows, in which Meadows asked them to withdraw their petitions, lest they "invite the abolishment of public schools." And they introduced a recently passed bill which gave individual school districts broad leeway to close their

¹⁸ See *Carson v. Warlick*, 238 F.2d 724,728 (4th CCA, 1956).

¹⁹ *Southern School News*, Nov., 1957.

schools and establish “private” schools.²⁰ It was just this sort of delegation of authority to local officials that the Alabama lawmakers thought made the placement law legally sound.²¹

The plaintiffs were challenging the constitutionality of a state statute, which under the Federal Rules of Civil Procedure required the designation of a three-judge trial court (complaints were generally heard at the trial level by a single federal district judge). The three-judge court convened to hear the case included Federal District Judges H.H. Grooms and Seybourn Lynne and Circuit Judge Richard Rives of the Fifth Circuit Court of Appeals. This gave the plaintiffs *some* cause for hope. Harlan Hobart Grooms was a Republican, in the mountain tradition of Kentucky from whence he had moved to Alabama in the 1920s to practice law. Eisenhower appointed Grooms to the federal bench in 1953. Alabama’s U.S. Senator John Sparkman interrupted his confirmation hearing to simply add, “I just wanted to put in a good word for judge Grooms. He will make a fine official.” Since that time Grooms had not disappointed Sparkman or the rest of the Democratic establishment. He quickly identified himself as a friend to segregation, as all federal judges with enough support to get confirmed were expected to do. He ordered the integration of the University of Alabama because he thought the precedent was so clear and the issue so plain that such a ruling was unavoidable; he then refused to force Autherine Lucy’s readmission after the board of trustees expelled her for making false statements. Notably, Grooms also frustrated black plaintiffs in a suit aimed at segregated Birmingham busing, dismissed a suit aimed at Birmingham’s all-white police force, and ruled against black home owners who were being forcibly removed to make way for white housing. He did hold a personal disdain for white supremacy, and his devout Christianity led him to believe that, in his own words, “the moral teachings of

²⁰ School closure from above was under attack in Arkansas and Virginia, and some officials thought school closure by the local authorities themselves was more likely to survive court scrutiny. Indeed, this strategy was soon to be pioneered in Prince Edward County, Virginia, one of the original School Segregation Cases districts, and would withstand legal challenge into the 1960s.

²¹ *Southern School News*, Jan., 1958; see, for Arkansas and Virginia school closure from above, *Cooper v. Aaron*, 358 U.S 1 (1958), and *James v. Almond*, 170 F.Supp 331 (ED, VA, 1959); see for school closure by local authorities, and the establishment of a dubiously private system in its place, *Griffin v. Prince Edward County School Board* 377 U.S. 218 (1964).

the scriptures emphasize the worth of the individual, the protection of whose dignity is the prime purpose of all law." But he was, nonetheless, "uncontroversial," as described by a former Justice Department attorney. And his mixed record in civil rights cases spoke for itself.²²

If Grooms looked like a possible, if unlikely, ally for the plaintiffs, Seybourn Lynne left little room for speculation. Lynne has been described as a white supremacist and "paternalist segregationist." He was appointed by Harry Truman in 1946 after attending Auburn University and serving in the Army judge advocate general's corps during World War II. He was the dissenter in *Browder v. Gayle*, in which the majority held, on the authority of *Brown*, that Montgomery's bus segregation laws were unconstitutional. He established himself as openly hostile to plaintiffs' causes in civil rights cases and became infamous for letting such actions wither on his docket. He argued in his *Browder* dissent that the court was ignoring recent precedent and blazing a trail that it had no business blazing. Yet in a landmark case some years later, challenging the validity of Title II of the Civil Rights Act of 1964, Lynne himself showed a willingness to ignore recent precedent.²³ Birmingham restaurateur Ollie McClung had argued that the act exceeded Congress' ability to legislate under the Commerce Clause, and Lynne agreed, joined by Grooms. The Supreme Court later reversed the ruling. Lynne's discretionary use of precedent was not necessarily reckless, however, and he was not often reversed. Given his hostility to civil rights litigation, this was not good news for the Shuttlesworth camp.²⁴

²² Peltason, *Fifty-Eight Lonely Men*, p. 84; Jack Bass, *Unlikely Heroes*, pp. 61, 181; Freyer and Dixon, *Democracy and Judicial Independence*, pp. 140-4, 205-7, 213; Thornton, *Dividing Lines*, p. 205; Brian Landsberg, *Free at Last to Vote: The Alabama Origins of the Voting Rights Act* (University of Kansas Press, 2007), pp. 53-5.

²³ In refusing to hold that the Congress had the authority to regulate a local restaurant under the Commerce Clause, Lynne cited a number of cases – from the Civil Rights Cases, 100 U.S. 3 (1875), through the New Deal – in which federal courts had similarly limited the legislature's reach. In *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964), – decided the same day and on substantially the same issue as *Katzenbach v. McClung* 379 U.S. 294 (1964) – the Supreme Court cited a number of cases advancing Congress's authority to regulate under the Commerce Clause – all of which Lynne had chosen to ignore. See *Heart of Atlanta Motel v. U.S.*, 379 U.S. 241, pp. 256-7. See also Freyer and Dixon, *Democracy and Judicial Independence*, p. 206.

²⁴ Peltason, *Fifty-Eight Lonely Men*, pp. 84-5; Freyer and Dixon, *Democracy and Judicial Independence*, pp. 202-9; Thornton, *Dividing Lines*, pp. 205-5; Bass, *Unlikely Heroes*, p. 91; *Browder v. Gayle*, 142 F.Supp. 707 (MD, AL, 1956), affirmed per curiam, 352 U.S. 903 (1956); *Katzenbach v. McClung*, 233 F.Supp. 815 (ND, AL 1964), reversed 379 U.S. 294 (1964).

Dick Rives was a different story. Easily the elder among the three, Rives was born in Alabama, served in World War I, and returned to his native Montgomery to practice law. He was appointed by Truman to the Fifth Circuit Court of Appeals in 1951. He wrote the majority opinion in *Browder* and ended his career participating in a string of important civil rights decisions, such that he has been counted among the “unlikely heroes” of the Fifth Circuit who, as one scholar has described, “translated the *Brown* decision into a revolution for equality.” Indeed, the *Browder* decision, itself, set the precedent that the judges of the Fifth Circuit followed in applying *Brown* to other cases. For establishing himself on the wrong side of segregation and white supremacy, Rives was ostracized and harassed as a traitor to his state and his race for the rest of his life. His only friends in his hometown of Montgomery seemed to be former New Dealer and civil rights advocate attorney Clifford Durr and U.S. District Judge Frank Johnson – who was himself enormously important to the cause of civil rights in Alabama and the South, and who was the concurring judge in *Browder*. Having Rives on the panel offered the plaintiffs a flicker of hope in an otherwise dark room.²⁵

The three judges’ first action, in what was styled *Shuttlesworth v. Birmingham Board of Education*, was to deny a motion to dismiss the suit. While the denial was a good sign for the plaintiffs, there was plenty of reason to worry as the court considered the case in the winter and spring of 1958. The court could avoid controversy by simply following the lead of Judge Parker in the North Carolina case. In upholding North Carolina’s placement law, Parker had made the distinction between the law on its face and in its application and had given school officials the opportunity to apply it in some semblance of good faith.²⁶

On May 9, 1958, the court in *Shuttlesworth* relied upon this precedent and held that the Alabama Pupil Placement Law “furnish[ed] the legal machinery for an orderly administration of the

²⁵ Bass, *Unlikely Heroes*, pp. 70-7, see subtitle, *supra*, for full quotation; Freyer and Dixon, *Democracy and Judicial Independence*, pp. 205-13; Peltason, *Fifty-Eight Lonely Men*, p. 84; *Browder v. Gayle*, see n.21, *supra*.

²⁶ *Wilkinson, From Brown to Bakke*, pp. 83-4; *Carson v. Warlick*, 238 F.2d 724, 728 (4 Cir., 1956).

public schools in a constitutional manner.” The court added, “We must assume that it will be so administered. . . . If not,” Rives wrote for the unanimous court, “in some future proceeding it is possible that it may be deemed unconstitutional in its application.” The court admitted that “no intellectually honest person would deny” that the various states’ placement laws, including Alabama’s, “were passed to meet and solve problems presented by the School Segregation Cases.” But the judges refused to hold that the Alabama placement law’s sole purpose was to perpetuate segregated schooling. “In dealing with an Act of the legislature of a sovereign state,” they concluded, “we cannot lightly reach such a conclusion, nor are we permitted to do so except upon the most weighty and compelling reasons.” The court was allowing for more time, more “deliberate speed,” and allowing the school authorities the opportunity to embrace some sort of tokenism.²⁷

The Birmingham authorities had no intention of embracing tokenism until they absolutely had to, and there was not yet any indication that they had to. Shuttlesworth and the other plaintiffs in July, 1958 appealed the court’s decision to the U.S. Supreme Court.²⁸ The Court agreed to hear the appeal, in which the appellants argued that the Alabama placement law was unconstitutional on its face, that the trial court should not have restrained itself from determining if it had been unconstitutionally applied, and that, in any case, the school board had failed to properly act on the petitions. As the litigants waited for the Court’s decision that summer, the September school opening in Birmingham loomed amid renewed segregationist fears that another enrollment attempt by black students was forthcoming. To stave off such an attempt, the Klan burned crosses at a total of 14 white schools in Jefferson County, including Woodlawn, Phillips, and Graymont. The city’s great law-and-order moderate leader, Albert Boutwell, spoke to a Citizens’ Council rally in Selma, having just won the nomination for lieutenant

²⁷ Shuttlesworth v. Birmingham Board of Education, *Race Relations Law Reporter* 3.3, June 1958, p. 425-34, quoting from 430, 432, 434; see also at 162 F.Supp. 172.

²⁸ As the decision of a three-judge trial court panel, the ruling was appealable directly to the Supreme Court; i.e. the line of appeal did not have to run through the relevant Circuit Court of Appeals before appellants could apply for a writ of certiorari to the Supreme Court.

governor. Despite eschewing violent resistance, Boutwell spoke in a language which clearly implied a sense of militancy. “We are winning the segregation battle,” he said, but “now is the time for us to take the offensive” and to “take the problem to the people of the United States because the people are disgusted by the advocates of change.” That month Shuttlesworth’s church was bombed for the second time in two years. A crowd of 150 white men and teenagers gathered outside Phillips High to ensure that no blacks entered. And three white men threw dynamite bombs at black homes in the transitional Fountain Heights neighborhood, a few blocks away from the site where a city auditorium would be erected years later bearing the name of the mayor-to-be – Albert Boutwell.²⁹

That November, 1958, the Supreme Court issued a brief, *per curiam* opinion affirming the trial court’s decision in *Shuttlesworth v. Birmingham Board of Education*, though it carefully added that this was done “upon the limited ground on which the district court rested its decision.” The decision has been described by one legal scholar as a “strategic retreat,” a capitulation to massive resistance, and a recognition that the court lacked strong support from the Eisenhower Administration. Historian Numan Bartley, in his seminal study of massive resistance, described it as a compromise. When considered alongside the court’s ruling in the Little Rock case earlier in the year, *Cooper v. Aaron*, it certainly looked that way. *Cooper v. Aaron* was a strong reaffirmation of the principles of *Brown*, but *Shuttlesworth* signaled the Court’s willingness to embrace tokenism in satisfying the *Brown* mandate and its unwillingness to confront the southern states’ evasatory schematics, provided they were drafted with a veneer of constitutionality. In Bartley’s words, the justices in *Shuttlesworth* “legitimized a tightly controlled tokenism, permitting states to approach desegregation on an individual pupil-at-a-time basis and bringing almost anything short of massive resistance within the bounds of the *Brown* decision.” They also put the onus for desegregation back onto individual black students. Other southern states scrambled to enact Alabama-style placement laws, which the federal courts then upheld. It was,

²⁹ *Southern School News*, Aug., 1958, Sept., 1958; *Birmingham News*, Aug. 31, 1958.

according to one contemporary court observer, “the most important pro-segregation victory since *Plessy v. Ferguson*.” A *New York Times* columnist called it the “end of the legal phase of massive resistance,” a decision with which the “constitutional crisis over [pupil placement] statutes . . . passed into history.” So it must have seemed at the time.³⁰

Among segregationist leaders in Alabama, there was relief and cautious celebration. Governor Patterson hoped the decision reflected “a new trend towards letting us handle our own domestic affairs here without outside interference from Washington, which is the only way they can be handled without chaos and disorder.” Boutwell said he was hopeful that the decision would “help arouse more enthusiasm and hope that we in the South can get the Supreme Court and the people generally to apply sound reasoning in making their decisions. . . . We must stop the federal government,” the lieutenant governor continued, “from further usurpation of our rights guaranteed to the state and its people . . . and regain those already taken from us.” Patterson added that despite his approval of the decision, he did not “expect the race agitators to do anything sensible.” If by doing something “sensible,” he meant giving up on integrating the schools, his expectations were quickly met. Fred Shuttlesworth announced, “The case isn’t closed by any means. . . . We have no intention of backing away from the struggle. . . . As long as any parents want to request admission to white schools near their homes,” the reverend said, “we are going to prepare petitions for them. If the court can rule that [the placement law] can be applied without discrimination then it is up to the Birmingham school board to apply it without discrimination.” Reporters asked Boutwell what he thought the next step would be in light of such

³⁰ Shuttlesworth v. Birmingham Board of Education, 358 U.S. 101 (1958); Peltason, *Fifty-Eight Lonely Men*, pp.85-6, see p. 85 for ‘legal scholar’ and ‘contemporary court observer’ quotations; Bartley, *The Rise of Massive Resistance*, pp. 291-2; Bass, *Unlikely Heroes*, pp. 125-6; *New York Times*, Dec. 30, 1958; see for the constitutionality of other states’ similar plans, the Dollarway, Arkansas case, *Dove v. Parham*, *Race Relations Law Reporter* 5, p. 349 (1960) and p. 43 (1959), and *Holt v. Raleigh Board of Education*, *Race Relations Law Reporter* 3, p. 917 (1958) and *Race Relations Law Reporter* 4, p. 281 (1959).

comments and the “limited grounds” on which the placement law was upheld. “I’ve made it a practice never to speculate what the next move will be,” he replied, “but just to stand ready to meet it.”³¹

Insofar as state legislatures had intended placement laws to limit worst-case scenario desegregation to the admission of a select few blacks to white schools, the Supreme Court had signaled its approval of tokenism. But it remained to be seen if even that would occur in Alabama. State Superintendent Meadows certainly did nothing to encourage it. He applauded the *Shuttlesworth* decision by saying it was “sound basically,” in that it let local officials handle assignments. It was they who were “close to the problems in their school and [knew] what their people want[ed] in the way of school administration.” He then proceeded to send out a memorandum to local school boards, reminding them how the placement law allowed them to avoid actual assignment of blacks to white schools. “By careful assignment of pupils,” he wrote, “school officials can avoid maladjustments which will hinder the education of our young people.” For instance, “a child who is angry or emotionally upset in his school assignment,” he offered, “certainly is not in a suitable frame of mind to profit from his teacher’s instruction or carry out his school work efficiently.” According to Meadows, the completely disingenuous application of the law’s criteria was perfectly acceptable, and there were plenty of reasons to reject all black applicants. School board members need only look at the history of the law itself. From Engelhardt to Boutwell, its framers had openly admitted its purpose, and yet the Supreme Court had upheld it. Why should they hold themselves to a higher standard.³²

Despite the widespread assumption of the universally discriminatory application of the placement law, some Alabamians remained worried about the future of segregated education. One *Montgomery Advertiser* reader wrote the editor in December to warn that the Supreme Court’s decision in the *Shuttlesworth* case was nothing to rejoice about. The ruling was “fine but the opinion [implies]

³¹ *Southern School News*, Dec., 1958; *Birmingham News*, Nov. 25, 1958; *Atlanta Journal*, Nov. 25, 30, 1958; *Montgomery Advertiser*, Nov. 25, 1958.

³² *Birmingham News*, Nov. 26, 1958.

that we must expect to have an adverse decision should the law not be administered so that integration will follow. We have won a battle," he wrote, "not the war, and should be prepared to meet U.S. court orders forcing integration," in which case, he urged, the state legislature should provide for school closure and the establishment of a private school system. Montgomery saw itself thrown into the fire that very month, as Martin Luther King, Jr. announced in December that the Montgomery Improvement Association intended to encourage and organize a large number of black students to apply to white schools in the city. In a follow-up letter to the board of education the following summer, King wrote, on behalf of the MIA's executive committee, requesting "some reasonable compliance with the law of the land" and the dismantling of "a system which is injurious both to Negro children and white." The committee was hopeful that school integration could be "worked out through voluntary good will and that it will not be necessary to carry it through the courts," but King acknowledged that the MIA was "realistic enough to know . . . this will have to end up in court." If the applications were rejected, King announced, then the organization would initiate litigation challenging the placement law's unconstitutional application. Robert Shelton, the "Grand Dragon" of the state's Ku Klux Klan and an unofficial advisor to the governor, responded to the threat by assuring "bloodshed" if anyone attempted to integrate Montgomery schools. Governor Patterson himself responded by devoting a large portion of his inaugural speech two weeks later to the threat of integrated education. He counseled Alabama's black people to "speak out now against the agitators of your own race whose aim is to destroy our school system. If you do not do so," he declared, "we will have no public education at all."³³

School Closure, Private Schools, and Persistent Pressure

For those who felt the *Shuttlesworth* ruling might only serve to delay the inevitable, the concept of school closure and the establishment of segregated private schooling was becoming more and more

³³ *Montgomery Advertiser*, Dec. 12, 1958, Aug. 30, 1959; Thornton, *Dividing Lines*, pp. 103-4.

popular. Before taking office, Attorney General Gallion had established the Alabama Education Fund Foundation, with the purpose of coordinating funding to local, private white school corporations in the event of public school closure. Gallion himself explained the rationale behind moving towards such a system: the threat of school closure would “place the Negro in the position of sticking the dagger in his own throat . . . every time he tried to force integration.” He and others reasoned that the black community could not afford to provide its own schools like white communities could. Thus school closure meant private schools for whites, and no schools at all for blacks. The attorney general-elect clarified:

The Negro school teachers form one of the strongest groups of leadership in the Negro community and faced with the loss of a job and the loss of an education for their Negro pupils, they, combined with the Negro parents of school children, could be expected to exert a strong resistance to any forced integration attempts.³⁴

It was Citizens’ Council-style coercion, intimidation, and threat of economic reprisal, propagated by state officials.³⁵

Even when the Supreme Court shot down state-initiated school closures in the January, 1959 *James v. Almond* case, school closure by local officials remained viable. And private white schools remained a popular topic among segregationists. Governor Patterson twice sent his top legal advisor and his public service commissioner to Prince Edward County, Virginia to study the county’s private school corporation, founded after it closed its own schools rather than comply with a desegregation order. The governor was slowly revealing to the people of Alabama what he had known for some time. They were “kidding themselves” if they thought the state could maintain completely segregated public schools with the Supreme Court composed as it was. “The first time [the placement law] is used to preserve segregation, Patterson admitted, “then I am sure the U.S. Supreme Court will declare it

³⁴ *Montgomery Advertiser*, Nov. 9, 1958.

³⁵ *Montgomery Advertiser*, Nov. 9, 1958.

unconstitutional.” This did not mean that they should capitulate. Indeed, Patterson remarked at one point, “If any school in Alabama is integrated, it will be over my dead body.” Alabamians needed to “stop talking” and “make it plain that we will close our public schools first.” This would mean sacrifices for white parents, but it would hurt the Negro more because, the governor said, “he cannot finance private schools for his children.” Like the Citizens’ Council, Patterson thought that school closure ought to be a deterrent enough to further “agitation,” but he knew there were “rumblings” of renewed civil action. He thought the state was prepared. “If a school is ordered to be integrated,” he said, “then it will be closed down.”³⁶

Even before the governor’s revelations, local whites were beginning to prepare. In February a group of 17 prominent white Montgomery residents, under the leadership of local physician Hugh MacGuire, organized an interim committee for the establishment of a “private day school” for “students of white parentage.” The group consulted with Virginia segregationists who were already working to establish private, segregated schools in Norfolk. After advertising that their school would offer “instruction of outstanding excellence” to white children, grades one through nine, the Montgomery committee secured tuition payments from 100 families for the fall. In March a separate group of 23 parents came together at a mass meeting of the Montgomery Citizens’ Council and agreed to form the Montgomery County Educational Foundation, which they later announced would “do all possible to retain the public school system now used in Montgomery County,” but failing in this would “provide an alternative system . . .to maintain separation of the races in public education.” The group of “civic-minded men and women” described itself as a “sort of figurative fireman” preparing for the possible closure of schools. Foundation president Withers Davis said they would not “go out looking for trouble,” but would simply “be available and well prepared for all eventualities if integration threatens our segregated system of public education.” Public schools remained open that fall, but the MacGuire group

³⁶ *Montgomery Advertiser*, Dec. 31, 1959, May 16, 1960; *James v. Almond*, 170 F.Supp. 331 (ED, VA, 1959).

made good on its plans anyway and opened the state's first private school explicitly intended "for children of white parentage" – the Montgomery Academy. A few private, segregated schools had been established in Alabama in the immediate wake of *Brown*, including the Indian Springs School just south of Birmingham and Saint James School, a Methodist parochial school in Montgomery. But with the opening of the admittedly and openly all-white Montgomery Academy in the old Alabama governor's mansion in 1959, the "segregationist academy" movement in Alabama began in earnest.³⁷

Meanwhile, the type of pressure that Gallion had envisioned making a serious impact on the integration drive came to bear on the middle class black community in Montgomery. In fact, statewide pressure on blacks *and* white moderates, from both the Council and the Klan, kept challenges to segregated education confined to Shuttlesworth's ACMHR. The Montgomery Citizens' Council in February published a resolution that made clear the consequences for anyone who supported desegregating the schools there. The Council condemned the "nefarious integration programs of [the MIA's] alien and alien-controlled masterminds" which aimed to "bring about mass integration in [the] local schools." It called upon the legislature to enact school closure laws and authorized its own officers to begin preparations for city-wide private schooling for white children. The councilors then declared:

No person who now enjoys success, leadership, or acceptance in our communities will continue to enjoy success, leadership, or acceptance, should he aid in making things more difficult for our mission of maintaining segregation. . . . If the negroes want to communicate with the whites, they must understand that they cannot do it now, and never can do it through the radical leader of the present integration push [King], or anyone associated with him. Furthermore, in no discussions between any groups or persons shall any proposal to alter or modify our segregated pattern in the schools be a subject of consideration or discussion. Any person who violates these standards will, in our sober opinion, be adjudged and marked by the people of these

³⁷ *Montgomery Advertiser*, Feb. 8, 20, 22, March 20, April 10, May 22, 1959; Thornton, *Dividing Lines*, p. 104. A group of Baptists in Selma attempted to open a private elementary school, but were unsuccessful in securing pupils, which Thornton attributes to the widespread belief that school desegregation would not actually ever occur, or at least not anytime in the near future; see *Birmingham News*, July 30, 1959, *Montgomery Advertiser*, July 31, Aug. 4, 1959, Thornton, *Dividing Lines*, p. 413. Members of the Tuscaloosa Church of Christ opened a segregated private school for kindergarten through second grade in August, 1959; see *Montgomery Advertiser*, Aug. 22, 1959.

communities to be an enemy of the white people and a traitor to the cause of the heritage of the white people.³⁸

The Citizens' Council was prepared to wage all-out war on whites and blacks alike if there was any more talk of integrated schools in Montgomery.³⁹

Klan activity also began to rise. Klansmen erected "welcome signs" outside at least ten cities across the state. Typical of these was a circular saw attached to a steel rod outside Montgomery, on which was painted a white-robed, horse-mounted Klansman with a fiery cross. The saw teeth were painted red. A spike in cross burnings was also indicative of renewed activity, including another round of schoolyard burnings in Birmingham before the start of the 1959 school year and a series of burnings in the yards of moderate clergymen, most notably the Alabama Council on Human Relations' Robert Hughes. Additionally, a rise in reported floggings, rallies, and pamphleteering was reported.⁴⁰ A *New York Times* reporter interviewed law enforcement officials, newspaper editors, and others across the state that fall and reported a consensus among them. They all felt that, despite relatively small numbers of actual Klan members, a significant "threat lay in the attitude of tolerance and sympathy for the Klan's tactics shown by an increasing number of whites," who had been "blinded by their emotional reaction to the threat of public school desegregation."⁴¹

The combined pressure from the Council and the Klan seemed to work. The Council's drive for white "unity" and the Klan's threatened violence frightened white moderates and liberals into remaining silent or effectively sidelined. More importantly, would-be black activists were forced into acquiescence. Pressure on King in Montgomery, for example, from the many black teachers in his

³⁸ *Montgomery Advertiser*, Feb. 1, 1959.

³⁹ *Montgomery Advertiser*, Feb. 1, 1959.

⁴⁰ "Flogging" was a way of describing popular method of intimidation which was, much of the time, a nice way of saying "beating."

⁴¹ *New York Times*, Sept. 27, 1959; *Birmingham News*, July 27, Sept. 1, 1959; *Montgomery Advertiser*, July 27, 28, 1959. The pamphleteering, or in one Montgomery case, sticker-placing, resulted in a row between a Klansman and a white store owner, who was being intimidated because he hired black waitresses to replace white ones. The restaurateur eventually murdered the Klansman, and the incident became the subject of sensational news coverage; see *Montgomery Advertiser*, Dec. 31, 1959.

organization and in his Dexter Avenue congregation, began to take a toll. The prospect of closed schools served to frighten enough who stood to lose their jobs in the event of school closure that they forced MIA to back off of its litigation threat. There would be no school suit in Montgomery in 1959, nor for the next five years. King himself left the city to return to Atlanta a year later.⁴²

In Birmingham though, Shuttlesworth renewed his own challenge, just six weeks after the Supreme Court's decision in his case. Eleven students applied for transfer to white schools in January of 1959, including Shuttlesworth's three children and several others from the initial challenge. After more achievement tests in February, Superintendent Banks denied the applications, saying only that the transfers were not in the best interests of the applying students. Shuttlesworth responded by announcing that his group had "no intention of accepting this as a fair nor a final answer. The struggle is on," he said, "and there can be no let-up nor retreat until equality of privilege and opportunity is ours as for others." As a pastor, Shuttlesworth was not overly concerned about being subject to white economic reprisal. His pastorate was a mix of middle and lower class blacks, and he never received the sort of pressure that King did from a teachers bloc, in part because Birmingham's black teachers were spread across a number of congregations. And violence from Klansmen was clearly not something that Shuttlesworth feared enough to back down. Despite these advantages, Shuttlesworth was not immune to pressure to slow down, as the city's black attorneys soon demonstrated.⁴³

The next step for ACMHR would have been to initiate another lawsuit, but the onset of what the black press called the "Birmingham Stalemate" prevented this for over a year. Judge Seybourn Lynne had decided after the last school case to start enforcing a federal court procedural rule that required out-of-town attorneys to "associate" with a local attorney before bringing an action. Shuttlesworth was using Ernest Jackson, who was from Florida, but he could not get any of Birmingham's seven black attorneys to associate with Jackson. Led by Arthur Shores, the black attorneys had decided take a stand

⁴² *Washington Post*, April 3, 1960; Thornton, *Dividing Lines*, pp. 105-7, 392-8.

⁴³ *Birmingham News*, Feb. 24, 1959.

on the issue of filing a suit to desegregate the city's parks. Like many in the city's black middle class, Shores and the others thought it would be better in the case of parks to negotiate with white moderates for better black facilities. They had been pressured towards this by Lynne himself. There was nothing preventing the city from shutting down the white and black parks entirely in the event of a challenge; this had already been done in Montgomery. It was one area in which reluctant acquiescence prevailed upon some of the city's middle class leadership, but Shuttlesworth did not agree. His own pastorate and his organization contained a large and more militant working class element which took from its pastor and president a disdain for any sort of capitulation or compromise.⁴⁴ With the attorney bloc steadfast on the parks issue, however, there was nothing Shuttlesworth could do to press the school issue in the courts, which despite his militancy, was still where ACMHR placed the most faith and hope for any kind of change. That fall Willie Williams became Birmingham's eighth black attorney, and he had no ties to the established seven attorneys and no desire to join the cartel. Only then was Jackson able to finally associate with a local and break the "stalemate."⁴⁵

Williams, Jackson, and Shuttlesworth then moved to initiate a new lawsuit, this time avoiding the placement law altogether. They submitted a petition in November, 1959 to the board of education, with 81 signatures, audaciously asking the board to formulate and present a plan for integrating the school system by December 1. The new superintendent, Dr. Theo Wright, claimed that the petition did not "constitute an appropriate request for any action which the board or the superintendent is required to take under the Alabama Pupil Placement Act," under which "each student must apply and be assigned as an individual" as there was "no provision for class action." Nor was there any action

⁴⁴ The members of the activist reverend's church and of the ACMHR have been described as "respectable working class black people . . . neither of the black bourgeoisie or the black underclass," and their preference for action over accommodation was pivotal to a sustained movement in the city; see Thornton, *Dividing Lines*, pp. 217-27; Glen Eskew, "The Classes and the Masses: Fred Shuttlesworth and Birmingham's Black Middle Class," in Marjorie White and Andrew Manis, Eds, *Birmingham Revolutionaries: The Reverend Fred Shuttlesworth and the Alabama Christian Movement for Human Rights* (Macon: Mercer University Press, 2000), pp. 32-47, 37; see also Eskew, *But For Birmingham*, pp. 147-8.

⁴⁵ Thornton, *Dividing Lines*, pp. 217-27; Eskew, "The Classes and the Masses," pp. 32-47, 37; Eskew, *But For Birmingham*, pp. 147-8.

required, Wright added, by “[any] other applicable law.” Wright was correct about the placement law, of course, and Jackson and Shuttlesworth knew this. Where the superintendent misspoke, in the minds of the petitioners, was in dismissing the request as to action required by “other applicable law,” which for them meant the Fourteenth Amendment. The petition was submitted solely as the basis for pending litigation, based on just such an understanding.⁴⁶

Jackson filed the suit in June, 1960 on behalf of Shuttlesworth and his children and five other children and their parents. The complaint charged the Birmingham school board, Superintendent Wright, and commissioner Bull Conner with maintaining a bi-racial school system. There was a “dual set up of zone lines” which was “predicated on the theory that Negroes are inherently inferior to white persons and, consequently, may not attend the same public schools attended by white children who are superior.” Also, the school system assumed that Negro teachers were inferior and, therefore, “may not teach white children.” The plaintiffs dismissed the placement law as wholly inadequate and sought a permanent injunction against the school board or an order otherwise requiring the reorganization of the system in an integrated fashion. The case was about to languish on Seybourn Lynne’s docket for as long as the judge could let it, but with the filing of this complaint, the struggle over segregated education in Alabama was in the federal courts to stay.⁴⁷

“Why Not Me?”

The case was styled *Armstrong v. Birmingham Board of Education*, with James Armstrong – the father of four of the children making the complaint – topping the list of plaintiffs. He had been a plaintiff on his children’s behalf in the original suit as well. Armstrong was born in the Black Belt city of Selma in 1923. He served in the army in World War II, and as with a great many black activists of his era, this experience helped prepare him for a lifetime of challenging Jim Crow. He later recalled that being in

⁴⁶ *Montgomery Advertiser*, Oct. 31, Nov. 4, 1959; *Birmingham News*, Nov. 24, 1959.

⁴⁷ *Southern School News*, July, 1960.

the movement was “just like when I was in the army. You go through so much in the army,” he said, “especially when I left off of Normandy Beach. Fear leave[s] you. You think about what you are trying to do, and you just move forward with faith.” Armstrong was a founding member of ACMHR, a regular at mass meetings, and a devoted Shuttlesworth follower. As an established barber in the black Smithfield section of Birmingham, Armstrong was not as susceptible to economic reprisal as others, making him an idea plaintiff in the school suit. Armstrong himself explained it this way:

When [Shuttlesworth] called for families to come forward with our attack [on] segregated schools, ten families came forward – my family and nine others. But the other nine fell out for various reasons. So I carried the ball. Lots of them got fired from their jobs . . . because they signed [the] petition. Some of them left the city because they lost their job. Well, I thought it was a thing that had to be done, and I asked myself a question: “Why not me?” I guess I said I was self-employed – I could handle it much better, so I just stuck with it.⁴⁸

Armstrong was better situated than most to make a complaint, but that did not mean that he was immune to pressure and intimidation. Indeed, he acknowledged putting his entire family at risk and asking them to bear the burden together. He even endangered his clientele. First there was pressure from the superintendent, who discovered that the supervisor of the city’s black elementary schools was a client of Armstrong. Wright instructed the supervisor to put pressure on the barber to back off his legal challenge. The supervisor gave up when, Armstrong said, “he found out I wasn’t going to change.” Then there was harassment at the Armstrong home from city services personnel. One night, at one o’clock in the morning, a man came with a back hoe to fix the plumbing, which was not in need of repair. The next night, a ladder truck from the Birmingham Fire Department came by around the same time, shining its lights about the house. There had reportedly been a call about a fire at the Armstrong residence. “No fire here,” Armstrong had to tell them. Another night it was an ambulance; another it was the police. Then there were calls at all hours of the night about the Chevrolet, which Armstrong did

⁴⁸ Horace Huntley and John W. McKerley, Eds, *Foot Soldiers for Democracy: The Men, Women, and Children of the Birmingham Civil Rights Movement* (Urbana: University of Illinois Press, (2009) , pp. 35-44, 42.

not own, that had been listed for sale in the local classifieds. There were calls about an unpaid hotel bill in Pascagoula, Mississippi, to which he had never travelled. There were the standard crank calls in which no one would speak. “What they are doing is trying to keep you awake all of the time,” explained the barber, “to keep your family upset.” Klansmen also watched Armstrong’s barber shop. “I had a lot of customers stop coming,” he explained, “because they were afraid of what was going to happen at the shop.”⁴⁹

Shuttlesworth and Armstrong may not have known it at the time, but they had provided the model for the dismantling of the state’s segregated education system. The NAACP was gone. The Citizens’ Council and the Klan had threatened and intimidated white moderates and liberals into silence or timidity. Councilors and local and state elected officials, some of the Councilors themselves, had demonstrated their willingness to engage in economic reprisal against those who supported desegregation. Klansmen had demonstrated their willingness to use violence against even random blacks in retaliation for the same. State and local officials had also pushed many black activists into acquiescence with their threats of school closure and privatized schooling for whites only. The state court system had proven to be openly hostile to civil rights actions, and to civil rights organizations and blacks in general. If there were to be any successful challenges to Jim Crow education, they would have to be mounted by individuals like James Armstrong – black activists who had some shield from economic reprisal and who had a will to put their families at risk and to bear intimidation and harassment.

In Birmingham it took the leadership of a Fred Shuttlesworth, and as it turned out, not just willing black attorneys, but skilled and determined attorneys. This was not all. The federal court system was far more likely than the state’s to provide equal justice to black plaintiffs, but the judges on the federal bench in the southern trial courts and circuit courts were not of a unified mind on school desegregation. As Judge Lynne’s intransigence demonstrated, the particular judge hearing a

⁴⁹ Huntley and McKerley, *Foot Soldiers for Democracy*, pp. 39-40.

desegregation case could be a significant factor in its success or failure. Activist petitioners in Alabama would find their jurists, though, and they would soon be reinforced by the majority of judges on the Fifth Circuit Court of Appeals. There would be help from at least two other significant sources, too. The NAACP was prepared to mount an Alabama comeback, in the form of the Legal Defense Fund, and control of the federal executive was about to pass to an administration that more enthusiastically, if belatedly and sometimes timidly, demonstrated support for the cause of civil rights.

CHAPTER 4: THE FIFTH CIRCUIT, THE DEPARTMENT OF JUSTICE, AND THE PROMISE OF LITIGATION, 1962

By the summer of 1962, the *Armstrong v. Board of Education* case had languished on the docket of Judge Seybourn Lynne for two years with no hearing on the merits of the complaint. During that two-year's time the direct action wing of the civil rights movement had intensified its attack on Jim Crow in Alabama. The 1961 Freedom Rides, in particular, had exposed the level of violence that segregationists would unleash to 'defend the rights' of the whites of the state. They had also forced a confrontation between Governor John Patterson and the Kennedy Administration, exposed the governor's intransigence to the nation, and necessitated an injunction from District Judge Frank Johnson to ensure the riders' protection. Citizens' Councils subsequently initiated a series of "reverse freedom rides," paying desperate black families' bus fare to northern cities and making a public display of their desire to live amongst no blacks at all if segregation were to, indeed, fall.¹

Alabama joined Mississippi and South Carolina in 1962 as the three states in the South to maintain absolute segregation in education. Token desegregation had been ordered in parts of all other southern states as a result of litigation, or in the case of North Carolina, as a result of business moderates' cooperation to avoid litigation. Alabama had seen nearby major cities fall to the menace, notably Atlanta, Chattanooga, and Pensacola. Alabamians remained under the defiant leadership of Patterson and under the watchful eyes of the Council and the Klan, though, and segregated education in the Heart of Dixie remained unscathed. Those segregationists that had begun to accept the inevitability of at least tokenism could also take heart that Alabama was also one of six southern states that had passed a local-option school closure law and a tuition grant law, allowing local school officials to close their own schools and establish a subsidized "private" white system in the event of court-ordered

¹ *A Statistical Summary of School Segregation and Desegregation in the Southern and Border States* (Nashville: Southern Education Reporting Service, 1961), pp. 3-4; see, for injunction against obstructing the Freedom Rides, *United States v. United States Klans*, 194 F.Supp. 897; see, for "reverse freedom rides," *Birmingham News*, March 31, 1963.

desegregation. Many thought that more court challenges were inevitable, but in a climate of fear of economic and violent reprisal that summer, Birmingham was the only district threatened with a suit in federal court, and District Judge Seybourn Lynne did not seem very eager to let even that proceed.²

Nelson v. Birmingham and Bush v. Orleans Parish

In June, 1962, black activists in Birmingham decided that they had waited on Lynne long enough and attempted to force the issue. Attorney Orzell Billingsley filed a separate action in federal court, on behalf of the Reverend Theodore Nelson and his children, Agnes and Oswald, seeking an injunction against the Birmingham Board of Education for operating a racially segregated public school system. Billingsley, a Birmingham native and graduate of Howard Law, was partner to Arthur Shores and an emerging leader amongst the city's black middle class moderates. He had represented the activist Nelson in 1956 in an attempt to force the desegregation of downtown elevators, in what has been called "Birmingham's first step towards racial integration." Despite being part of the anti-Shuttlesworth moderate wing of black activism in the city, he often worked with the fiery working class leader, too, and even represented him on occasion when he was arrested – which was often. The hope in filing the *Nelson* case, with *Armstrong v. Birmingham Board* already pending, was that *Nelson* would land on the docket of District Judge H.H. Grooms. Billingsley thought Grooms might be less evasive and that he might provide some hope of fairer proceedings and a fairer judgment.³

Billingsley and Nelson were disappointed, however, when Grooms did indeed get the case but then refused to hear it on account of the substantially similar pending action in *Armstrong*. "To save much time and expense," Grooms wrote, the hearing on a preliminary injunction in *Nelson* needed to be

² *Statistical Summary of School Segregation and Desegregation*, 1961, pp. 3-4; Peltason, *Fifty-Eight Lonely Men*, p. 132.

³ *Birmingham News*, July 9, 11, 1962, Dec. 19, 2001; *Nelson v. Birmingham Board of Education*, *Race Relations Law Reporter* 7.3, Fall, 1962, pp. 659-62; *Southern School News*, Aug., 1962; Thornton, *Dividing Lines*, 176-7, 206, 212, 218, see for 'first step' quotation, p. 177.

postponed until the hearing on the merits of *Armstrong*. Judge Lynne had assured Judge Grooms that *Nelson* was “now at issue” and “would have an early trial date, very likely not later than October.” If the attempt had failed to get another case immediately before Grooms, then, it at least finally forced Lynne’s hand in the two-year-old *Armstrong* case. Not satisfied with that, Billingsley appealed to the Fifth Circuit Court of Appeals to issue a writ of mandamus – forcing the trial court to promptly hear and decide the motion for preliminary injunction in *Nelson*. Billingsley argued that still no date had been set for a hearing on the merits of *Armstrong* and that the plaintiffs and the attorneys in that case were different, even if the defendants and the core issue were the same. The appellate court obliged Grooms to answer. The district judge argued that both suits were class actions and that his court had “a heavy burden of work” which ought not be “multiplied by duplicate” with a “wasteful consumption of time and effort.” A panel composed of Circuit Judges Richard Rives, John Minor Wisdom, and John Brown unanimously agreed with Grooms on August 17. They could find no precedent for the simultaneous consideration or adjudication of class actions seeking similar relief. They instead found that the proper course when such actions were pending was to stay the latter proceeding as Grooms had done.⁴

Judge Brown issued a special concurrence, however, in which he expressed “serious misgivings,” not because of the actions of Judge Grooms, but because of the unwarranted inaction of Judge Lynne. The accusation that Grooms had failed to discharge his duty was “unsupported,” but the class represented by the two actions had been, nonetheless, the victim of “impermissible delay.” Brown declared it “simply beyond belief that this ‘very same action’ [*Armstrong*] should have been allowed to pend undecided since 1960.” According to Brown, the issue was “the very, very simple one of a federal court order to put an end to a segregated school system – a matter as to which, I gather, there is no real dispute.” Brown continued to express incredulity. “Why it should have taken this long,” he wrote, “to

⁴ *Nelson v. Birmingham Board of Education, and Nelson v. The Honorable H.H. Grooms, Race Relations Law Reporter* 7.3, Fall, 1962, pp. 659-62, Decision on Petition for Writ of Mandamus, Aug. 17, 1962, pp. 660-62; *Birmingham News*, Aug. 10, 18, 1962; *Southern School News*, Sept., 1962; Thornton, *Dividing Lines*, pp. 218-19.

get pleadings, motions, etc. in shape, I cannot imagine. Just what is going to be so complicated about the trial now scheduled for October is likewise beyond my knowledge.” The judge continued to rebuke both Judge Lynne and the Birmingham authorities for so many years of delay:

The matter is now simple: Does Birmingham have a segregated system? If – and there really is no if – that is so, then the question is: What is being done to eradicate it? We have now made plain by cases which are an affectation to cite that a plan of desegregation must be offered or the district court must fashion its own plan. Here it is 1962. This is eight years after the warning to commence with deliberate speed. More than that, the case about to be heard to consider non-existent defenses will not take place until October. That means that for yet another year Birmingham has put off the ‘evil’ day The case – Negro children who seek only their constitutional rights – is now an old and ancient one. Perhaps the best proof that there is a need for a ‘second’ class action seeking identical relief is the singular lack of success in getting anything effectively done by those presuming to represent the class in the first case. . . . This is a matter of clear right. It ought not to be encumbered by the embarrassing predicament of attacking a conscientious, vigorous, energetic judge, as is Judge Grooms, for non-performance of duty.⁵

It *should* have been fairly clear writing on the wall for segregationists in the Fifth Judicial Circuit.

By 1962, the ideological orientation of the Fifth Circuit Court of Appeals had shifted significantly. The Circuit Court – which at the time heard appeals from Alabama, Florida, Georgia, Texas, Louisiana and Mississippi – had been composed in the years before *Brown* of cautious, New Deal Democrats who proved to be defenders of the racial status quo.⁶ With the elevation of the liberal Democrat Rives to the chief judgeship, and most especially after the appointments by President Eisenhower of the pro-integration Republicans Brown (1955), Wisdom (1957), and Elbert Tuttle (1954), the Fifth Circuit began to look much different. This was around the same time the Supreme Court decided to retreat and leave school desegregation jurisprudence up to the “fifty-eight lonely men” of the federal trial and appellate courts in the South. After *Cooper v. Aaron* and *Shuttlesworth*, the new-look Fifth Circuit began to fill the school desegregation void created by the mostly silent Supreme Court. Rives, Tuttle, Brown, and

⁵ Nelson v. The Honorable H.H. Grooms, *Race Relations Law Reporter* 7.3, Fall, 1962, pp. 659-62, Decision on Petition for Writ of Mandamus, Aug. 17, 1962, pp. 660-62, Judge Brown, special concurrence, pp. 661-2; *Southern School News*, Sept., 1962.

⁶ The Fifth Circuit was later split into the Fifth and Eleventh Circuits.

Wisdom, along with then federal District Judges Frank Johnson of Alabama and J. Skelly Wright of Louisiana, took the ambiguous *Brown* and *Brown II* mandates and slowly gave them specificity. They began forcing a recalcitrant South into compliance as local activists forced the issue in case after case. The Fifth Circuit also led the way in expanding the *Brown* mandate to include racial equality more broadly construed, beginning with the *Browder v. Gale* bus segregation decision, in which Rives and Johnson constituted the majority and Seybourn Lynne the dissenting vote.⁷

If the Fifth Judicial Circuit included amongst its appellate and district judges these six, who have been described as leading a “revolution for equality,” it also included a number of openly segregationist jurists who routinely frustrated civil rights actions on their respective dockets. At the appellate level, this included Ben Cameron. At the trial level it included a number of judges who would be reversed frequently by “the four” of the Fifth Circuit appellate court. Judge Lynne was not among the most egregiously outspoken, at least, or the most frequently reversed. But a brief survey of statements attributable to other segregationist jurists reveals their similarity with their average southern, white, segregationist neighbors. Mississippi's Harold Cox frequently made racist remarks from the bench and once described Negro would-be voters as “acting like a bunch of chimpanzees.” Texas' T. Whitfield Davidson once lectured blacks in his courtroom at the conclusion of a hearing in a Dallas school suit, offering as proof of his *non*-racist credentials that he had “received [his] first nourishment from a black woman's breast.” Davidson went on to argue that “the southern white gentleman does not feel unkindly towards the Negro,” but he still has “a right to maintain his racial integrity, and it can't be done so easily in integrated schools.” E. Gordon West of Louisiana called *Brown* “one of the truly regrettable decisions of all times,” whose “only real accomplishment to date has been to bring discontent and chaos to many previously peaceful communities, without bringing any real attendant benefits to anyone.” Georgia's J. Robert Elliott remarked that he did not want “pinks, radicals and black voters to outvote

⁷ Bass, *Unlikely Heroes*, pp. 15-25; Constance Baker Motley, *Equal Justice Under Law: An Autobiography* (New York: Farrar, Strauss, and Giroux, 1998), pp. 133-5.

those who are trying to preserve our segregation laws and traditions.” The former head of the NAACP’s Legal Defense Fund, Jack Greenberg, later recalled, “Apart from Tuttle, Wisdom, Brown, Johnson, and just a few others, southern federal judges were indistinguishable from state judges in racial attitude.”⁸

Judge Brown’s rebuke of Judge Lynne was a sign of the hardline that the Fifth Circuit appellate court was developing in school desegregation cases in spite of obvious judicial resistance. It gave hope to black activists in Alabama that, perhaps, there could be significant cracks in the wall of segregated education developing, after all. Taken together with the ruling the Fifth Circuit handed down in the New Orleans case, *Bush v. Orleans Parish*, just days before the *Nelson* mandamus ruling, it was clear that the time provided for by “all deliberate speed” was up, at least for Birmingham. The *Bush* case, brought by blacks in New Orleans in 1952, predated even the *Brown* ruling. Its history reveals parallels between past and future developments in Louisiana and Alabama. After the *Brown* decisions, District Judge Skelly Wright ordered the Orleans Parish school board to desegregate “with all deliberate speed,” whereupon the Louisiana state legislature enacted a large body of segregationist legislation designed to preserve Jim Crow schools, including an Alabama-style pupil placement law. In 1959 Wright ordered the school board to submit a desegregation plan, which never came, and finally ordered the board to implement the court’s own plan, a one-grade-a-year, stepladder desegregation program utilizing the placement act. The state legislature, governor, and state court system then launched a combined assault that gave the governor authority over the Orleans Parish school system, but the three-judge panel then hearing the case struck or enjoined all of these actions in the fall of 1960. This back and forth between state officials and the district court continued through November, when two black girls were admitted to previously all-white schools. Whites in New Orleans responded with demonstrations, acts of violence, and a near total withdrawal of white children from the affected schools. These disturbances could not affect the

⁸ “That Fascinating and Frenetic Fifth,” *Time*, Dec. 4, 1964, p. ___; “Interpreter in the Front Line.” *Time*, May 12, 1967, p. 72; Bass *Unlikely Heroes*, pp. 15-25; Peltason, *Fifty-Eight Lonely Men*, 26-8, 118; Wilkinson, *From Brown to Bakke*, p. 81; Jack Greenberg, *Crusaders in the Courts: How a Dedicated Band of Lawyers Fought for the Civil Rights Revolution* (New York: Basic Books, 1994), p. 352.

court, since the Supreme Court had ruled in *Cooper v. Aaron* that the threat of violence or “white flight” could not prevent compliance, especially since it was often manufactured by the very state officials trying to hide behind it.⁹

In the fall of 1961, the number of black students in formerly all-white schools in New Orleans increased to 12, all of whom were in the first or second grade. That spring a group of black parents intervened and challenged the placement system itself, arguing that the parish board operated a dual system of assignment based on over-lapping racial zones and only used the placement law when dealing with potential black transfers. This was the same challenge made in *Armstrong and Nelson*, and it was a logical way of challenging a perfectly disingenuous and obviously unconstitutional system. In April, the court enjoined the parish school board from using the placement law so long as it operated a dual system in such a fashion. Wright then accelerated the district’s desegregation plan to apply to the first six grades, which were found to have been disproportionately affected by racial discrimination in pupil-teacher ratios, classroom sizes, and facilities provisions. Wright was subsequently appointed to the Washington D.C. Court of Appeals, and the case fell to Judge Frank Ellis, who relaxed Wright’s last order by reapplying the grade-a-year plan upon the motion of the parish school board. The school board, nonetheless, appealed this order because Ellis let the injunction against its use of the placement law stand. The plaintiffs appealed Ellis’ slowdown of the desegregation plan. Thus did the *Bush* case come before the Fifth Circuit Court of Appeals in the summer of 1962.¹⁰

The Fifth Circuit court had ruled just a few weeks earlier, in a Pensacola, Florida case, that placement laws were unconstitutionally applied when they were clearly “administered . . . in a manner to maintain complete segregation in fact.” This signaled the court’s willingness to then take the next step hinted at in *Shuttlesworth*, wherein Alabama’s placement law had been upheld only “on its face.” In the *Bush* ruling in August, a panel including Judges Rives, Brown, and Wisdom (the same trio that

⁹ *Bush v. Orleans Parish School Board*, 308 F.2d 491 (5th CCA, Aug, 1962), pp. 491-5.

¹⁰ *Bush v. Orleans Parish School Board*, 308 F.2d 491 (5th CCA, Aug, 1962), pp. 495-7.

heard the *Nelson* mandamus appeal) joined in Judge Ellis's contention that "to believe that desegregation [could] be effected [in Orleans Parish] with all deliberate speed through application of the placement law," without the disestablishment of dual school assignment zones based on race, was "no more than a 'speculative possibility wrapped in dissuasive qualification.'" Judge Wisdom wrote further:

When a statute has a state-wide discriminatory effect or when a School Board maintains a parish-wide discriminatory policy or system, the discrimination is against Negroes as a class. Here, for example, it is the Orleans Parish dual system of segregated school districts, affecting all school children in the Parish by race, that, first, was a discriminatory classification and, second, established the predicate making it possible for the Pupil Placement Act to fulfill its behind-the-face function of preserving segregation.¹¹

Wisdom further condemned Louisiana's placement act because it had been, "with a fanfare of trumpets, . . . hailed as the instrument for carrying out a desegregation plan while all the time the entire public knows that in fact it is being used to maintain segregation by allowing a little token desegregation." Citing a recent Sixth Circuit opinion in which the court declared that there could no longer be "Negro schools" and "white schools" but "only schools," the court upheld the injunction against the discriminatory use of the placement law. It ordered the adoption of a compromise desegregation plan, along the lines of grade-a-year type plans in place in Atlanta, Houston, Dallas, and Nashville.¹²

The Louisiana and Alabama placement laws were so similar, and the legal challenges in *Bush* and *Armstrong* and *Nelson* were so similar, that anyone attuned to the activity of the appellate courts could have drawn the reasonable conclusion from the Fifth Circuit's handling of this New Orleans appeal that Birmingham was next. The Birmingham *News*, whose publisher Clarence Hanson placed it squarely in the camp of the white business moderates, certainly saw the sign. Upon publication of the *Bush* ruling,

¹¹ *Bush v. Orleans Parish School Board*, 308 F.2d 491 (5th CCA, Aug, 1962), p. 499; see, for Pensacola case, *Augustus v. Board of Public Instruction of Escambia County*, 306 F.2d 862 (5th Cir., July, 1962), p. 869.

¹² *Bush v. Orleans Parish School Board*, 308 F.2d 491 (5th Cir., Aug, 1962), p. 499. The Sixth Circuit case was *Northcross v. Board of Education of City of Memphis*, 302 F.2d 818, (6th CCA, 1962) p. 819; this language would years later be famously echoed by the Supreme Court in *Green v. New Kent County*, 391 U.S. 430, 442; see a discussion of *Green v. County School Board* also at Chapter 13, *infra*.

the Birmingham daily acknowledged that the Fifth Circuit had “thus in effect [given] warning of Alabama’s placement act,” especially in light of the focus on a dual zone system. The complaint in the *Nelson* case, the *News* observed, had placed a “heavy emphasis on [the] charge that Birmingham operates a dual zone system.” Regardless of Judge Lynne’s pending ruling, the *News* concluded that “appeals court judgment [was] largely predictable.” All of Birmingham’s citizens “best be looking ahead,” it wrote, because “the problem is in the [near] future.” When the court issued its ruling days later on the mandamus petition in *Nelson*, Judge Brown’s strongly worded concurrence made it even more clear. “It seems obvious, if this opinion is read correctly,” the *News* surmised, that Judge Brown “does see an almost certain desegregation order by the fall of 1963.” It was “folly for city officials, school people, or [the] public to refuse to face the record. . . . *Birmingham probably has one year of grace between next month and the following September.*”¹³ A week later, when Chattanooga was forced to implement a desegregation plan that put 100 black students into formerly all-white schools, the *News* again urged some thoughtful action. “Thus far,” it wrote, “there seems only assumption that [similar] action will be resisted. But ‘how’ is something not much if at all discussed.”¹⁴

Ole Miss and the Election of Wallace

Events in Mississippi the following month ensured that any discussion of the “how” to which the *News* referred would include still more denunciation of the federal government trampling upon states’ rights. A full-scale riot erupted in Oxford when James Meredith attempted to enroll at the University of Mississippi per a federal court order, prompting President Kennedy to send in U.S. Marshalls, and after a shoot-out, federalized National Guard and U.S. Army military police. The *News* tried to use the failed resistance of Mississippi segregationists as another example of why more Alabamians should get behind the law-and-order moderate line and accept the inevitable. A reader from Mountain Brook, a quiet and

¹³ Emphasis in original.

¹⁴ *Birmingham News*, Aug. 13, 20, 29, 1962.

wealthy community to which whites had been escaping the inevitable in Birmingham for over a decade, accused the *News* of hiding “behind a screen of platitudes” and by “retreating to the line that it is really pointless to oppose federal power because it is more forceful, thereby implicitly accepting the notion that might is right.” He advocated continued defiance of “judicial trespass” by any and all who “who have a meaningful commitment to constitutional government.” Another reader wondered whether Alabamians could continue to “stand silently by while federal troops . . . whip into submission a state in their own country. God bless Mississippians,” she wrote, “for their firm stand.” A Dora woman was moved to question whether the *Brown* decision was even settled law. Perhaps the *News* could “point [her] to an amendment to the Constitution that gives the Supreme Court at least some of the legislative powers formerly vested in a Congress.” She asked, “Shall we be governed by laws or by men? Shall we be free or slaves?” A self-proclaimed moderate cautioned that “new measures of resistance must be made because, at all costs, . . . bloodshed must be avoided.” He concluded, however, that the “invasion of Mississippi” would “only serve to consolidate and harden Alabama’s resistance” and that all Alabamians “must remember always the arrogant, almost tyrannical, crushing power of the federal government of these ‘United States.’” After all the federal government had not only violated Mississippi, it had “stained her honor [and] humbled her before the world”¹⁵

Alabama’s segregationists were not prepared to concede the inevitability of school desegregation, particularly as it looked to become reality only via federal compulsion. They had elected John Patterson governor in order to prevent it, and he had done so. They would probably have elected him again were it not for the state’s constitutional ban on successive gubernatorial terms. Instead they elected state Circuit Judge George Wallace, who had vowed never to be “out-niggered” again when he lost to Patterson. This time around, Wallace had run the most segregationist campaign of all, in an election in which every campaign was segregationist, including that of the hapless and irrelevant Big Jim

¹⁵ *Birmingham News*, Sept. 28, 30, Oct. 2, 4, 7, 1962.

Folsom. Wallace had won the Democratic primary that spring by crushing attorney Ryan DeGraffenried. Though he was unopposed in the general election, he continued to publically declare that he would defy any attempt to desegregate anything. He proclaimed his willingness to “stand up to those lousy, no-account judges that are trying to take over our school system.” He frequently, though ironically, touted his unsuccessful defiance of Frank Johnson on the matter of turning over voter registration rolls to the recently created U.S. Civil Rights Commission. Johnson and Wallace had been friends and classmates in law school at the University of Alabama. Wallace had subsequently used his position as a circuit judge to grandstand and campaign. He orchestrated a controversy over the voter rolls so that he could claim to be protecting them from the hated federal government. Wallace backed down when Johnson threatened to jail him for contempt, but Johnson still rebuked him for “attempt[ing] to give the impression that he was defying this court’s order,” and for using “devious methods” and “means of subterfuge” in dealing with the Civil Rights Commission. Johnson refused to let the court, as he put it, “be swayed by . . . politically-generated whirlwinds.”¹⁶

Wallace dramatized the brief and anti-climactic showdown as one in which he had "risked his freedom" in order to prevent "a second Sherman's March to the Sea." He later publically called Johnson an "integratin, scalawagin, carpetbaggin, no-good, bald-faced liar," and privately called him a "no-good, goddamn, lying, son-of-a-bitching, race-mixing bastard." He used the incident to establish his defiant credentials and subsequently claimed that he would “stand in the schoolhouse door” if he had to do so to prevent school desegregation. After the Ole Miss riots, he reiterated his pledge. He told reporters that he would request permission to administer the state’s placement law and that he would then refuse to administer it in such a fashion as to desegregate, even if that meant defying court orders. He was prepared to dare Frank Johnson to jail, not just a lowly state circuit judge, but a sitting governor, for

¹⁶ Carter, *Politics of Rage*, pp. 98-109; In re: Wallace, Stokes, Rogers, Livingston, Evans, and Spencer, Dec. 11, 1958 – Jan. 26, 1959, *Race Relations Law Reporter* 4.1, Spring, 1959, pp. 97-122, see pp. 120-1 for quoted order; *Southern School News*, Oct., 1963, see for “lousy, no-account judges” quotation.

contempt, as a federal court had recently done in the Ole Miss case.¹⁷ Alabama's most defiant segregationists once again had their man.¹⁸

If segregationists stood poised to continue in their defiance, and if the implementation effort initiated by the banished NAACP were to have any chance of success, then there would have to be more concerted efforts from activist blacks across the state, not just in Birmingham. Such efforts came slowly and with understandable caution, but they began to come. That fall, as Ernest Jackson and Willie Williams prepared for the *Armstrong* trial, activists in two Alabama cities attempted to enroll in white schools. In Gadsden, less than an hour's drive northeast of Birmingham, six black students attempted to enroll at all-white Gadsden High. The six walked the few blocks from their West Gadsden neighborhood to the white facility, where they entered the school during an assembly and sought registration. Flabbergasted staff sequestered the six and summoned the principal and superintendent as a mob of white students quickly gathered in the hall outside. The students told the superintendent, I.J. Browder, that they wanted to attend the school blocks away from their homes, rather than have to attend the Negro high school across town – Carver. They also mentioned that Gadsden High had a nice, new science facility, while Carver had no such facilities. Browder told them that the school system had tried “to give the Negro schools the type of instruction that will best train them in courses that they both need and want.” By this he meant courses like cosmetology, industrial arts, and “diversified occupations,” not chemistry and physics. Browder told them the registration period had ended the week prior, and he dismissed their effort as a “publicity stunt.” A larger group returned to the school

¹⁷ See, for the holding of Governor Ross Barnett in contempt of federal court, *Meredith v. Fair*, 313 F.2d 532, 534. Wallace was never held in contempt, and federal judges in Alabama continued to show great restraint with the contempt power when dealing with recalcitrant state officials. A federal judge later came close to – but ultimately refrained from – holding Governor Fob James in contempt in the late 1980s, during the long-running litigation aimed at Alabama's prison system (*James v. Wallace*, *Pugh v. Locke*: see CH 12, note 16, *infra*); see Yackle, *Reform and Regret: The Story of Federal Judicial Involvement in the Alabama Prison System* (New York: Oxford University Press, 1989), pp. 195-6. Governor Guy Hunt was held in contempt of federal court in 1991 for refusing to comply with an injunction in an off-shoot prison case; see *Parrish v. Alabama Department of Corrections*, 156 F.3d 1128 (11th CCA, 1998).

¹⁸ Carter, *Politics of Rage*, pp. 98-109; *Birmingham News*, Oct. 3, 1962.

the following day, only to be turned away at the door. They settled for a formal presentation of their grievances to Browder.¹⁹

The Gadsden students could at least rest assured that the city's activist blacks had already filed suit to desegregate Gadsden High. The challenge came as part of an omnibus desegregation suit filed in federal district court in May. The plaintiffs audaciously sought the desegregation of every public facility in the City of Gadsden, including the high school, the city hall, the city auditorium, the swimming pool, and the tennis courts. They named as defendants the city itself and a host of city officials that included the heads of nearly every department under city supervision. As the fate of Birmingham's schools hung in the balance, few paid attention to what many thought was a doomed litigious effort, but the pending suit was the result of a growing effort to re-challenge segregated education in the federal courts.²⁰

Huntsville, the Department of Justice, and "Impacted Areas" Litigation

In Huntsville, a similar challenge illuminated a new threat to segregated education that came from the federal administrative bureaucracy. Mrs. Marvin Burnett brought her daughter, Ladonna, to Huntsville's all-white Madison Pike Elementary to register on September 4, the same day as the Gadsden attempt. The principal referred her to the superintendent, who blithely told her that her child had been assigned to Cavalry Hills School for Negroes and dismissed her with a vague promise for a hearing. What made this attempt significant was the fact that Mrs. Burnett's husband was a sergeant in the United States Army, and he was stationed at nearby Redstone Arsenal. The NAACP had alerted officials at the U.S. Justice Department (DOJ) as early as 1959 to the fact that Huntsville school officials planned to use 31 acres of land donated by the federal government to build a segregated elementary school. Not only did the school district use the land as such, it used federally allocated funds with which to build the school itself. The government made such funds available to so-called "impacted areas," or

¹⁹ *Birmingham News*, Sept. 5, 1962; *Southern School News*, Sept., 1962.

²⁰ *Southern School News*, Nov., 1962.

school districts which enrolled a large number of children of federal personnel. This was the case in Huntsville, where the Army and NASA each had a large presence. This only became a problem for segregated school systems when the Department of Justice's recently created Civil Rights Division (CRD), on behalf of the U.S. Department of Health, Education, and Welfare (HEW), began to investigate whether or not these federal funds were being used in furtherance of segregation. The Madison Pike school was found to be one of four off-base schools whose segregated student body was entirely composed of the dependents of federal personnel. The children of black personnel at Redstone, like Ladonna Burnett, were of course forced to attend local Negro schools.²¹

The investigation of impacted areas funds use in Huntsville marked the first involvement of the Justice Department in school desegregation in Alabama. The department soon became a key ally for black activists. The Civil Rights Division, like the United States Commission on Civil Rights, was a product of the Civil Rights Act of 1957, which was, itself, the recommendation of President Truman's Committee on Civil Rights. The CRD was initially staffed with around a dozen young, idealistic, energetic attorneys who were given a broad mandate:

Enforcement of federal statutes prohibiting discrimination in voting, public schools and facilities, places of public accommodation, employment and housing; (2) prosecuting persons who interfere with the exercise of federal civil rights on account of race, religion, or national origin; (3) coordinating enforcement of the prohibition against discrimination in activities receiving federal financial assistance from federal departments and agencies; (4) intervening in significant cases brought by private individuals involving denials of the equal protection of the laws on account of race; (5) preparing amicus curiae briefs in significant private civil rights cases,

²¹ *Birmingham News*, Sept. 5, 1962; *Atlanta Journal*, Sept. 5, 1962; "Segregation in Public Schools Built with Federal Funds for the Education of Military Dependents," in Files of W. Wilson White, 1958-1959, *Records of the United States Department of Justice's Civil Rights Division, 1958-1973*, in *The Civil Rights Movement and the Federal Government* [microfilm] (Bethesda: LexisNexis, 2008) [see in manuscript at Records of the Department of Justice, Records of the Civil Rights Division, 1958-1973, Record Group 60, National Archives and Records Administration (College Park, MD)] (collection hereafter cited as DOJ Civil Rights Division Records); Memorandum from Assistant Attorney General W. Wilson White to the Deputy Attorney General, May 19, 1959, on Desegregation of Off-Base Service Schools, Files of Joseph M.F. Ryan, 1958-1960, DOJ Civil Rights Division Papers.

primarily in the United States Supreme Court; (6) and preparing legislative proposals in the civil rights area.²²

In its earliest years the CRD focused on voting rights, using the power vested in it by the 1957 act and, subsequently, by the 1960 Civil Rights Act (which also made it a crime to defy federal court orders, codifying the principal established in *Cooper v. Aaron*). Since the Federal Bureau of Investigation (FBI) was often suspicious of the civil rights movement, if not openly hostile to it, enforcing civil rights law generally fell to the CRD alone. Its attorneys worked long hours in the field and filed dozens of civil actions in cases of racially discriminatory voting practices. Its involvement in school desegregation began when it participated as *amicus curie* in several cases in the late 1950s, including the Orleans Parish suit. The Justice Department's participation in school desegregation cases actually dated back slightly farther, to the landmark NAACP higher education cases of the late 1940s and early 1950s – *McLaurin v. Oklahoma State Regents* and *Sweatt v. Painter*. The department had also filed *amicus* briefs in *Brown I* and *Brown II*. The Eisenhower Administration, though, despite its cautious embrace of the Truman legacy through the Committee on Civil Rights and the desegregation of the military, softened the DOJ's position on implementation. Thus, it was not until the Kennedy Administration came to power that the department, by way of the Civil Rights Division, began to vigorously pursue school desegregation implementation.²³

The Kennedy Administration's policy on civil rights has been described as cautious and reactive overall, but as a result of that same policy, the CRD began to play a much bigger role in civil rights

²² Michal Belknap, Ed., *Civil Rights, the White House, and the Justice Department, 1945-1968*: Vol. 17, *Administrative History of the Civil Rights Division of the Department of Justice During the Johnson Administration* (New York: Garland, 1991), pp. 5-6.

²³ Belknap, *Administrative History of the Civil Rights Division During the Johnson Administration*, pp. 7-8; Brian Landsberg, *Enforcing Civil Rights: Race Discrimination and the Department of Justice* (Lawrence: University of Kansas Press, 1997), pp. 1-5, 135-7; Brian K. Landsberg, "The Kennedy Justice Department's Enforcement of Civil Rights: A View from the Trenches," in John F. Kennedy, *History, Memory, Legacy: An Interdisciplinary Inquiry*, Ed. John D. Williams, et al. (University of North Dakota Press Online), <http://www.und.nodak.edu/instruct/jfkconference>, accessed Dec. 20, 2012, pp. 4-10. For a sympathetic interpretation of Eisenhower's civil rights legacy, see David A. Nichols, *A Matter of Justice: Eisenhower and the Beginnings of the Civil Rights Revolution* (New York: Simon and Schuster, 2007).

enforcement generally, and in school desegregation specifically. Former CRD attorney and legal scholar Brian Landsberg has provided a compelling and insightful analysis of the Kennedy Justice Department, arguing that it was as proactive as it could have been within its mandate. Landsberg has maintained that DOJ was “not a free agent to roam at will among policies that seem[ed] attractive or even morally compelling.” Given that limitation, the CRD “set an appropriate standard for enforcement of civil rights” which has “largely prevailed ever since,” according to Landsberg. During the Kennedy administration, that standard came into clear focus. In 1961, in one of his first official actions, the newly tapped Assistant Attorney General in charge of the Civil Rights Division, Burke Marshall, went before the House of Representatives and testified against legislation that would have withheld federal funds from segregating school districts. Marshall argued against such punitive measures in favor, naturally, of litigation. Marshall thought that cooperation with local officials should at least be attempted first, and civil actions brought if possible and necessary. The following year, both approaches began to become reality. HEW secretary Abraham Ribicoff announced that his department would soon begin withholding federal funding from school districts with segregated schools in impacted areas. At the same time, DOJ began to consider how and where it might initiate negotiations with and, if necessary, litigation against impacted areas districts. Thus did the CRD discover that Huntsville was one of around 100 impacted areas districts which used federal funds to maintain a dual system, and one of the aforementioned four that had on-base or near-base segregated schools populated solely with U.S. personnel.²⁴

In early July, 1962, Marshall and Second Assistant Attorney General for Civil Rights, St. John Barrett, began to formulate a specific policy on impacted area school districts and to reach out to those districts, including Huntsville. A native of California, where he had briefly been an assistant district attorney, Barrett had been with the CRD since its inception. He had worked on the Little Rock cases and

²⁴ Carl Brauer, *John F. Kennedy and the Second Reconstruction* (New York: Cambridge University Press, 1977), pp. 124-46; Landsberg, *Enforcing Civil Rights*, pp. 137-8; Landsberg, “The Kennedy Justice Department’s Enforcement of Civil Rights: A View from the Trenches,” see for quotation, p. 10.

the Prince Edward County Virginia case, and he had most recently accompanied James Meredith in his attempt to register at Ole Miss. He was already an elder statesman in the CRD at just 39. CRD attorney John Doar later remembered that he had “such confidence in [Barrett]” because “[he] had a much better grasp of civil rights law than I did.” Barrett worked with Marshall to establish some sort of plan for the CRD effecting school desegregation on its own, rather than having to join in cases brought by private individuals. After focusing on impacted areas, the two decided to approach only impacted areas districts which had received federal dollars for construction, because each such district had recently agreed, upon accepting these funds, to educate federal dependents on the “same basis” as other children in their system and in accordance with the laws of the state. This was to be the rationale behind initiating litigation. The department was prepared to formally demand that impacted areas districts completely eliminate the dual system of pupil assignment district-wide, not just in the schools built with federal money or in the schools enrolling the children of federal personnel. The CRD was keenly aware of recent developments in school desegregation jurisprudence and formulated its specific demands accordingly: no overlapping racial zone lines, no discriminatory application of pupil placement laws, no default assignment to the school last attended. Privately, though, the department was willing to accept less, provided that local officials negotiated in good faith.²⁵

Marshall decided to personally fly to Huntsville later that month to assess the situation, especially as to the possibility of negotiating a plan with local officials. He met with the Superintendent of Huntsville City Schools, Raymond Christian, and several of the city’s leading white business moderates, including the editor of the Huntsville *Times*. The businessmen had participated in biracial negotiations and were responsible for what had been, up to that point, a comparatively reasonable approach to voluntary desegregation. Huntsville was in extreme north Alabama, near the Piedmont and

²⁵ Memorandum from Assistant Attorney General Burke Marshall to Second Assistant St. John Barrett, July 10, 1962, “Policy Questions re Impacted Area School Desegregation” attached, Files of Joseph M.F. Ryan, 1958-1960, DOJ Civil Rights Division Papers; *Washington Post*, June 17, 2012 (Barrett Obituary); St. John Barrett, *The Drive for Equality: A History of Civil Rights Enforcement* (Publish America, 2009).

far from the Black Belt. Racial tension there had been somewhat mitigated over the years by the city's geography, by the presence of a relatively progressive, upper-middle-class white community associated with the federal facilities, and most of all by the simple fact that the city had fewer blacks than any other major city in the state. The Huntsville business moderates were alone in Alabama in recognizing that some sort of start to desegregation ought to come voluntarily, or at least without the sort of massive resistance that characterized all other official action in the state. They acknowledged to Marshall that the threat of massive resistance from Patterson was such that they doubted an attempt to desegregate the schools could or should be made that fall. Marshall countered that Wallace's campaign did not seem to give any indication that he would react any differently. One of the men claimed to have spoken with Wallace personally and that the judge had conveyed to him that "he did not really mean his campaign speeches." Undoubtedly aware of Wallace's earlier episode with Judge Johnson, Marshall surmised that Wallace would probably promise very little privately, that he would "have to make a lot of noise," but will he would "give in at the end." The group as a whole also noted that segregationist resistance in the city probably meant that the school board would privately invite a court order to initiate desegregation.²⁶

This understanding revealed one of the fundamental dynamics of the next ten years of school desegregation in the state. Demagogic state officials, namely Wallace, would resist as stringently and for as long as possible. Any moderate local officials who personally thought progressive action to be necessary would resist such action either on account of said state officials or because of the risk of a massive local segregationist backlash. This would create a leadership void into which the federal government would have to step, usually by way of court orders. School officials in many cases, like

²⁶ Memorandum from Assistant Attorney General Burke Marshall to Attorney General Robert Kennedy "re Huntsville Alabama School Situation," July 31, 1962, Michal Belknap, Ed., *Civil Rights, The White House, and the Justice Department, 1945-1968*, Vol. 7, *Desegregation of Public Education* (New York: Garland, 1991), Doc. 64 [Held in Manuscript at Kennedy Presidential Library, Burke Marshall Papers, Box 1]. This inaction of state and local officials and the creation of a void for the federal government has been described, using a football metaphor, as the "Alabama Punting Syndrome."

Huntsville, welcomed such orders because they could then blame desegregation on the federal government, which simultaneously played right into the popular gubernatorial line about outside interference and states' rights.

Marshall left the meeting with the Huntsville business moderates and Superintendent Christian with the understanding that desegregation would have to come via litigation and federal court order, but that the school officials would be privately amenable and would comply with any such orders in good faith. Marshall also knew that the case for litigation in Huntsville was a good one. The CRD had ascertained that not only the city of Huntsville school system, but the Madison County school system as well, were educating a large number of federal dependents: specifically, 103 on-base children and 1,934 off-base children in the county system and 742 on-base and 9,671 off-base children in the city system. Of these, nearly 1,000 were black children. And the two systems had received several millions of dollars in federal funds. St. John Barrett began drafting a complaint immediately. The division also prepared similar complaints for Montgomery, which received impacted areas funds for schools educating children from nearby Maxwell and Gunter Air Force Bases.²⁷

Marshall and Barrett might have felt that the CRD had good cause to bring a strong suit against Huntsville, Madison, and Montgomery, but the division was concerned about the impact of filing a school desegregation suit where not only schools, but all public facilities, were still fully segregated. It seemed more logical to initiate an action where there were already cracks in the wall of segregated education, which at that time was anywhere but Mississippi, South Carolina, or Alabama. The CRD filed suit the next month, September, against the Prince George County, Virginia school system. It marked

²⁷ Memorandum from Assistant Attorney General Burke Marshall to Attorney General Robert Kennedy "re Huntsville, Alabama School Situation," July 31, 1962, Belknap, *Desegregation of Public Education*; Assistant Attorney General St. John Barrett, Memorandum for the Attorney General's Informal Report, "Legal Action on Impacted Area Schooling," Aug. 24, 1962, Belknap, *Desegregation of Public Education*, Doc. 65 [Held in Manuscript at Kennedy Presidential Library, Burke Marshall Papers, Box 16].

the first time the Justice Department initiated a school desegregation case. It would certainly not be the last.²⁸

The Armstrong/Nelson Trial

The state of Alabama remained temporarily safe from an impacted areas suit that fall, but it could not escape black activists' suits attacking Birmingham's system, which finally came to trial in October. The trial itself revealed the tattered and doomed logic of segregation to which its practitioners clung. They needed sympathetic jurists to maintain their grip, and of these there were plenty. But could they mount a challenge that would stand up to the test of the Fifth Circuit Court of Appeals? Judge Lynne had allowed the two suits to be consolidated for hearings that month. Billingsley, Williams, and Jackson tried to establish first that the city operated a dual school system, an obvious fact outside the courtroom but nonetheless one requiring some sort of evidentiary proof. One school board member admitted freely that the city operated a dual system and that this was, indeed, what the placement act was meant to preserve. Another denied any knowledge of a dual system. Superintendent Wright admitted that if a black child showed up to register at a white school, he would not be registered, but he called this a "matter of custom" and argued that schools were simply designated "white" or "black" on account of their location. "They get their name from the area they're in," he protested, "generally, Negroes go to the Negro schools in their area and white students do the same."²⁹

Governor Patterson and Attorney General MacDonald Gallion had been preparing the state's case for several years, for just such an occasion. It hardly mattered that it came in defense, technically, of only the city of Birmingham's school officials. The school board's attorneys of record included

²⁸ Memorandum from Assistant Attorney General Burke Marshall to Attorney General Robert Kennedy "re Huntsville, Alabama School Situation," July 31, 1962, Belknap, *Desegregation of Public Education*; Assistant Attorney General St. John Barrett, Memorandum for the Attorney General's Informal Report, "Legal Action on Impacted Area Schooling," Aug. 24, 1962, Belknap, *Desegregation of Public Education*, Doc. 65; see, for the filing of U.S. v. School Board of Prince George County, *Southern School News*, Oct., 1962.

²⁹ *Southern School News*, Nov., 1962; Thornton, *Dividing Lines*, pp. 218-19.

Birmingham lawyers Joseph Johnston (another architect of the state's defense), Ormond Somerville, and Reid Barnes, and all had connections to Patterson and Gallion. They followed the lead the current and former attorneys general had provided. In addition to clearly disingenuous efforts to claim the dual system was a "matter of custom," the defense tried to establish that desegregation would ruin education in the city. The fundamental premise of this argument was that blacks were inferior intellectually. To establish this, the city officials called the head of the school system's guidance program, who testified that tests given to children entering the first grade revealed that 67 percent of black children were of a mental age less than 6 years, while only 30 percent of white children were deemed the same. The head guidance counselor also testified that other assessments showed white students in the school system in grades four through eight were above the national average in academic ability, while black students in the same demographic were below average. Superintendent Wright testified that introducing such inferior pupils into classes with superior ones would create "educational chaos." The defense also introduced the deposition of a psychology professor at the University of Virginia, who testified that "general findings" showed that black students across the country, i.e. in integrated districts of the North as well as those of the South, scored significantly and roundly lower than their white counterparts on intelligence quotient tests. Billingsley tried to remind the court of the findings presented in *Brown*: that segregation itself – separate and inherently unequal education – produced this scholastic retardation in black pupils, not only through universally discriminatory funding but also by creating a psychological inferiority complex in the black student.³⁰

The defense ignored Billingsley's reminder and instead stuck to biological racism, attempting to provide an academically-supported case for innate inferiority. Its' *coup de grace* was a study undertaken and presented by Dr. Wesley Critz, a former anatomy professor from the University of North Carolina's School of Medicine. The study, entitled "The Biology of the Race Problem," had

³⁰ *Southern School News*, Nov., 1962; Thornton, *Dividing Lines*, pp. 218-19.

actually been commissioned some years prior by Governor Patterson himself, who arranged payment of \$3,000 to Critz for the effort. Critz testified that human beings were “not born equal in the biological sense,” nor did they “have equal endowments.” The Negro was, according to the doctor, 200,000 years behind the white man, anthropologically speaking. “Through all recorded time,” he argued, “the Negro never invented the wheel, the sail, the plow or a system of writing . . . never produced a great religious leader or philosopher [and] remained a relative savage through the ages in which the Caucasian and the Mongol were building their civilizations.” Desegregation could supposedly not rectify this iniquity. Indeed, Critz’s study concluded, “large and significant differences do not disappear when social and economic factors are equated.” Therefore, integration was not only “evil,” it was “not Christian.” It would lead inevitably to intermarriage between whites and Negroes, which itself would result in the “invariable deterioration” of the white race’s genetic pool. Had Alabama White Citizens’ Councilors Sam Engelhardt, Walter Givhan, or Alston Keith been on the stand, they would have testified that integration of the schools was unthinkable, leading as it inevitably would to miscegenation and mongrelization, because “the nigger” was “a separate individual altogether,” perpetually inferior and pitiable. Critz’s study and testimony were the exact same argument cloaked in discredited science.³¹

The city officials’ final line of defense was also the invocation of a favored Citizens’ Council tactic: pointing the finger northward. The defense called Congressional representative George Huddleston, Jr., who as a member of a special congressional committee supervising administrative activities in Washington D.C.’s recently desegregated schools testified about the “substantially increased” discipline problems in those schools. Huddleston also testified that there had been a “substantial migration” of white families out of the city into burgeoning suburbs as a direct result of desegregation. The cry of northern racism and discrimination had been popular for decades amongst segregationists in the South; it was part of the irrationally lingering animosity of the Civil War and the

³¹ *Southern School News*, Nov., 1962; Thornton, *Dividing Lines*, pp. 218-19. See, for the Engelhardt quotation, CH 1, *supra*, and for similar remarks made by Givhan, Keith, et al., CHs 2-3, *supra*.

over-sensitivity to northern interference. It was the equivalent of a child's arguing upon being caught engaging in bad behavior that a sibling or friend had also been engaged in the same behavior, supposedly absolving the child himself. The problem for southern whites seemed to be that the other offender, the accuser, and the punisher were all the same, insofar as the federal government was still equated with the Yankee North anytime there was a question of "outside interference." Fortunately for the defense in *Armstrong* and *Nelson*, Judge Lynne was of a similar disposition, and as a paternalist segregationist, he was sympathetic to the school officials' line of reasoning. When the hearings ended on October 26, Lynne gave the parties until December 1 to file summary briefs and until December 31 to file reply briefs, thereby delaying a ruling until January 1 at the earliest date, and until mid-winter or later at the most realistically possible date. Billingsley and Jackson protested the delay to no avail. "School doesn't open here until September," Judge Lynne reminded them, "[and] nobody's in any hurry here."³²

John LeFlore, Vernon Crawford, and Mobile

The problem was that Alabama's black activists were, in fact, in a hurry. Almost nine years after the original School Segregation Cases decision, though, only so many were in a position to mount effective challenges to the status quo. Outside of the pending Birmingham cases, the Gadsden effort, and the potential for federal administrative intervention, activism aimed at segregated education had been effectively stymied. Slowly, though, the progress of *Armstrong* and *Nelson*, in light of the Fifth Circuit ruling in the New Orleans case and along with the possibility of CRD action, inspired others to take action of their own. In November a group of black activists in the port city of Mobile, a few hours' drive east of New Orleans on Alabama's Gulf Coast, attended a meeting of the Mobile City-County School Board. The activists petitioned the school officials to plan for the "reorganization of the biracial school system of this county into a unitary, non-racial system" and to "present to the community, within

³² *Southern School News*, Nov., 1962; *Birmingham News*, Oct. 26, 1962.

the next 60 days, a plan for such desegregation which will include a prompt and reasonable start.” This was no simple request for tokenism under the placement act. The group requested that the board “provide for the elimination of all racial distinctions and discriminations from the public school system, including,” it continued, “the assignment of pupils and professional school personnel on a non-racial basis, with all deliberate speed.” Just as in Birmingham, and just as with the NAACP petitions of the 1950s, this was intended to set up a civil action in federal court.³³

A letter accompanied the petition. The signatories reiterated their desire that the school board finally provide an answer to the Mobile NAACP’s original petition of 1955. They tried to appeal to business moderates by admitting that theirs was a “challenge to probity” in the state of Alabama and that they simply wanted “citizens of good will and all who have respect for law and order [to] defend with their moral support a course of action which will bring to our city and county another instance of a high standard in race relations.” “Moral support” meant support which did not necessitate action, not support for a cause one thought was morally just. The petitioners knew that white business moderates were beginning to see the value of “law and order,” not just as a differentiation from the Klan, but as a genuine appeal to avoid disturbances such as those at Tuscaloosa during the Lucy crisis, in Birmingham and Montgomery during the Freedom Rides, and at Ole Miss. Blacks did not have to get segregationists to agree that segregated education was morally wrong, only that dogged and defiant persistence in it encouraged violence, which itself was bad for the state’s image and bad, then, for industrial recruitment and business in general.³⁴

Behind this appeal to white business moderates in Mobile was John L. LeFlore. LeFlore had resurrected the Mobile chapter of the NAACP in the 1920s and had been an active leader in the city ever since. He had worked with aggrieved black stevedores during World War II and had since been mostly concerned with voter registration. In the wake of the NAACP’s banishment, he had become director of

³³ *Montgomery Advertiser*, Nov. 15, 1962; *Southern School News*, Dec., 1962.

³⁴ *Ibid.*

casework for the Non-Partisan Voters League and had begun recruiting former NAACP members. He remained attuned to the progress of school desegregation litigation and saw in the early 1960s a chance to file a meaningful suit. LeFlore was not a preacher or a teacher, nor was he an attorney. He was, thus, quite unlike a number of black activist leaders of his time. He worked for the United States Post Office in Mobile, and his father-in-law was a substantially well-off physician and prominent member of the city's black upper-middle class. He was therefore shielded from many of the standard forms of economic reprisal and was, in that regard, very much like most sponsors of school desegregation litigation. In time his relative prosperity and preference for biracial cooperation with business moderates earned him charges of Uncle-Tom-ism – a derogatory characterization for those deemed to be conciliatory to paternalist-inclined whites. But in the early 1960s, he was in position to lead the city's willing and able black activists in the second major challenge to Jim Crow education in the state of Alabama.³⁵

LeFlore secured local attorney Vernon Crawford for the task. Crawford was not unlike the other young black attorneys in the state, so few in number though they were. He had served in the merchant marine in the war and returned to attend Alabama State College in Montgomery. The state of Alabama paid for his out-of-state law training, of course – in Crawford's case at Brooklyn Law School, from whence he returned to Alabama to practice law in his hometown in 1956. He was the only black lawyer in Mobile and, like Fred Gray in Montgomery and Willie Williams and Orzell Billingsley in Birmingham, he was eager to take advantage of the cracks he saw potentially developing in the wall of segregation. All Crawford and LeFlore needed were people like James Armstrong and his family to ask, "why not me?" Each of the 27 signatories to the petition to the Mobile school board had asked and answered that question. Some of them were soon to become litigants in a case that would change the city of Mobile in

³⁵ Scotty E. Kirkland, *Pink Sheets and Black Ballots: Politics and Civil Rights in Mobile, Alabama, 1945-1985* (M.A. thesis, University of South Alabama, 2009), pp. 30-7.

fundamental and enduring ways, and which remained on the docket of the federal district court there for more than 30 years.³⁶

As 1962 wound to a close, the prospect of school desegregation in Alabama looked more realistic than at any other time in the state's history. The Birmingham suits were pending Judge Lynne's ruling. Lynne himself had proven to be obstructionist in civil rights litigation, where he could, and the ruling was far from guaranteed one way or the other. But the *Bush* case and Judge Brown's concurrence in the *Nelson* mandamus proceedings, along with desegregation orders in Atlanta, Chattanooga, Pensacola, and elsewhere, made it clear that the majority of judges of the Fifth Circuit Court of Appeals were beginning to force the issue in reluctant district courts. Birmingham looked to have only its "one year of grace" before desegregation became some sort of reality. John LeFlore and Vernon Crawford were cognizant of this possibility and prepared to force Mobile into compliance in the same fashion. Then there was the matter of the "impacted areas" across the state. The Civil Rights Division had quietly signaled its intention to coerce these districts into compliance, and it had begun to initiate litigation elsewhere in the South. HEW underscored this federal threat in December when it issued letters to superintendents in all impacted area systems, advising them that they could not rely on federal assistance the following year lest they "proceed to arrange for the provision of desegregated schools in accord with [federal] policy."³⁷

Business moderates in Huntsville were prepared to work behind the scenes with the CRD to effectuate peaceful desegregation but had made it clear that they, and especially the school board itself, needed a federal court order to get it done. Hardline segregationists in Huntsville would ostracize the

³⁶ Kirkland, *Pink Sheets and Black Ballots*, p. 102; Shawn Bivens, *Mobile, Alabama's People of Color: A Tricentennial History, 1702-2002* (Publication of research undertaken for unfinished Ph.D. dissertation, Howard University) (Victoria, Canada: Trafford, 2004), pp. 249, 283.

³⁷ *Southern School News*, Dec., 1962.

board members or worse were they seen to be on the “integrationist” side of the fence. Segregationists across the state had demonstrated in their reactions to the Ole Miss crisis that they were not prepared to capitulate to black activists and the federal government, no matter how eminent others thought school desegregation to be. The voters of Alabama made their support of continued defiance clear when they elected George Wallace in a landslide. Wallace “out-segged” every other candidate in Alabama through repeated rhetorical flourishes of resistance and by touting his own defiant credentials. The state was, thus, on a collision course: persistent activism was fast approaching determined resistance, and in the middle stood a growing number of “moderate” segregationists who seemed willing to do only the bare minimum to avoid a catastrophe.

CHAPTER 5: THE LITIGIOUS BREAKTHROUGH BEGINS, SPRING, 1963

“Our Most Historical Moment”

On a bitterly cold Monday morning, January 14, 1963, George Wallace stood atop the same Confederate star upon which John Patterson had taken the oath of office four years prior. Like Patterson before him, Wallace did not let the assembled crowd forget that it was the same spot from which Jeff Davis had taken the oath of office as the first and only president of the Confederacy. True to the segregationist one-upsmanship of his campaign, Wallace saw fit to also invoke Confederate General Robert E. Lee – the quintessential southern hero who fought valiantly to the bitterest of ends against insurmountable odds. Wallace’s inaugural speech that day – the magnum opus of Klansman and Citizens’ Councilor Asa Carter – was made famous by one line. It was a pithy encapsulation of southern white defiance and, incidentally, a barometer of southern white insecurity, like a final and forlorn battle cry before a hopeless siege: “In the name of the greatest people who ever trod this earth, I draw the line in the dust and toss the gauntlet before the feet of tyranny, and I say segregation *today*, segregation *tomorrow*, segregation *forever!*” Wallace had vowed in his campaign to “stand up for Alabama,” and he promised the electorate that if they stood with him, they could defy the tyrannical federal government, especially the judiciary, and the communist black activists, especially the NAACP, just as the Confederate rebels had resisted Yankee aggression and carpetbagger invasion 100 years prior. And they elected him overwhelmingly for it.¹

The less famous, or infamous, lines of the speech read like a Citizens’ Council broadsheet, and they revealed the deepening sense of panic and dread that segregationists were trying to suppress. Wallace wanted to exploit their fears, to help them suppress that panic and dread, and to promise them

¹ Alabama Governors, Inaugural Addresses and Programs, SP194, Alabama Department of Archives and History (ADAH), Montgomery, Alabama [Wallace Inaugural Speech, ADAH]; see full text of Wallace’s inaugural speech also at *Montgomery Advertiser*, Jan. 15, 1963.

that he could keep the wolves of desegregation at bay indefinitely, when everyone, including Wallace himself, was beginning to feel that this might be impossible. Wallace has been called a weathervane by one of his biographers, and his inaugural speech that day functioned in much the same way. He made sure to include all of the fundamental segregationist fears, and he dressed them with recent events that made them seem all the more palpable. All of this was delivered with a marshal language intended to rile segregationists and steel them for the fight to defend Alabama's rights and the integrity of the white race. It was everything that they wanted to hear.²

Before Wallace delivered the "segregation forever" line, he said "I have stood where Jefferson Davis stood, and took an oath to my people. It is very appropriate, then, that from this Cradle of the Confederacy, this very heart of the great Anglo-Saxon Southland, that today we sound the drum for freedom as have our generations of forebears before us done" He spoke passionately about their "freedom-loving blood" and called them to "send an answer to the tyranny that clanks its chains upon the South." There was, then, the threat of enslavement by the federal government, the purity of the white race at stake, the upturning of southern society making white slave and black dominant, and the duty to "sound the drum" and go to battle to prevent this. Then he went immediately to school desegregation. Speaking of reports of disturbances in recently desegregated Washington, D.C. public schools, Wallace declared that the people of Alabama would never "sacrifice our children to any such type school system." The reports, he said, were "disgusting and revealing." The federal troops sent into Mississippi during the Ole Miss crisis would have been better served, he suggested, guarding the citizens of the nation's capital. All white people had to do to avoid this fate, he argued, was to send the message to the integrationists in the federal government that "we give the word of a race of honor that we will tolerate their boot in our face no longer." He then reminded them who the nearest manifestations of that government were: "let those certain judges put *that* in their opium pipes of

² Carter, *Politics of Rage*, p. 14; Wallace Inaugural Speech, ADAH.

power and smoke it for all its worth.” There was no misunderstanding that Wallace meant especially his old friend and recent nemesis, Judge Frank Johnson, who was known to enjoy a tobacco pipe in his chambers, just down the street from the inaugural site.³

All segregationists knew that the most real and immediate threat to their society were the black activists themselves. Wallace tried to paint them as communist revolutionaries, even comparing the white race to the Jews of Nazi Germany and arguing that the activists were part of a global communist conspiracy to persecute the “international white minority.” The “Afro-Asian bloc” would not rest until the white race was “footballed about according to [its] favor.” Referring to ongoing African post-colonial liberation movements and to the Cuban socialist revolution, he then added, “The Belgian survivors of the Congo cannot present their case to a war crimes commission, nor the Portuguese of Angola, nor the survivors of Castro,” nor, he said emphatically, bringing the rhetorical flourish back around to the real issue, could “the citizens of Oxford, Mississippi.” Beneath it all lay the threat of miscegenation and mongrelization. Carter allowed Wallace to bring this in at the conclusion of the speech, just as he returned to the language of the Civil War, Reconstruction, and Redemption: the great Lost Cause. The governor issued a warning to “those of any group who would follow the false doctrine of communistic amalgamation,” that the white people of Alabama would not “surrender our system of government, our freedom of race and religion” under any circumstances. When the South was “set upon by the vulturous carpetbagger and federal troops, all loyal Southerners were denied the vote at the point of a bayonet, so that the infamous, illegal 14th Amendment might be passed.” Southerners did not accept this fate, of course; they “did not even consider the easy way of federal dictatorship and amalgamation in return for fat bellies.” No, “they fought,” Wallace said, “and they won.” Then Wallace concluded by calling out the business moderates, the liberals of the ACHR, and anyone else not behind the line of defiant resistance. “I stand ashamed,” he said with disgust, “of the fat, well-fed whimperers

³ Wallace Inaugural Speech, ADAH.

who say that it is inevitable, that our cause it lost. They do not represent," he said, "the great people of the Southland," who would soon "grasp the hand of destiny and walk out of the shadow of fear and fill our divine destination. Let us not simply defend," he urged, "but let us assume leadership of the fight God has placed us here in this crisis. Let us not fail in this, our most historical moment."⁴

The Evolving Tenor of Law and Order

As the moment of which Wallace spoke fast approached, most segregationists were supportive of the maintenance of "law and order." No one came out "for" violence. Violence happened, of course, whether it was the product of ritualistic and sadistic Klan operations, as in the case of Edward "Judge" Aaron's mutilation, or of a mob frenzy, as at Tuscaloosa and Oxford. Klansmen had been engaged in a terrorist bombing campaign in Birmingham for years; the first wave of Freedom Riders was assaulted no less than three times; floggings were commonplace. Business moderates came out against these violent responses, not because they were less supportive of segregation, but because they feared the repercussions for the state's image, for its ability to recruit new industries, and for their companies' bottom lines. Some public officials, even Wallace at times, came out against violence and "for" law and order, because it was their public duty. Wallace's moderate, incoming attorney general, Richmond Flowers, would quickly break with the administration. Flowers told voters during his election campaign that "law and order and the rights so secured under the constitution . . . will not be turned over to the passions of mob hysteria so long as I am attorney general." In his own inaugural speech, Flowers warned that continued defiance would only "bring disgrace to our state, military law upon our people, and political demagoguery to the leaders responsible." He nonetheless pledged to "do battle for our southern traditions," including segregation. No one wanted another Ole Miss, of course, and no one

⁴ Ibid.

wanted to be New Orleans, but these were the sole grounds upon which support for possible compliance was based. Almost no one who was white wanted desegregation.⁵

Even the Council on Human Relations took the law-and-order tack. It was an easy way to appeal to segregationists to accept, on some level, the inevitable: that complete segregation in Alabama's public schools would have to end at some point. The ACHR essentially adopted the business moderate line, announcing on the front of a recruiting pamphlet its desire to "Keep our schools open and accredited," to "Keep industries expanding," and to "Create more and better jobs for our people." Among the Council's stated purposes were to promote channels of communication, to foster "an atmosphere of human dignity and decency," and to "encourage and support government agencies dedicated to the maintenance of law and order in the implementation of the decisions of the courts." One ACHR member broke the message down into a succinct summation of the business moderates' foundational argument: "Reasonable people know that violence hurts everybody, and also hurts the pocketbook, scares off payrolls, and chokes economic growth." On the completely opposite side of the issue, the Citizens Councilors were arguing for defiance, but theirs continued to be a message of law and order as well, for defiant resistance need not be violent. Top George Wallace aid Seymore Trammell told a Dallas County Council meeting just before the governor's inauguration, "The white children of the South are being held literally as hostages with the ransom being – forced to mix with the black." The answer was not to engage in violence, however. These men could remain within the bounds of the law and still stand up to the "black and malignant heart[ed]" federal judges who were "seeking to destroy the South." These district judges "should be scorned and they and their families and their friends ostracized by responsible southerners," as indeed were Frank Johnson and Richard Rives.⁶

⁵ *Southern School News*, Nov., 1962, Feb., 1963; on business moderates, or "progressives," generally, see Eskew, *But for Birmingham*, and Thornton, *Dividing Lines*.

⁶ "Let's Work Together," Pamphlet of the Alabama Council on Human Relations, *Facts on Film, 1962-1963 Supplement*, Miscellaneous Materials; *Southern School News*, Nov., 1962.

When the specter of desegregation returned to threaten the University of Alabama, seven years after Autherine Lucy's failed attempt, business moderates and state and school officials used a law-and-order message to stave off what many thought would be another Oxford-type riot. Vivian Malone, a Mobile native and a student at unaccredited all-black Alabama A&M, announced in November of 1962 that she was among several students who had submitted applications to the university. The university, which was technically still under injunction from the Lucy case, tried to claim that the registration period for the semester beginning in February, 1963 had ended. Malone made clear that she was going to press the issue, securing the assistance of John LeFlore and the Mobile Citizens Committee. University president Frank Rose called for law and order. The Board of Trustees unanimously approved a resolution expressing "determination that law and order must be maintained at all times." The Alumni Council applauded Wallace for his lip service to law and order. But when the editor of the school's student newspaper, the *Crimson White*, went so far as to suggest that Malone was "entitled" to attend the university, a cross was burned on his fraternity house lawn, and he received so many threatening phone calls that he began to employ a security detail.⁷

State Democratic Chairman Roy Mayhall perhaps best expressed the business moderates' stance on law and order when he went before the state Young Men's Business Club and announced that "if integration comes to Alabama – by court order or what – I favor enforcing the law." He argued that the Supreme Court, the lower federal courts, and the Kennedy White House could all be expected to uphold and enforce the law, and that Alabamians should accept this and move on, rather than "kicking a tree because you've run your car into it." Mayhall later wrote a guest editorial in a local newspaper revealing the "voluminous" response to his published remarks, the majority of which he said was supportive. However, he wrote that he was "shocked to find that there are so many people in Alabama who seem to be against law and order," as evidenced by the letters he had received "condemning [him] in the most

⁷ *Southern School News*, Dec., 1962, Jan., 1963.

insulting terms.” As an example he cited a letter from one man who accused Mayhall of being “afraid to stand up for the white race . . . just plain NAACP scared.” The chairman wrote that he had, as a “man who tries to walk the road of lawful adjustment,” simply “resign[ed] himself to searing criticism and even worse.” He admitted that “we may dislike some of our laws” and that “keeping the law may not be easy sometimes,” but he urged still that Alabamians avoid the “ugly, moronic violence of mob hysteria” and the expression of “dislike with bloodshed and anarchy.” Even in offering Biblical scripture, Mayhall found the same message, for “he that keepeth the law, happy be he.” Maintaining law and order amid forced, unpalatable changes seemed so fundamentally necessary and so simple that Mayhall was incredulous that “so many people in Alabama” could possibly be “against it.” But there they were: those who understood George Wallace’s “stand” for Alabama and his impending “stand in the schoolhouse door” to be synonymous with “stand[ing] up for the white race.” On this issue, for many, there could be no compromise.⁸

One group of white people in Alabama which might have been expected to support desegregation from a morally defensible position were the leaders of the white churches in the state. But the issue had already fractured denominations and congregations in which there were a select few clergymen who spoke out in favor of integration. In the white Baptist Church, for example, rare top-down initiatives were almost always met with resistance from congregants, some of whom were blatantly racist, but many of whom were what historian Wayne Flynt has called “passive” racists, suffering from “structural blindness to racist elements of society.” When it came to integrating the Baptist churches themselves, there were “too few prophetic voices to even hold a serious debate” on the matter. Certainly some Catholic clergy, and occasionally other protestant denominational clergy, were willing to speak out, but the number of prophetic voices increased only slightly when it came to school desegregation. For the most part, the closest the white clergy in Alabama would come to

⁸ *Southern School News*, Dec., 1962, Jan., 1963; Wayne Flynt, *Alabama Baptists: Southern Baptists in the Heart of Dixie* (Tuscaloosa: University of Alabama Press, 1998), pp. 517-20.

supporting integrated education, save for the very few individuals who joined the ACHR, was to come out reluctantly for “law and order.” Two days after Wallace’s inaugural, 12 clergymen representing the Baptist, Methodist, Roman Catholic, Episcopal, Jewish, Presbyterian, and Greek Orthodox churches issued a joint statement entitled “An Appeal for Law and Order and Commonsense.” The leaders argued that “there may be disagreement concerning laws and social change without advocating defiance, anarchy and subversion,” and that “laws may be tested in the courts or changed by legislatures . . . constitutions amended or judges impeached by proper action. But the “American way of life,” they urged, “depend[ed] upon obedience to the decisions of competent jurisdiction in the meantime.” The group admitted that it did not “pretend to know all of the answers,” but it insisted that defiance would only lead to “violence, discord, confusion, and disgrace.”⁹

The widespread reliance on a message of law and order in fostering both resistance and reluctant acceptance influenced *how* and *when* school desegregation would come to Alabama. Almost no one outside of the black activists themselves came forward to argue that ending segregated education in Alabama was the morally proper course of action or, outside of the ACHR, even that it was the decent and dignified thing to do. Occasionally it was couched as constitutionally sound, as the “law of the land,” but as evidenced by Wallace’s characterization of the 14th Amendment as “illegal” and by widespread denunciation of *Brown* as the same, this was not often. Those few recognitions of constitutional reality were, themselves, generally in the form of compulsory, reluctant resignations to the unfortunately inevitable. Some of the most vehement defiance slowly became this sort of begrudged acquiescence to only the absolute bare minimum compliance necessary, and gradually it morphed into myriad forms of successful evasion. In short, some segregationists began to accept school desegregation, not because it was right, only because according to some it was the law and because

⁹ *Southern School News*, Feb., 1963.

further resistance only fostered violence, which most everyone could agree was undesirable for one reason or another.¹⁰

Litigious Beginnings in Mobile and Huntsville

The 60 days John LeFlore and Vernon Crawford had asked the Mobile school board to take to consider their petition expired the day George Wallace took the oath of office. On Tuesday the board issued a statement, telling the petitioners the board felt that “in light of [its’] obligations, including [a] tremendous building program, that it would be ill-advised and not in the best interest of your people for us to attempt to present a formula for integration of the public schools at this time.” The “building program” was an effort to modernize black school facilities in the hopes that ‘separate and more genuinely equal’ might dissuade black activists from pressing the issue of desegregation. The board was prepared to spend \$7 million on black schools, with the decidedly modest immediate goal of ending double sessions necessitated by extreme overcrowding. “Frankly,” the board added, “we do not know and would hesitate to say what effect an integration program by the board, or forced integration, would have in the shift of public load from one area to another or whether or not there would be some serious incidents such as have occurred in other places.” The response concluded with a thinly veiled threat: “if [the board was] faced with forced integration, it would seriously delay and possibly completely stop the . . . plans for carrying out [the] building program as it is scheduled now.” LeFlore’s response was swift. He announced that night his plans to file a suit in federal court “as soon as possible,” in light of the fact that the school authorities had left blacks “no choice.”¹¹

LeFlore was prepared to bring in a powerful ally, too. He called attorney Constance Baker Motley, veteran of the original School Segregation Cases, and began to arrange for the NAACP’s Legal

¹⁰ Freyer, in *The Little Rock Crisis*, has argued that there is a difference in change “imposed through law” and change achieved through “implementation of moral principal,” with Little Rock experiencing only the former, and that only through “compulsion or compliance, not consent”; see pp. 3, 18, 29, 32.

¹¹ *Montgomery Advertiser*, Jan. 16, 1963.

Defense and Education Fund, Inc. (LDF) to participate as counsel. The LDF was, by then, a separate entity from the NAACP proper. It consisted only of attorneys and operated on a separate budget and under a separate charter. The Fund had recently responded to Leflore's request to assist Vivian Malone in her attempt to enroll at Alabama, and Motley had agreed. The NAACP's return to Alabama was thus to come via the so-called "Inc. Fund," seven years after the parent organization had been banished by John Patterson. Over the next decade, the LDF would participate in the majority of major school desegregation suits in the state, often with attorney's from the LDF's New York offices – including Motley and Jack Greenberg – assisting in litigating cases themselves. Much of the preparatory work was done, though, by attorneys like Crawford, Fred Gray, and Orzell Billingsley, who became NAACP-LDF "associated" counsel, receiving modest financial support for their efforts and carrying at the least the badge of the organization. The meager and occasional financial support was important when Crawford, Gray, Billingsley, and others had to work pro bono, or for free, as was the case in a number of civil rights actions. Occasionally the attorneys could secure court orders for defendants to pay attorney's fees, but this was always a fight and never a guarantee. Therefore, LDF assistance was important even if local attorney's carried much of the workload.¹²

Before LeFlore, Crawford, and Motley could set in motion their announced suit against the Mobile school board, the Justice Department filed its own suit. Just four days after Wallace's inaugural, the Civil Rights Division filed its impacted areas suits against school officials in not only Huntsville and surrounding Madison County but Mobile as well, where the children of nearly 1,000 military personnel and roughly 15,000 civilians stationed at the U.S. Air Force's Brookley Field attended federally supported, segregated schools. Combined with children of members of the U.S. Engineers, the Coast Guard, and those employed at the Dauphin Island Air Warning Station, the federal dependents constituted almost 20 percent of the Mobile City-County School System's enrollment. In Huntsville it

¹² *Jackson Daily News*, Jan. 16, 1963; Motley, *Equal Justice Under Law*; Gray, *Bus Ride to Justice*; Greenberg, *Crusaders in the Courts*.

was closer to 4,000 service members and 20,000 civilians, all at Redstone Arsenal, which included Army missile command, support, and school facilities as well as NASA's Marshall Space Flight Center. The Mobile City-County school system had received nearly \$12 million in federal aid since 1950, according to the CRD, and Huntsville and Madison almost \$10 million.¹³

In their final form, the complaints against the three school systems focused on the provision in the United States Code that authorized the impacted areas funding, under which the local school officials had agreed to educate federal dependents on the same basis as other children and "in accordance with the laws of the State." Marshall and Barrett knew, however, that this was far from a guaranteed victory in federal district court. The authority of the U.S. to bring the suits was questionable, to begin with. The Department of Health, Education, and Welfare was already monitoring compliance, and Justice Department action might be deemed superfluous. The few school desegregation cases in which the U.S. had participated as *amicus curie* were actions brought by private individuals, and there was no legislation giving the attorney general the expressed authority to bring suits himself. Additionally, the "laws of the State" in Alabama included the placement law, which had not yet been declared unconstitutional on its face or in its application. There was also some concern that Congress had recently declined to attach desegregation riders to proposed school aid legislation, a potentially damning indication that the legislative branch was not fully behind efforts at federal compulsion. Finally, there was the matter of the judge. The action fell on the docket of Judge Grooms, and it was, therefore, anyone's guess what sort of ruling the U.S. might receive.¹⁴

Reaction to the suits among state officials was unsurprising. In announcing the filings, Attorney General Robert Kennedy had tried to soften the reaction amongst segregationists by cautioning that the Justice Department was "not saying to the school districts, desegregate or the government will take its

¹³ *Southern School News*, Feb., 1963.

¹⁴ *United States v. Madison County Board of Education*, *Race Relations Law Reporter* 8.2, Summer, 1963, p. 490.

money away.” George Wallace, of course, disagreed and called the action “blackmail,” which would be “resisted in every way by the state of Alabama.” Wallace called it but “another example of a destructive blow at the liberty and freedom to which Americans are entitled” and an attempt to bring the South into the “socialist-liberal pattern of integration.” The governor called on, not only the state’s congressional delegation, but “all officials and every citizen of this state to oppose this suit which will destroy not only our southern traditions and customs, but will further restrict the liberty and freedom we enjoy.”

Wallace never openly counseled violent resistance. These references to “liberty and freedom” and “traditions and customs” were ways to appeal to a wider range of people, including those who deeply valued “law and order.” It was partly for this purpose that Wallace created a Committee on Constitutional Law and State Sovereignty of the Alabama Bar Association, a group of skilled attorneys, including Birmingham’s Joe Johnston, which was tasked with coordinating a statewide defense of segregated education. The quickly-convened Committee advised the governor upon meeting that the complaints should be “vigorously defended” and that it was confident the suits could not, ultimately, be “properly or legally maintained.”¹⁵

The mere existence of the committee was an affront to Attorney General Flowers, whom Wallace had all but written off after Flowers’ less-than-completely-defiant inaugural speech. Flowers had denounced demagoguery in the law-and-order flavored speech, and the governor had considered that a direct shot at himself. Wallace never forgave the attorney general and effectively excluded him from any meaningful role in administration affairs which did not legally require or call for his involvement. Flowers nonetheless reacted to the suits’ filings in much the same way as Wallace. He agreed with the Sovereignty Committee’s findings and announced that “every legal means possible will be taken to maintain the present segregated status of these schools.” Even the liberal, law-and-order

¹⁵ *Southern School News*, Feb., 1963.

moderate U.S. Senators Lister Hill and John Sparkman denounced the litigation, with Sparkman saying that “as a lawyer and legislator” he could “find no legal basis” for them.¹⁶

The Alabama state legislature had clarified its defiant position on school desegregation before the federal suits were even filed. The day after the Wallace inaugural, the legislators adopted a resolution pledging, “At no time will we in Alabama voluntarily submit to integration of our schools.” They called the U.S. Supreme Court “a national oligarchy,” which had, along with the lower courts, repudiated the “the very foundational concepts of Constitutional government.” The legislators argued that the United States’ “unique and most significant contribution to the concept of public education,” was the “method of control of public schools and policies by local state authorities.” The federal courts had “invaded this sacred area of our lives” and created a crisis unequalled in urgency “since the perilous days of the War Between the States.” This sort of “encroachment,” the resolution read, “must be faced. This problem is upon us. It is here. The solution will require vision, dedication to principle and a firm resolve.” Both houses of the legislature unanimously approved the resolution, although a few legislators quietly recognized that it was little more than a recitation of an already clear position. It was, though, also a test of individual legislators’ positions. In the polarized political climate occasioned by the real threat of school desegregation, no one was willing to vote against such a resolution, lest they be branded an integrationist or even an NAACP-sympathizing communist. One legislator who downplayed the resolution’s impact admitted, “We are all segregationists” in the legislature, and everyone knew that.¹⁷

The U.S. Attorney in Mobile, V.R. Jansen, Jr. called the Justice Department’s filing of the impacted areas suits “an embarrassing situation.” U.S. Attorneys, like federal district court judges, were residents of the states they served and often locals in the cities in which they served. Jansen was no

¹⁶ John Hayman, *Bitter Harvest: Richmond Flowers and the Civil Rights Revolution* (Montgomery: Black Belt Press, 1996), pp. 183-91.

¹⁷ *Southern School News*, Feb., 1963.

exception, and his reaction reflected that of a number of Mobilians. He complained to the press, “Two days after LeFlore announces he’s going to take the segregation issue to court, the Justice Department files suit.” It gave the impression, Jansen, said, “that the Justice Department [was] reacting to the will of the NAACP.” He noted that up to that point all school desegregation suits had been the result of the actions of private individuals, while the impacted areas suits represented a new phase in which the federal government was the sole plaintiff. Jansen signed the Mobile complaint, he said, “only because the law requires it.” The Justice Department did not have to work closely with the U.S. Attorney’s office, and in many cases a begrudging signature was as far as the cooperation went.¹⁸

Because the Justice Department suits applied only to impacted areas, and because everyone knew the suits to be significantly vulnerable to failure, LeFlore went through with his planned action in Mobile, two weeks after the CRD actions were filed. He and the Reverend Calvin Houston secured the cooperation of four black students in the Hillsdale Heights neighborhood in West Mobile. The four attended St. Elmo High School for Negroes and had to travel 34 miles round trip to school each day, while bypassing each time the all-white Baker High in a much more sensible and convenient location, only four miles away. Houston accompanied the four to Baker on January 31, while LeFlore sent the Mobile City-County Board of Education a registered letter that day, along with formal requests for the students’ transfer signed by their parents the next day. The school officials issued letters of rejection a week later to each of the four students, arguing that the school board’s policy was “to consider transfers during the school year only under emergency circumstances which do not exist in this instance.” LeFlore responded by announcing the group’s plan to move forward, finally, with litigation. He expressed “regret” for the “unfair action of the school board” in denying what he called “the basic human rights of these children to transfer to a school near to their homes. To us,” he said, “and we believe to all other Americans who adhere to the principles respecting the dignity of the individual and the noblest

¹⁸ *Southern School News*, Feb., 1963.

traditions of our country, this is an important question which transcends the so-called race issue.” Therefore, the group would attempt to “have this matter resolved in a manner to afford [these] children equal educational opportunity” and would soon “institute court action with the hope that all deserving school children may pursue their school work at the best school available.”¹⁹

In March LeFlore made good on the promise. The LDF’s Motley, Greenberg, and Derrick Bell, along with local associated counsel Vernon Crawford and Clarence Moses, filed a complaint in Mobile’s federal district court on the 27th on behalf of black students and their parents. At the top of the list of plaintiffs was Birdie Mae Davis, thus the case was styled *Birdie Mae Davis v. Board of School Commissioners of Mobile County*. The plaintiffs’ class action complaint sought a permanent injunction against the school board, its individual members, and the superintendent, which they charged with “operating a dual school system in Mobile County based wholly on the race or color” of students. The operation of a dual system included a variety of activities the plaintiffs sought to immediately enjoin: initial assignment of students to racially identifiable schools; assignment of teachers, administrators, and staff on the basis of race; dual and discriminatory funds appropriation; construction of segregated facilities; the racially-based approval of curricula; and the segregation of all extra-curricular activities. The plaintiffs sought an order from the federal court directing the defendants to completely reorganize the school system “into a unitary non-racial system” by, in part, providing a plan for the reassignment of all pupils in the system. The complaint documented all of the recent efforts of LeFlore and the black activists of the city to effectuate school desegregation, including the November, 1962 petition and the more recent enrollment attempt and transfer requests, which had gone unanswered. Announcing the filing, LeFlore lamented that such action was necessary. “We were hopeful,” he said, “that public

¹⁹ *Montgomery Advertiser*, Feb. 1, 2, 8, 1963; *Birmingham News*, Feb. 7, 1963.

schools here may have been voluntarily desegregated as has already happened in at least 20 other southern cities,” but the school authorities had again given the activists “no choice.”²⁰

That same month, activists in Huntsville filed a similar action. Two local doctors and activist members of the black middle class organized the effort: Sonnie Hereford III, a general practitioner, and John Cashin, a dentist. Hereford was the son of sharecroppers who had paid his own way through Alabama A&M and had left the state for medical school in Tennessee, returning to practice in 1956. Cashin was born into an activist middle-class family. His father had also been a dentist, his mother a teacher and school administrator. He briefly attended Fisk University in Tennessee before transferring to Tennessee State and then matriculating to Meharry Medical School, where he met Hereford.²¹ Both Cashin and Hereford had been inspired to energize the movement in Huntsville by activists from the Student Nonviolent Coordinating Committee (SNCC) who came to the city in early 1962 to organize sit-in protests. Hereford became involved by volunteering bond money for the arrested students. He and Cashin were soon joining in demonstrations themselves, and by 1963 they had struck at the heart of the business moderates’ deepest fears by picketing the New York Stock Exchange with signs reading “Don’t Invest in Huntsville – It’s Bad for Business.” The two doctors’ actions were partly responsible for the concessions that business moderates had made in Huntsville to that point, most notably the desegregation of downtown lunch counters. But they were aware, through negotiations with the white leaders, that litigation would be necessary to bring about any movement on the school desegregation front. Skeptical of the successful potential of the CRD suits, they decided to file their own. Thus did *Hereford v. Huntsville Board of Education* fall on the docket of Judge Grooms on March 11, 1963. The complaint was filed by five parents on behalf of their children, as a class action seeking much the same

²⁰ *Southern School News*, April, 1963.

²¹ Cashin would go on to establish the National Democratic Party of Alabama in a direct challenge to the segregationist establishment party, and would later challenge Wallace for the governorship in 1970 as the first black gubernatorial candidate in the state’s history.

relief as in the Mobile case, with the only difference being that the Huntsville plaintiffs specifically cited the unconstitutional application of the Alabama placement law.²²

The “Very Heart of Our Defenses”: Tuskegee and *Lee v. Macon*

Before 1962, there had been one elementary/secondary school desegregation suit filed in the state of Alabama: *Shuttlesworth*. In 1962 there were two pending: *Nelson* and *Armstrong*. By the spring of 1963, there were eight, including the *Hereford* case and two impacted areas suits in Huntsville and the *Davis* case and one impacted areas suit in Mobile. The one other school desegregation suit on the dockets of the federal courts in Alabama that spring would turn out to be the most far-reaching among them, the most jurisprudentially significant, and the most meaningful for the largest number of black school children. Perhaps unsurprisingly, it grew from one of the great seedbeds of Alabama grassroots activism – the city of Tuskegee. The NAACP-LDF’s Constance Baker Motley, LDF associated counsel Fred Gray, and Gray’s partner Solomon Seay, Jr. prepared the complaint, which Gray filed on January 28 in the federal district court in Montgomery. There it landed on the docket of Frank Johnson, giving it the best chance of any of the eight to provide relief without the necessity of appeal.²³

Gray filed the class action complaint on behalf of 16 black students in Tuskegee and their parents, seeking a permanent injunction against the Macon County Board of Education, its individual members, and the superintendent. Like the Birmingham challenge, Gray’s petition focused on the use of dual attendance zones for initial assignment of students, teachers, administrators, and personnel. The plaintiffs acknowledged having failed to exhaust their administrative remedies under the placement law, arguing that this was because “the remedy there provided is inadequate to provide the relief sought.” In other words, they wished to have the court acknowledge what everyone knew – that the

²² *Southern School News*, April, 1963; *New York Times*, March 26, 2011; *Washington Post*, March 27, 2011; Gaillard, *Cradle of Freedom*, pp. 185-6.

²³ *Southern School News*, Feb., 1963; Gray, *Bus Ride to Justice*, pp. 208-9; Solomon Seay, Jr., *Jim Crow and Me: Stories from My Life as a Civil Rights Lawyer* (Montgomery: New South, 2008), pp. 89, 91, 97.

placement law would never be used to bring about that which it was designed to thwart. The placement law had been upheld on its face in *Shuttlesworth*, but it had been, Gray charged, “uniformly administered and applied to the plaintiffs in such a way as to discriminate against them with respect to their constitutional rights under the due process and equal protection clauses of the Fourteenth Amendment and the due process clause of the Fifth Amendment not to be denied admission to the public schools of Macon County, Alabama on the ground of race or color.” Gray also seized the issue raised by the Justice Department and argued that the Macon County school officials had used nearly \$100,000 in impacted areas funding allocated for the dependents of employees at the federal Veterans’ Administration Hospital in Tuskegee. In lieu of a decree enjoining the defendants from operating the dual system, Gray prayed that the court would demand that the school board submit a desegregation plan, which the court could then monitor.²⁴

The case was styled *Lee v. Macon County Board of Education*. The lead plaintiff was Anthony Lee, whose father Detroit Lee had urged Gray to file the complaint in the first place. The elder Lee had come to Alabama from Texas in the New Deal era and had become involved with the Civilian Conservation Corps, later deciding he wanted to attend the city’s famed Tuskegee Institute and emulate his heroes, Booker T. Washington and George Washington Carver. After a brief stint at the Institute, he had worked as a civilian at the air base in Tuskegee during the war and remained in the city afterwards, helping to organize its first NAACP chapter in the meantime, despite what has been described as the Institute’s “historical antipathy” to the organization. He had also quickly become involved with the existing activist organization in the city, the Tuskegee Civic Association (TCA), during its long-running campaign to register the city’s black voters. Tuskegee and Macon County were overwhelming black, and as Sam Engelhardt understood, black voter registration could mean real political power. Lee had been a

²⁴ Lee v. Macon County Board of Education (Civil Action 604-E), Original Complaint, Filed January 28, 1963, in Lee v. Macon County Board of Education Trial Record, Federal District Court House, Montgomery Alabama [Collection hereinafter cited as Lee v. Macon Trial Record].

plaintiff in the landmark gerrymandering case, *Gomillion v. Lightfoot*, in which Gray and the TCA had secured a favorable ruling from Judge Johnson, thwarting Engelhardt's efforts to draw blacks out of the city limits and overcoming Attorney General John Patterson's illegal raid of the TCA offices. The TCA continued to prioritize voting rights activism into the late Fifties, but Lee had other plans. He had come to Fred Gray at that time and asked him to take on the county's segregated school system, offering his eldest son as the initial "test case." Lee had five children, some of whom were attending the county's all-black Catholic parochial school. As a clerk at the VA hospital, the burden of private school tuition was difficult to bear for Lee, but his position as a federal employee also facilitated his brazen activism, which was a driving force in all that he did. Gray and TCA president Charles Gomillion asked Lee to wait until their voting rights cases were settled, when they could all devote more time to school litigation. Gray offered to make the Lees lead plaintiffs in the case when he filed it. When the complaint was finally filed in January, 1963, Lee's eldest son had graduated. And so his next oldest son, Anthony, appeared at the top of the list of plaintiffs.²⁵

Detroit Lee had sent a letter and an accompanying petition the previous September to the county school authorities to set up the litigation. The Macon County Superintendent, C.A. Pruitt, was a former Auburn football player known affectionately as "Hardboy." He acknowledged receipt of the letter and petition but took no action on them, nor did he act on a follow-up letter Lee sent that October. The TCA worked the remainder of the fall to put together a list of willing and appropriate plaintiffs. This was a complicated and serious process that attorneys and activist leaders in *each* case had to undertake. In this case the effort was organized by Lee, Gomillion, and the Reverend K.L. Buford, who would soon spearhead the reorganization of the NAACP in Tuskegee. The group approached families that they thought would be interested or willing and invited them to meetings, at which the

²⁵ Anthony Lee, Interview with the Author, Nov. 14, 2011, Tuskegee, Alabama, digital recording in possession of the author, to be deposited; Anthony Lee, Interview with Brian Landsberg, Sept. 6, 2012, transcript in possession of the author; Gray, *Bus Ride to Justice*, p. 209; Norrell, *Reaping the Whirlwind*, pp. 57-7, 137-8, 166-9.

leaders would tell the parents what to expect. Of course, they had to consider which students would not only be willing to endure what might come, but which would also be scholastically appropriate to be the so-called “test cases.” Generally this meant outgoing students who were also near the top of their respective classes academically, but who at the same time did not mind giving up whatever extra-curricular activities that they were engaged in. The brightest students were not considered appropriate by some, lest they outshine the white students and draw the additional ire of the white community. Anthony Lee was a natural choice as a bright, though not top, student and a rising senior interested in politics and law who had been exposed to the movement at the dinner table with his father. Willie Wyatt was similarly situated. His father was an electrician at the VA hospital, so his family was shielded from economic reprisal. He was also bright and interested in the movement. His parents, he later recalled, “never hid politics from us” children, and so throughout the voting rights struggle in Tuskegee, Wyatt had been exposed to the goals of the movement, the dangers and the intricacies. “I had seen James Meredith go through this,” he remembered, “and my dad talked about Autherine Lucy a lot.” So, he thought simply “that might be something to do.” For each student who agreed to become a “test case,” there had to be, perhaps above all, a measure of courage. As both Wyatt and Anthony Lee later recalled, for all of the selection process’s attention to scholastics and character and even internal squabbles between Tuskegee’s middle and working class leaders, it often came down ultimately to “who was brave enough.” “You don’t think about living and dying at that age,” Wyatt said, “and I had no fear.” At the time, he said, “I didn’t know what fear was.” The gravity of the situation for which they had signed up would become clear enough that fall.²⁶

²⁶ Lee v. Macon County Board of Education, Original Complaint, Jan. 28, 1963, Lee v. Macon Trial Record; Anthony Lee Interview with the Author, Nov. 14, 2011 (Anthony Lee Interview); Willie Wyatt, Interview with the Author, Jan. 4, 2012, Stone Mt., Georgia, digital recording in possession of the author, to be deposited (Willie Wyatt Interview); Fred Gray, Interview with Brian Landsberg, Sept. 6, 2012, transcript in possession of the author (Gray-Landsberg Interview); Gray, *Bus Ride to Justice*, pp. 209-10.

By March of 1963, when *Hereford* and *Davis* joined *Lee v. Macon*, *Armstrong* and *Nelson*, and the impacted areas suits on the federal trial court dockets, the reality of a litigious onslaught began to set in for some Alabama state officials. The federal government had additionally flustered segregationists that month by announcing its intention to operate integrated on-base schools for federal dependents in impacted areas for which it had not yet filed suit, including Montgomery (home to Maxwell and Gunter Air Force Bases), Dothan (home of the Army's Ft. Rucker), and Anniston (home of the Army's Ft. McClellan). State Superintendent of Education Austin Meadows, a died-in-the-wool segregationist with a penchant for outrageous bloviation, told the Alabama Education Association that it was time for the white race to "outwit the forces that would destroy us or delay us in our date with destiny." It was up to the assembled educators, he argued, to teach "racial pride," lest white racial integrity be "doomed." They could obviously no longer look to Washington for federal aid, he said, "unless we get the Constitution of the United States amended to outlaw federal control of education." The state stood to lose millions, Meadows continued, "because there is no Judas Iscariot among us who will sell our racial integrity for the proverbial 30 pieces of silver." At the same time Attorney General Flowers, more realistic in his outlook but just as apocalyptic in his rhetoric, complained to the press that he did not have the manpower to combat so many suits as his office had been tasked with defending, particularly those filed by the Justice Department. In addition to the impacted areas suits, these included a number of voting rights cases seeking records inspection in Black Belt counties. Flowers called the impacted areas complaints the "suits to supersede all suits." If they were successful, he frankly predicted, "it's all over." But he then singled out *Lee v. Macon*, calling it the "most deadly" of all the actions pending. In *Lee*, unlike the impacted areas cases, there were private individuals who had made complaints. The attorney general knew that *Lee* thus had a higher probability of success than the DOJ suits. Of course, there were private plaintiffs in the other pending cases in the state and across the South as well, but only *Lee v. Macon* was filed in Frank Johnson's court, and Flowers knew that too. It

was a case, he worriedly acknowledged, that could constitute the beginning of the end, because it struck, he said, right “at the very heart of our defenses.”²⁷

Birmingham, The “Stand in the Schoolhouse Door,” and the Federal Commitment

At the behest of Fred Shuttlesworth and the ACMHR, the Southern Christian Leadership Conference began a direct action campaign in Birmingham in late March in an attempt to force business moderates’ into significant concessions. The suppression of the protests garnered international attention and widespread condemnation. During the upheaval, Police Commissioner Eugene “Bull” Conner and the rest of the incumbent city administration refused to give way to the duly elected, incoming administration. Birmingham voters, encouraged by the business moderates, had overwhelmingly approved a change from a mayor-commission to a mayor-council form of government and had subsequently elected Albert Boutwell mayor, but sitting mayor Albert Hanes and Commissioner Conner refused to leave office. Litigation soon forced them to relent, but not before Conner ordered the city fire department to use fire hoses and high-pressure water cannons on peacefully protesting children and ordered the police to use the canine squad to intimidate protestors in the city’s Kelly Ingram Park. Images of the seemingly excessive, violent crackdown were broadcast and printed across the country as hundreds of marchers and picketers, including Shuttlesworth, Ralph Abernathy, and famously Martin Luther King, Jr. were hauled off to the Birmingham jail.²⁸

The city’s business moderate cadre was a relatively small group, led by real estate executive and Chamber of Commerce president Sydney Smyer. It included a number of downtown store owners and a few leading industrialists. They spoke for only a very small percentage of the city’s whites, but they had the power and the desire to negotiate a settlement with the leaders of SCLC, namely King and

²⁷ *Baltimore Afro-American*, March 2, 1963; *Southern School News*, April, 1963.

²⁸ Eskew, *But for Birmingham*, 217-97; Thornton, *Dividing Lines*, pp. 231-333; see also, on the movement in Birmingham in 1963, generally, Diane McWhorter, *Carry Me Home: Birmingham, Alabama: The Climactic Battle of the Civil Rights Revolution* (New York: Simon and Schuster, 2001), pp. 303-570.

Abernathy, in late April and early May. Smyer summed up the group's position when he remarked during the negotiations, "I'm no integrationist, but I'm not a goddamn fool, either." Only a fool would have failed to realize that racial unrest, boycotts, and national and international press coverage of police brutality was bad for business, and so Smyer and the others were willing to meet some of the protestors' demands. Shuttlesworth was in the hospital when the group negotiated and subsequently announced an agreement, and he immediately made clear that he felt betrayed by the establishment black middle class moderates who allowed SCLC to accept far less than what ACMHR had initially set out to achieve. The agreement allowed for the desegregation of downtown lunch counters, the gradual removal of "white" and "colored" signs from department store waiting rooms, and a promise to promote and gradually enforce the hiring of black store clerks. Shuttlesworth had his eyes set on much more, including school desegregation. The activist leader dragged himself from his hospital bed and begrudgingly announced the terms of the settlement to the press before collapsing from exhaustion. It was a difficult end for Shuttlesworth, but he could take some solace in the fact that, even then, the *Armstrong* and *Nelson* cases were sitting on Judge Lynne's docket, likely to be decided that summer.²⁹

Klansmen almost immediately attempted to assassinate King by bombing his brother's home in the Ensley neighborhood as well as the A.G. Gaston Hotel downtown, where King always stayed and from whence the settlement had been announced. King had left earlier that day to make it back to Atlanta to preach the next morning and thus escaped the fate the Klansmen intended. Blacks in nearby homes in Ensley, and those brought out from downtown stores and bars by the sound of the Gaston Hotel blast, nonetheless responded by assaulting arriving police at both locations and by engaging in what quickly became the first full-scale urban riot of the 1960s. President Kennedy authorized the mobilization of the Second Infantry Division and the Eighty-Second Airborne. At the same time, the Alabama State Troopers, along with a posse led by Dallas County Sheriff Jim Clark, established their

²⁹ Eskew, *But for Birmingham*, pp. 280-97; Thornton, *Dividing Lines*, pp. 218-19, 330-3; see, for Smyer quotation, Brauer, *John F. Kennedy and the Second Reconstruction*, p. 278.

newfound role as the governor's personal shock troops by descending upon the city at Wallace's order. The troopers and the Dallas posse assisted the Birmingham Police, against that unit's will, in quelling the unrest in short order. King subsequently disengaged from the campaign entirely and left Shuttlesworth to continue to pursue his own, more lofty goals. Shuttlesworth was left to deal with not only the black establishment leaders whom the Birmingham minister blamed for the watered-down agreement, but also a community of black people who were obviously frustrated enough to riot, settlement or not. In May the city itself settled into a fragile peace that almost no one was fully content with. Meanwhile, the plaintiffs in the two Birmingham school cases filed a motion to force Lynne to finally issue a ruling, and Vivian Malone filed a motion before Judge Grooms to consolidate her case with the Lucy case and force the University of Alabama to admit her for the summer semester.³⁰

As the events in Birmingham were reaching a critical stage late that April, U.S. Attorney General Robert Kennedy had secured an audience with Wallace in Montgomery. During the meeting, Kennedy tried to get Wallace to privately assure that he could maintain law and order in the event of school desegregation. Wallace and Seymour Trammell tried to get Kennedy to use his influence to force the NAACP to back off its support for the various desegregation lawsuits. Neither one had budged, and Wallace had announced to the press, "My stand has not changed" on the issue of defiance of school desegregation. In the governor's opinion, Kennedy "did not change in this regard either." The attorney general wanted to avoid the use of federal troops or federalized guardsmen, to avoid another Little Rock or Ole Miss. Wallace wanted precisely the opposite. The presence of federal troops in Alabama would make all of his denunciations of federal tyranny and outside agitation and interference real for the white voters of Alabama.³¹

The violence in Birmingham had caught the governor off guard. Once it had subsided, he began to consider how to exploit tensions surrounding the potential desegregation of the University of

³⁰ Eskew, *But for Birmingham*, pp. 293-304; Thornton, *Dividing Lines*, pp. 330-3.

³¹ *Southern School News*, May, 1963.

Alabama in Tuscaloosa. Wallace was confident he could use Klan contacts like Grand Dragon Robert Shelton to contain violence there if the ultimate payoff would be political triumph in forcing the Kennedys to use federal troops to desegregate the university. In a subsequent meeting with Tuscaloosa banker George LaMaistre, Wallace revealed which of the two outcomes was more important to him. LaMaistre was a business moderate and one of a precious few whites in Alabama who believed segregation was morally wrong. He approached the governor with an appeal to maintain law and order in the event of either elementary and secondary school desegregation that fall, or the seemingly inevitable and more immediately threatening desegregation of the university at Tuscaloosa. The two engaged in a shouting match in the governor's office during which LaMaistre stressed that the *Brown* decision was the "law of the land" and that to disobey it was pointless. Wallace retorted that "law and order" was a "communist term" and that "every time the communists take over, they clamp down with law and order."³²

In May Judge Grooms granted Vivian Malone's motion to consolidate her case with Lucy's and held that the 1956 injunction still applied to the University of Alabama's dean of admissions. He denied a motion for delay filed by university officials, who cited the Birmingham unrest and argued that it would be "extremely unwise" for Malone to enroll that summer semester. Grooms announced that he had taken "judicial notice of the condition that exists in this state," but he argued that the governor had "said that he would maintain law and order." Granting the motion for delay, he argued, "would be tantamount to saying that law and order has broken down." The judge reminded the parties that when he and Judge Rives had allowed for delay in the Lucy case years earlier, the Supreme Court had "promptly slapped both of us down. . . . I don't see," he said, "that I have any alternative about the matter. The court . . . is not a free agent in the matter of school segregation or integration." The university board of trustees declared similar resignation when announcing Malone's acceptance, arguing

³² *Southern School News*, May, 1963; Carter, *Politics of Rage*, pp. 129-30, see for LaMaistre meeting.

that it was “faced with the choice between the admission of some of the applicants or the outright disobedience of the order of the federal court with consequent prison sentences and other severe penalties for the dean of admissions and any successor appointed for him, and everyone else officially connected with the university – which punishment would not prevent the admission.”³³

Wallace immediately declared his intention to make good on his campaign pledges and to block “any Negro who attempts to enroll at the university.” He vowed to use the state’s police power “to see that the laws are faithfully executed” and to “safeguard the health, safety and welfare of the state. . . . I embody the sovereignty of this state,” Wallace said. Thus it was up to him, and him alone, to engage in “legal resistance and legal defiance.” The Justice Department filed for a temporary restraining order against the governor, which Judge Lynne granted, writing that “thoughtful people, if they can free themselves from tensions produced by established principles with which they vehemently disagree, must concede that the governor of a sovereign state has no authority to obstruct or prevent the execution of the lawful orders of a court of the United States.” Lynne proceeded to use the personal pronoun for the first time ever in a written opinion. “I love the people of Alabama,” he wrote, “I know that people of both races are troubled and, like Jonah of old, are ‘angry even unto death’” But it was his personal prayer, Lynne continued, “that all of our people, in keeping with our finest traditions, will join in this resolution that law and order will be maintained” Lynne was a segregationist, but even he understood that Wallace’s brand of outright defiance was beyond the scope of reasonable resistance under the rule of law and within the federal system. “In the final analysis,” he wrote, “the concept of law and order, the very essence of republican government, embraces the notion that when the judicial process of a state or federal court . . . has been exhausted and has resulted in a final

³³ *Southern School News*, June, 1963; *Lucy v. Adams, Malone v. Mate*, *Race Relations Law Reporter* 8.2, Summer, 1963, pp. 448-52.

judgment, all persons affected thereby are obliged to obey it.” Wallace had no intention of going to jail for contempt, but he did intend to milk the situation for all of its political worth.³⁴

For these reasons, Wallace orchestrated the carefully planned charade that – because of his campaign pledge to this effect – became known as the “stand in the schoolhouse door.” The governor prearranged to stand in front of the Foster Auditorium admissions building, seemingly blocking Malone’s path, until confronted by Assistant Attorney General Nicholas Katzenbach, who had been authorized by executive order of President Kennedy to take “all appropriate steps to enforce the laws of the United States.” Wallace, flanked by the shortest state troopers that could be found to make him appear taller for the anxiously assembled press corps, read from a podium a prepared statement decrying and “forbid[ing]” the “illegal act” of enrolling Malone and James Hood. When the governor refused to step aside, a seemingly frustrated Katzenbach walked away and had DOJ officials and U.S. Marshals take Malone and Hood to the dormitories; the two students had actually already registered earlier and had been kept in the car to avoid having to arrest Wallace for contempt. With Wallace still defiantly posturing, though, President Kennedy issued an order federalizing the Alabama National Guard, which was then dispatched to the scene. The general in command of the unit reported to Wallace that it was his “sad duty” to order the governor, again in the doorway of Foster Auditorium, to step aside. Only then did Wallace give way, calling it a “bitter pill” to swallow and part of a “trend towards military dictatorship.” Wallace had gotten most of what he wanted: he had used the state and local police as well as his Citizens’ Council and Klan contacts to ensure there were no riots and no violence of any kind. Yet he had forced the Kennedy Administration to federalize the Guard anyway. So he could the next day lament the federal “military occupation” when conceding the enrollment of a third black student, David

³⁴ *Southern School News*, June, 1963; United States v. Wallace, Memorandum Opinion and Order Granting Injunction, June 5, 1963, *Race Relations Law Reporter* 8.2, Summer, 1963, pp. 453-5.

McGlathery, at the University of Alabama's Huntsville Center. Attorney General Flowers later called the it "the greatest production since Cleopatra."³⁵

The civil rights movement had already begun to push the Kennedy Administration into a firmer commitment. The events in Birmingham had confirmed in the President's mind the need for new civil rights legislation, and the showdown over Vivian Malone's enrollment gave him the opportunity to announce its proposal. Kennedy had already in February requested legislation from Congress with the aim of making the CRD's job of enforcing voting rights law easier, giving HEW the ability to provide technical and financial assistance to desegregating school systems, and extending and enhancing the life of the Civil Rights Commission. In proposing that legislation, the President had appealed to business moderates by arguing that racial discrimination was detrimental to economic growth, to America's international image and prestige, and to the cost of public welfare. Even then he also tried to also make the appeal that so few in Alabama were willing to make. He told the American people flatly that segregation, "above all," was simply "wrong." It should be "clear," in "hearts and minds," he argued, that the fundamental reason for enacting such legislation was "because it [was] right." After the spring protests and suppression in Birmingham, Kennedy had tasked Burke Marshall and DOJ with formulating a new, sweeping civil rights bill aimed at segregated public accommodations and segregated education, and in proposing this, his angle would be the same.³⁶

Wallace's defiant spectacle at Tuscaloosa gave the President occasion to go before the nation and announce the proposed legislation, and again he used an appeal to morality that would remain difficult, if not impossible, to find in the state of Alabama. In his partly ad-libbed speech, Kennedy first lamented that "the presence of Alabama National Guardsmen was required on the University of

³⁵ *Southern School News*, June, July, 1963; United States v. Wallace, *Race Relations Law Reporter* 8.2, Summer, 1963, pp. 453-58, p. 54; Carter, *Politics of Rage*, pp. 133-55, see, for 'military dictatorship' quotation, p.150-1; see, for the 'stand in the schoolhouse door' generally, Clark, *The Schoolhouse Door*; see, for Flowers' comment, *Southern School News*, April, 1965.

³⁶ Brauer, *John F. Kennedy and the Second Reconstruction*, pp. 247-64.

Alabama to carry out the final and unequivocal order of the United States District Court of the Northern District of Alabama,” which had ordered the admission of two “clearly qualified young Alabama residents who happened to have been born Negro.” He then called for Americans to “examine [their] conscience” about “this and related incidents.” The nation was facing, he said, a “moral crisis,” and those who saw fit to “do nothing” were not only inviting violence but also “shame.” Those who chose to “act boldly” were “recognizing right.” Kennedy said he was calling for legislation that would outlaw discrimination in public accommodations and that would “authorize the federal government to participate more fully in lawsuits designed to end segregation in public education.” The “orderly implementation of the Supreme Court decision [in *Brown*]” could no longer be “left solely to those who may not have the economic resources to carry the legal action or who may be subject to harassment.” The issue, the President emphasized, was not sectional, nor was it partisan. It was, of course, legal and legislative, but he argued that “law alone cannot make men see right.” In closing, Kennedy acknowledged that the country was “confronted primarily with a moral issue” which was “as old as the scriptures and as clear as the Constitution.” When NAACP Field Secretary Medgar Evers was shot dead the following night in Mississippi, the country could see that many violent segregationists’ ears were to remain deaf to such constitutional, biblical, and moral appeals.³⁷

The civil rights movement in Alabama had thus pushed the President of the United States into making the connection that the majority of white Alabamians could or would not make. Most segregationists in Alabama were more easily swayed to George Wallace’s martial appeals to defiant resistance than to seemingly weak-kneed appeals to moral conscience and racial equality. One hundred

³⁷ President John F. Kennedy, Radio and Television Report to the American People on Civil Rights, June 11, 1963, Selected Speeches of John F. Kennedy, Kennedy Presidential Library and Museum, Digital Archives, <http://www.jfklibrary.org/Research/Ready-Reference/JFK-Speeches>, accessed September 3, 2012; Brauer, *John F. Kennedy and the Second Reconstruction*, p. 264.

years of Lost Cause history teaching had convinced them that the federal government could be a tyrannical force, and recent events in Little Rock and Oxford and Tuscaloosa had confirmed that they were witnessing a present-day manifestation of this force. They were prepared to “give the word of a race of honor” that they would “tolerate their boot in [their] face no longer” and to eschew “the easy way of federal dictatorship and amalgamation in return for fat bellies.” But black activists had forced the issue not only onto the streets, as in Birmingham that spring, but also squarely into the federal courts, the one and only place where many among them thought the struggle to end segregated education could be effective.

During the summer of 1963, the eight school desegregation actions pending against Huntsville, Madison County, Mobile, Birmingham, and Macon County were waiting to be adjudicated, and the Fifth Circuit appellate court was no longer willing to delay *Brown’s* implementation. It was clear to many that these activists, their newfound allies in the Kennedy Administration, and certain members of the federal judiciary were going to make the fall of 1963 that “most historical moment” which Wallace had portended in his inaugural speech. Though few segregationists were swayed by Kennedy’s impassioned imploration, many were being won over to the cause of “law and order” and were beginning to, as the moment approached, reluctantly accept that absolutely segregated education might be about to meet some sort of end. As these moderates prepared to foster non-violence and compliance, some among them began to channel absolute defiance into peaceful and seemingly compliant evasion. At the same time, some of those who had been rallied to the fight by Wallace’s call to arms prepared to turn his words into violent actions that even the governor would have to abhor.

CHAPTER 6: “THE LAST GRAIN OF SALT FROM THE LEGAL HOURGLASS,” SUMMER, 1963

Just two weeks after the “stand in the schoolhouse door” at Tuscaloosa, George Wallace saw an even greater opportunity to make good on his defiant campaign pledges. He announced on June 28, 1963 his intention to “take appropriate action in keeping with the dignity of [the] state” if pending court action brought the threat of desegregated public elementary and secondary schools to fruition. “At the moment,” Wallace announced, “there is no court order telling us to admit Negroes to our high schools.” But, “whenever the time comes,” the governor said, he would make a “forceful stand” to “prevent tampering” with the state’s “school system.” It was anyone’s guess at that point what sort of force Wallace had in mind, but it was increasingly clear with each passing day that summer that “the time” was coming very soon.¹

Five school desegregation suits were pending adjudication at that point, including five brought by black activists: *Hereford* in Huntsville, *Armstrong* and *Nelson* in Birmingham, *Lee* in Macon County, and *Davis* in Mobile. In addition the U.S. Department of Justice had filed impacted areas suits against Huntsville and surrounding Madison County. Given the willingness of federal judges on the bench in Alabama to thwart or delay civil rights proceedings, it was no surprise that the first judicial rulings in 1963 on these challenges to segregated education were setbacks for the plaintiffs. Blacks pressed the issue, though, with the assistance of not only the Justice Department’s Civil Rights Division (CRD), but the NAACP Legal Defense and Education Fund (LDF). If some federal trial court judges were unwilling to grant relief, the Fifth Circuit Court of Appeals was by then comprised of a majority of justices, backed by recent decisions of the Supreme Court, who felt that the time for delay and intransigence had run out. And in the Macon County case, Judge Frank Johnson proved willing to grant relief without the necessity of appeal. By the summer’s end, time would run out on defending Jim Crow schools from any breach of

¹ *Montgomery Advertiser*, July 21, 1963, reprint of editorial from the *Florence Times; Southern School News*, July, 1963.

the color line. Not everyone was willing to accept the federal courts as the final arbiters of segregation's fate, however. And the ever-looming specter of George Wallace reminded them that they were not alone. With the state still on edge from the recent events in Birmingham, they watched as the drama moved from the streets to the courtroom.

When the first desegregation injunctions were handed down that summer, the reaction amongst whites in Alabama was mostly predictable. Law-and-order moderates began to search for some way to effect minimal compliance without violence or school closure. Other segregationists simply decried the court orders, and lamented black activism, the interference of outside "agitators," and the latest encroachment of the federal government on states' rights. Hardline segregationists in the Ku Klux Klan, the White Citizens' Councils, and other groups planned to frustrate the efforts of the law-and-order moderates. Wallace himself publically called for law and order, but behind the scenes he encouraged the efforts of the hardline segregationists and sought to dissuade the law-and-order moderates from complying. The governor's campaign had been the pinnacle of racial defiance, and his gubernatorial record was about to be marred by more desegregation than had ever occurred in Alabama, and more than had occurred in such a short period of time in any other state in the Deep South. Already, his restless ambitions were turning to creating a national profile for himself. He felt that in order to remain a viable candidate, both within Alabama and beyond, he had to prove that his pledges had not been empty. Fearful of the effect of the governor's potential actions on more militant segregationists, the moderates prepared with a sense of urgency and foreboding for that "most historical moment" of which the governor had spoken only months before.

The Fifth Circuit Four and *Armstrong v. Birmingham*, *U.S. v. Madison*, and *Davis v. Mobile*

In May 1963, Judge Seybourn Lynne provided the first blow to black activist litigants when he refused to order the Birmingham school authorities to desegregate or even to formulate a

desegregation plan. Lynne dismissed the *Nelson* case altogether. The Nelson children had moved to Michigan, had been living there for the duration of the trial, were attending schools there, and were apparently not coming back. Lynne ruled that Rev. Nelson, therefore, had no standing to sue on their behalf. Fred Shuttlesworth's children had also moved to Cleveland, where Shuttlesworth himself would soon move and pastor a church until his death many years later. Lynne dismissed the Shuttlesworth children as plaintiffs in the *Armstrong* case, leaving only the four children of James Armstrong: Dwight, Denise, James, Jr., and Floyd. The judge concluded that it was "graphically" apparent from Superintendent Wright's testimony that the Birmingham Board of Education had "operated a segregated school system based upon race in the past" and that it was "doing so now" with "no plans to discontinue such an operation." He also rejected "out of hand" certain evidence offered by the defense. Lynne was particularly unimpressed with the state-sponsored sociological and anthropological studies on segregation which attacked the major premise of *Brown* – that separate educational facilities were inherently unequal and that their maintenance was a deprivation of equal protection as provided by the Fourteenth Amendment. Lynne's rejection said more about the ambitious defense than about his own views on desegregation, though.²

The judge was swayed by the testimony of a number of defense witnesses who predicted "chaotic" or even "catastrophic" results from "indiscriminate mixing." Following the path of delay opened by the *Shuttlesworth* ruling, Lynne agreed with the defense's claim that the plaintiffs had not properly exhausted their administrative remedies as provided by the Pupil Placement Law. He acknowledged that the Fifth Circuit Court of Appeals had become "especially alert to strike down deviations by district courts from the constitutional norm of *Brown* in sometimes trenchant opinions delivered by able judges." But he argued that the appellate court had not yet been able to rule on the Alabama Placement Law's application. The Fourth Circuit had done so relative to the North Carolina

² *Armstrong v. The Board of Education of the City of Birmingham*, *Race Relations Law Reporter* 8.2, Summer, 1963, pp. 460-65, see also at 220 F. Supp. 217 (ND, AL, 1963).

placement law in the *Carson v. Warlick* case, he noted, and it had upheld that law's application. Lynne could not "sanction discrimination" designed to perpetuate segregation "in the name of the placement law," but he was still not prepared to grant injunctive relief until the school officials' "good faith [had] been tested." Thus the burden of initiating desegregation was, once again, said to be on the black students themselves.³

The Birmingham school board's good faith had, in actuality, been tested for nine years running, and everyone involved knew this. The ruling was intended as a compromise measure, to allow the school board the opportunity to implement some measure of token integration under the placement law and without the necessity of an injunction. Admitting the four Armstrong children that fall, and perhaps a few more here and there in subsequent years, was what Lynne called "discreet desegregation." He and other moderate segregationists considered it far more feasible and palatable than the wholesale reorganization, or "massive integration," that the plaintiffs were seeking. Even if the Fifth Circuit reversed him, Lynne could at least say he had made a valiant attempt to delay and had maintained his judicial integrity.⁴

Attorneys Willie Williams and Ernest Jackson quickly announced the plaintiffs' intention to appeal to the Fifth Circuit. Williams said that he had been "hoping to provide evidence that would satisfy the judge that he had to issue an injunction for massive desegregation at this time, not go on a student-by-student basis." Shuttlesworth was more candid in his reaction, characterizing the decision as generally "against what America promised," adding, "[It] must be appealed at once." He criticized the decision more specifically, saying, "Evidently Judge Lynne has not read the Memphis case in which the U.S. Supreme Court indicated that it is tired of delays in school desegregation." The Birmingham

³ *Armstrong v. The Board of Education of the City of Birmingham*, *Race Relations Law Reporter* 8.2, Summer, 1963, pp. 460-65, see also at 220 F. Supp. 217 (ND AL, 1963); *Birmingham News*, May 28, 1963; *New York Times*, May 29, 1963.

⁴ *Armstrong v. The Board of Education of the City of Birmingham*, *Race Relations Law Reporter* 8.2, Summer, 1963, pp. 460-65, see also at 220 F. Supp. 217 (ND AL, 1963); *Birmingham News*, May 28, 1963; *New York Times*, May 29, 1963.

reverend referred to a decision issued just days before in a public accommodations case, in which the Court applied *Brown* via *Gayle v. Browder* and held that “deliberate speed” could not “countenance indefinite delay.” Williams and Jackson, and Lynne too, were of course fully aware of the Memphis case, as they were of the more immediately important June 3 decision of the Supreme Court in a combined Nashville and Knoxville school case. In that case, the Court held that pupil transfer programs clearly based on race were “one-way ticket[s] leading to but one destination . . . continued segregation.” The Court held that state administrative remedies no longer needed to be exhausted for courts to provide relief, a position it bolstered with a decision in an Illinois school case handed down the same day. In light of these developments, Williams and Jackson had good reason to not only appeal Lynne’s decision but to also enter a motion for a preliminary injunction pending a ruling on the merits of the appeal.⁵

Both the plaintiffs’ and the school board’s attorneys wanted the Fifth Circuit to hear the appeal *en banc*, or with all nine circuit judges sitting. But Chief Judge Elbert Tuttle assigned only a three-judge court consisting of himself, Judges Richard Rives, and newly appointed Judge Walter Gewin. The outlook was not good in either case for the school board, despite the presence on the panel of Gewin. Gewin was a native and resident of Tuscaloosa. Prior to his appointment, he had been a prominent trial lawyer in Birmingham and in West Alabama’s Hale County, which he also represented for a term in the state legislature in the late 1930s and early 1940s. He briefly served in the judge advocate general’s corps in the final year of World War II, after which he served as a county and state prosecutor. The 1961 Kennedy appointee was generally considered to be a strident segregationist, though he was less doggedly so than, for example, Mississippi’s Ben Cameron. He would later soften his position in school

⁵ *New York Times*, May 29, 1963; *Montgomery Advertiser*, May 29, 1963; *Birmingham News*, May 29, 1963; Bass, *Unlikely Heroes*, p. 227. *Browder v. Gayle*, 143 F.Supp. 707 (M.D., AL, 1956), affirmed per curiam, *sub nom* *Gayle v. Browder*, 352 U.S. 903 (1956). See, for the Memphis decision, *Watson v. Memphis*, 373 U.S. 526 (1963); see, for the combined Nashville and Knoxville decision, *Goss v. Board of Education of the City Knoxville*, 373 U.S. 683 (1963). See, for the Illinois decision, *McNeese v. Board of Education for Community Unit School District 187*, 373 U.S. 668 (1963).

desegregation cases and civil rights cases in general, but at the time he could be reasonably expected to side with the school board.⁶

Tuttle and Rives, though, were half of the “Fifth Circuit Four” and were almost sure to side with the plaintiff-appellants. Tuttle himself had issued a ruling just days before strongly rebuking District Judge Clarence Allgood for upholding the Birmingham School Board’s suspension of hundreds of students who had been arrested for their participation in demonstrations in the spring. Tuttle called the arrests “illegal” and the subsequent actions of the school board “shocking.” He agreed to hear the appeal – argued by NAACP-LDF attorney Constance Baker Motley – the very night of the district court’s decision. Williams, Jackson, and Motley were optimistic, then, about the *Armstrong* appeal. In addition to Tuttle’s suspensions ruling, they were aware of several other instances in which the Fifth Circuit court had issued injunctive relief prior to the exhaustion of administrative remedies. They cited seven of these in their brief to the court. In one such case – involving Savannah’s city-county school system – the appellate court overturned the school board’s use of the state of Georgia’s placement law.⁷

The federal district courts continued to frustrate black activists in Alabama, however. A rapid back-and-forth between the trial courts and the appellate court developed that summer of 1963, prior to the opening of schools in the fall. The day after Lynne’s *Armstrong* ruling, Judge Hobart Grooms issued a ruling dismissing the Justice Department’s impacted areas suits against Huntsville and Madison County. According to Grooms, the cases illustrated “the rule that the hand that extends the benefaction may also attempt to control its use.” He agreed with the defendant school boards and state officials that not only did the United States lack the authority to bring the suit in the first place, but it failed to state in its complaint a claim upon which relief could be granted. Grooms noted that the Fifth Circuit

⁶ Bass, *Unlikely Heroes*, pp. 159-60; Freyer and Dixon, *Democracy and Judicial Independence*, pp. 143-5, 205, 213, 271.

⁷ *Birmingham News*, June 26, 1963; see, for the Birmingham school suspensions, Bass, *Unlikely Heroes*, pp. 206-9; see, for legal proceedings in the Birmingham school suspensions case, *Woods v. Wright*, May 22, 1963 (ND, AL and 5th CCA), *Race Relations Law Reporter* 8.2, Summer, 1963, pp. 444-48.

had recently reaffirmed its refusal to consider the U.S. a “person” under the Fourteenth Amendment. He also pointed out, as Burke Marshall and the CRD’s St. John Barrett had feared, that the Congress had not only repeatedly refused to usurp local school systems’ authority, but it had refused to attach desegregation riders to federal education funding bills. Nor had Congress granted the attorney general the authority to bring civil rights suits in any area other than voting rights; indeed, Congress had “deliberately failed” and “deliberately refused” to do so. Grooms argued that the state’s placement law was still constitutionally sound and that no black students in the districts in question had brought complaints arguing discriminatory application of it (although the plaintiffs in the *Hereford* case were seeking injunctive relief against the Huntsville school authorities, which Grooms footnoted without further comment). Finally, Grooms cited a U.S. district judge’s recent dismissal of a DOJ impacted areas suit in Mississippi. He granted the motion to dismiss and suggested that relief for the federal government rested not with the courts but with the Department of Health, Education, and Welfare. “Our cries to Washington have been so loud,” Grooms wrote, “that they muted the claims to local control and states’ rights.” The Justice Department indicated its intent to appeal to the Fifth Circuit.⁸

Plaintiffs in the *Davis* case in Mobile found no easier route to relief than the Justice Department or the *Armstrong* plaintiffs in Birmingham. Sitting on the federal bench in the state’s port city was District Judge Daniel Thomas. A Truman appointee, Thomas had previously been a state circuit solicitor and Mobile County solicitor before serving in the Navy during World War II. He moved to the bench after six years of successful private practice with one of Mobile’s most prominent firms, and he very quickly established himself as a foe of civil rights litigation. By all accounts a very personable, friendly, and likeable judge, Thomas had facilitated some measure of cooperation between business moderates and black activists, namely John LeFlore, in desegregating some of Mobile’s public accommodations. He was nonetheless clearly on the side of the segregationists when the law allowed it, and he routinely

⁸ United States v. Madison County Board of Education, *Race Relations Law Reporter* 8.2, Summer, 1963, pp. 490-1; *Birmingham News*, May 29, 1963; *Montgomery Advertiser*, June 28, 1963.

frustrated civil rights litigation if he thought things were moving too fast. Justice Department attorneys who litigated before Thomas variously described the judge as “weak” and “reluctant.” One DOJ attorney who tried a voting rights case in the Southern District later concluded that Thomas “found civil rights cases distasteful” and that he believed delay in such cases was “a legitimate judicial technique,” particularly if it could be justified as reducing the likelihood of violence. According to the attorney, he was “always careful to follow the minimum of what the law required”; he “repeatedly placed an artificially narrow construction on the law and on higher court decisions”; and he was ultimately “unable to act as a neutral judge.”⁹

Motley later recalled that, in 1963, “everyone in Mobile was ready for desegregation except the federal district judge [Thomas].” The LDF attorney plainly exaggerated – not “everyone” else was ready for desegregation. But she was spot on about Judge Thomas. On April 25, during a hearing at which he refused Motley’s request that the court hear oral arguments, Thomas also refused to rule on the plaintiffs’ motion for a preliminary injunction ordering the Mobile school board to submit a desegregation plan within 30 days. Thomas instead gave each side that same amount of time to file briefs and two more weeks to file reply briefs. By the time the matter was adjudicated, then, it would be too late to order any sort of desegregation for the 1963-64 school year. Thomas knew this.¹⁰

Williams, Jackson, and Motley appealed Thomas’s refusal to rule on the preliminary injunction to the Fifth Circuit. They argued that it was, in effect, a denial of the request, and that this was an abuse of the judge’s discretionary authority. He should have actually ruled on the request for a preliminary injunction promptly, they contended, in light of the fact that the Mobile school system was, without

⁹ Freyer and Dixon, *Democracy and Judicial Independence*, pp. 137-45, 278; Landsberg, *Free at Last to Vote*, pp. 117-120; Landsberg recalls that Thomas’s intransigence was so infamous that a provision of the Voting Rights Act was designed with the Alabama jurist in mind and referred to as “the Thomas amendment.”

¹⁰ Motley, *Equal Justice Under Law*, p. 147; Brian Landsberg, Interview with the Author, March 29, 2012, Digital Recording in possession of the author and to be deposited (Landsberg Interview). See, for proceedings in Davis, *Southern School News*, May, June, July, 1963, Davis v. Board of School Commissioners of Mobile County, *Race Relations Law Reporter* 8.2, Summer, 1953, pp. 480-89.

question, unconstitutionally segregated. The three judge court appointed to hear the appeal consisted of Judges Tuttle, Rives, and Griffin Bell. Bell was a Kennedy appointee from Georgia who was set to emerge as the leader of the court's conservative bloc. He was generally on the other side of the aisle from "The Four" on matters of civil rights and school desegregation. He has also been described, though, as a moderate with "a masterful ability to accommodate competing interests." Bell joined in a *per curiam* opinion denying the plaintiffs' petition and refusing to cite Judge Thomas for abuse of discretionary authority. The ruling carried a "caveat," however. The court held that it was the "duty of Judge Thomas to promptly rule on this motion for preliminary injunction." It added, "The amount of time available for the transition from segregated to desegregated schools becomes more sharply limited with the passage of years since the first and second *Brown* decisions." Therefore, it was the appellate court's duty to "require prompt and reasonable starts, even displacing District Court discretion, where local control is not desired, or is abdicated by failure to promptly act."¹¹

Thusly bound and mildly admonished by the appellate court, Thomas prepared for a quick ruling upon the submission of briefs. In a brief prepared by local defense attorneys and Birmingham's segregation law specialist Joe Johnston, the defendant Mobile school authorities argued that it was not "practicable as an administrative matter" for the school board to submit a plan for desegregation for that fall, as enrollments for particular schools had already been set. The board maintained that "wholesale reshuffling" would undoubtedly result in "chaotic conditions jeopardizing the education of all the pupils, were it to be required on a hurried or 'crash' basis." Judge Thomas agreed and issued an order to that effect on June 24. The plaintiffs' motion could not be granted "as a practical matter, independent of other considerations." Thomas held, "Radical revision of school attendance areas and other far-reaching administrative changes simply cannot be managed within the time available."

¹¹ *Southern School News*, May, June, 1963; *Davis v. Board of School Commissioners of Mobile County*, *Race Relations Law Reporter* 8.2, Summer, 1963, pp. 480-9, see also at 318 F.2d 63; *Montgomery Advertiser*, April 26, 1963.

Indeed, “no plan or basis for general rearrangement of an entire local school system,” the judge asserted, “should be required by this or any court without affording to both the school authorities and the public ample time for consideration and discussion of alternatives.” The imposition of a plan for that fall would be “arbitrary, hasty, and premature,” would “defeat the intended purpose,” and would “create confusion and impair the educational process for all pupils.” Thomas made clear the sort of “alternatives” the court had in mind by citing Judge Lynne’s recent decision in the *Armstrong* case, which was not controlling in Thomas’s court, but which nonetheless did “furnish a sound and appropriate basis for rejecting the notion that the sweeping reorganization proposed by the motion is necessary for plaintiffs’ protection.”¹²

In the same order, Thomas responded directly to the Fifth Circuit’s order requiring his hasty judgment. He argued that time and patience by his court, and cooperation between moderates in the community, had led to the orderly desegregation of the city of Mobile’s public golf course, airport, bus lines, and libraries without the necessity of court orders. “Mobile is perhaps the most desegregated city in the South,” the judge wrote, “with no unfortunate incidents.” Thomas wondered if it would be “too much to ask that [the Fifth Circuit judges] be mindful of ‘that area of discretion in the desegregation process in the District Courts’ left by the Supreme Court in the second *Brown* case” If they would, Thomas was certain that “the mandate of the court will be honestly, conscientiously, and fairly carried out with the least possible, if not complete absence of, unfortunate incidents.” In other words, Thomas was suggesting that if desegregation were limited to delayed token transfers approved via the placement law, then he could ensure the maintenance of law and order in Mobile. If not, there might be “unfortunate incidents.” He set the case for trial on the merits in November and gave the school

¹² *Davis v. Board of School Commissioners of Mobile County*, *Race Relations Law Reporter*, pp. 483-5, see also at 219 F.Supp. 542 (SD, AL, 1963); *Southern School News*, July, 1963; *Birmingham News*, June 10, 25, 1963; *Montgomery Advertiser*, June 11, 25, 1963.

board until then to submit a desegregation plan for 1964-65. Motley and Vernon Crawford quickly announced their intent to appeal.¹³

Just two days later, the *Armstrong* appeal came before the assigned three-judge panel of the Fifth Circuit, sitting in emergency session in Montgomery rather than in the Circuit's home city of New Orleans. Constance Baker Motley, as the far more experienced and nationally prominent attorney among the plaintiffs' counsel, had agreed to argue it before the panel. The plaintiffs were asking for an injunction that would force the Birmingham school officials to desegregate the entire first grade that fall. Motley and her LDF colleagues were seeking similar relief in other cases in the Fourth, Fifth, and Sixth Circuits. Motley was a native of Connecticut and a graduate of New York University and Columbia Law who had been with the LDF since 1945 and had worked with Thurgood Marshall and Robert Carter on the original School Desegregation Cases. Her keen intellect, sharp wit, and professionalism had earned her widespread respect from the men of the federal judiciary, whom she would, herself, join just three years later, as the first African-American woman to be appointed to the federal bench. At the *Armstrong* hearing, Motley confidently called Lynne's recent ruling in the case a "clear abuse of judicial discretion" and emphasized that the Alabama Placement Law was a "subterfuge" and "obviously a device for retarding desegregation." She maintained that the burden for desegregation should not be on the individual black students but on the school authorities, and she argued that courts were going to get "bogged down" if school boards were given a chance to use placement laws. Gewin predictably pointed out that Judge Lynne's ruling had not actually denied anyone access to a desegregated education. Tuttle suggested that Lynne might have at least enjoined the board from the use of the placement law as a means to perpetuate segregation. The lines were clearly drawn even before the

¹³ *Davis v. School Commissioners of Mobile County*, *Race Relations Law Reporter*, pp. 483-5, see also at 219 F.Supp. 542 (SD, AL, 1963); *Southern School News*, July, 1963; *Birmingham News*, June 10, 25, 29, 1963; *Montgomery Advertiser*, June 11, 25, 1963.

hearing. It was fairly clear that Tuttle and Rives were set to reverse Lynne's decision and order some sort of relief be granted, and they did not need Gewin to do it.¹⁴

As the panel of Tuttle, Rives, and Gewin took the *Armstrong* appeal under advisement, the appeal of Judge Thomas's actual denial of the motion for a preliminary injunction in *Davis* came up for a hearing two weeks later, on July 8. It came before a panel of Judges John Brown, John Minor Wisdom, and Bell. Brown and Wisdom quickly joined to reverse Thomas's decision and grant the injunction against the Mobile school board. The court cited the recent Memphis and Knoxville Supreme Court decisions in which the Court had ruled that "deliberate speed" could not "countenance indefinite delay" and that the context of "deliberate speed" had been "significantly altered" by the passage of time. The judges also cited the recent decision in the Savannah school case, in which the appellate court had ruled against the necessary exhaustion of placement-law-type administrative remedies. They rejected both Thomas' argument that desegregation that fall was administratively impossible and his contention that, as they put it, "if . . . action [was] not too hastily taken, the problem [would] work itself out with no strife or similar consequences." The administrative problem was "not one created by the Plaintiffs," but was indeed one of the school officials' own making, insofar as they had ignored the petitioners' request for a desegregation plan for over a year. The school board had not even presented an answer to the original complaint, having only filed a motion to dismiss. With the trial date set for November, this meant that at the very least, the plaintiffs would be denied their constitutional rights for yet another

¹⁴ *Birmingham News*, June 27, 1963; Thornton, *Dividing Lines*, pp. 219-20; Freyer and Dixon, *Democracy and Judicial Independence*, pp. 203-5; Bass, *Unlikely Heroes*, pp. 227-30; see, for an example of Motley and LDF arguing for similar relief in other school cases, *Northcross v. Board of Education of the City of Memphis*, *Race Relations Law Reporter* 7.1, Spring 1962, p. 40; Motley herself had also, by that time, participated in school cases in Atlanta and Savannah, Georgia; Pensacola, Jacksonville, Daytona Beach, and Sarasota, Florida; Hillsboro, Ohio; New Rochelle, Hempstead, and Amityville, New York; and Englewood, New Jersey. See Motley, *Equal Justice Under Law*, and "Integration's Advocate: Constance Baker Motley," *New York Times*, Sept. 11, 1963.

year, and even then Brown and Wisdom doubted whether the outcome would be anything more than “the reaffirmation of the teaching of the *Brown* decision.”¹⁵

The court thus ordered Thomas to enter an order pending the trial of the case on the merits. Thomas was directed to preliminarily enjoin the Mobile school board from failing to make an “immediate start” towards desegregation, including the formulation and submission of a plan by August 1. The court then dictated the parameters of such a plan, mandating the desegregation of the first grade that year and at least one other grade each successive year: the grade-a-year, step-ladder type plan which was becoming increasingly common throughout the circuit. Bell dissented, to no one’s surprise. He argued that the “chance of the disruption of the educational process in Mobile likely to be encountered in planning and effecting the necessary changes on such short notice outweigh[ed] the damage which [might] be incurred by the Plaintiffs waiting another year.” Bell suggested that the “lost year” could be made up by increasing the initial ante to two grades the first year instead of just one.¹⁶

Three days later, on June 12, the panel hearing the *Armstrong* appeal issued its ruling. Judge Rives wrote the majority opinion granting the plaintiffs the injunctive relief they sought against the Birmingham school officials, with Judge Tuttle concurring separately and Judge Gewin strongly dissenting. Judge Lynne’s assertion that the plaintiffs should have exhausted their administrative remedies was, Rives wrote, “directly contrary to the decisions of this court,” including the recent *Bush v. Orleans* ruling. Lynne had relied on a string of Fourth Circuit decisions, which Rives noted were made irrelevant since the June 3 rulings of the Supreme Court in the Tennessee and Illinois cases. Lynne had also argued that no black child had “taken the initiative” to bring about desegregation in Birmingham.

¹⁵ *Birmingham News*, June 29, 1963; *Southern School News*, Aug., 1963; Davis v. Board of School Commissioners of Mobile County, *Race Relations Law Reporter* 8.2, Summer, 1963, pp. 485-7, see also at 322 F.2d 356 (5th CCA, 1963); Watson v. Memphis, 373 U.S. 526 (1963); Goss v. Board of Education of the City Knoxville, 373 U.S. 683 (1963).

¹⁶ *Southern School News*, Aug., 1963; Davis v. Board of School Commissioners of Mobile County, *Race Relations Law Reporter* 8.2, Summer, 1963, pp. 485-7, see also at 322 F.2d 356 (5th CCA, 1963); Stell v. Savannah-Chatham County Board of Education, 318 F.2d 425 (5th CCA, 1963).

Rives argued that, in addition to being simply untrue, this was also irrelevant. The Supreme Court had declared in *Brown* itself, “School authorities have the primary responsibility” for initiating desegregation, not black pupils. When school authorities abdicated this responsibility, failing to show any kind of “good faith” start to desegregation, then the responsibility fell to the district courts, then the appellate courts. At no time was it upon the black students and their families. As for “deliberate speed,” Rives noted again the Memphis and Knoxville Supreme Court rulings, along with the Fifth Circuit’s own May ruling in *Davis* and a June 17 ruling in an Atlanta case, and reiterated that “the time available for the transition from segregated to desegregated school systems” was becoming “more sharply limited with the passage of years.” The plaintiffs had filed their complaint three years prior and were entitled to immediate injunctive relief. However, the court noted its own decision the previous summer in a Pensacola case, in which it held that July was too late to issue an order to desegregate an entire grade in the fall “without any undue confusion.” Accordingly, Rives instead ordered the trial court to require the Birmingham board to submit a plan for the use of the Alabama Placement Law to effectuate desegregation by student choice that fall.¹⁷

Tuttle concurred and agreed “wholeheartedly” with everything that was said in Rives’ opinion, except for the provision for relief. Tuttle argued that the desegregation of an entire grade should have been ordered. He maintained that the Birmingham authorities had “completely failed” to make any start at desegregation. Rather than “accept the excuse” that the board had not “made the necessary preparation,” he suggested, the court ought to required even more. Tuttle wrote, “[When], fortuitously or otherwise, the first applicable order of a district court comes so late in the school year that the Board

¹⁷ *Armstrong v. Board of Education of the City of Birmingham*, *Race Relations Law Reporter* 8.2, Summer, 1963, pp. 466-80, see also at 323 F.2d 333 (5th CCA, 1963); *Southern School News*, Aug., 1963; Bass, *Unlikely Heroes*, pp. 227-9; Freyer and Dixon, *Democracy and Judicial Independence*, p. 205; Thornton, *Dividing Lines*, p. 220. See, for the June 3, 1963 rulings of the Supreme Court, *Goss v. Board of Education of the City Knoxville*, 373 U.S. 683 (1963), *McNeese v. Board of Education for Community Unit School District 187*, 373 U.S. 668 (1963). See also *Watson v. Memphis*, 373 U.S. 526 (1963); *Davis v. Board of School Commissioners of Mobile County*, footnote 8, *supra*; *Calhoun v. Latimer*, 321 F.2d 302 (5th CCA, 1963) (Atlanta); *Augustus v. Board of Public Instruction*, 306 F.2d 862 (5th CCA, 1963) (Pensacola); *Stell v. Savannah-Chatham County Board of Education*, 318 F.2d 425 (5th CCA, 1963).

then attempts to say it is too late to do anything by the following year, I think it is the duty of the appellate court to require a maximum effort by the Board.” Tuttle’s strong concurrence signaled that three of The Four were prepared to order grade-level desegregation if school boards continued to ignore their obligations. Rives was more cautious. In both *Armstrong* and *Davis*, the Alabamian’s mitigation ultimately prevailed. Upon the issuance of the *Armstrong* ruling, Wisdom and Brown modified their own order in *Davis*, writing, “At this initial stage in the travail of desegregating the public schools in Alabama, the School Boards of Mobile and Birmingham face substantially the same social, legal, and administrative difficulties.” At that “early point in the legal proceedings,” when, they concluded, “no school board in Alabama has formulated any plan for desegregation, there should not be one law for Birmingham and another for Mobile.” The Mobile board was thus granted a reprieve, in effect, thanks to Rives’ influence and preference for a more cautious approach. Token desegregation in Alabama would be as token as possible.¹⁸

Judge Gewin was nonetheless compelled to come to the defense of his fellow Alabamian, Judge Lynne. In a sharply-worded 27-page dissent in the *Armstrong* decision, Gewin observed that Judges Tuttle and Rives had “spoken in such inaccurate and disapproving terms with reference to the opinion and order of the distinguished trial judge.” Gewin found it “not only impossible to agree with them,” but necessary to write such a dissent to “inform those who may be interested of my opinion of the actual holding of the District Court.” He asserted that Lynne’s order and opinion, if read properly, “destroy[ed] every reason asserted in the majority opinion for the unusual action taken” The issuance of an injunction pending appeal on the merits, Gewin maintained, was a remedy only to be used “in *exceptional and extreme* cases where there is a *clear abuse of discretion or usurpation of*

¹⁸ *Armstrong v. Board of Education of the City of Birmingham*, *Race Relations Law Reporter* 8.2, Summer, 1963, pp. 469-70, see also at 323 F.2d 333 (5th CCA, 1963); *Davis v. Board of School Commissioners of Mobile County*, *Race Relations Law Reporter* 8.2, Summer, 1963, pp. 487-88; *Southern School News*, Aug., 1963.

judicial power.” There had been no such abuse, Gewin claimed.¹⁹ Judge Bell dissented just as vehemently from the modification of *Davis*. He concurred in it insofar as the modification might have served to “alleviate disruption of the educational process.” But he strongly dissented from the unusually hasty procedural handling of the case, which he said was “done at the expense of the judicial process.” It was not the Court of Appeals’ place to act like a trial court and to “mold and enter an equitable decree affecting an entire school system in a metropolitan community without hearing from the parties on the nature of the decree, and without facts before it to serve as a basis for the decree.” Bell concluded, “More constitutional rights will be lost than gained in the long run” as a result of the court’s action.²⁰

Judge Gewin called for an *en banc* rehearing of the *Armstrong* injunction appeal, as did the appellee school board. Both requests were denied by a 5-4 vote of the entire appellate court. Judge Ben Cameron saw fit to enter a blistering dissent to the denials for rehearing. The conservative judge fully concurred with Gewin’s dissent and, more importantly, lashed out at his fellow circuit judges. Cameron argued that the recent decisions of the court involved “questions of procedure” which had been “plaguing the court . . . for some weeks.” He quoted at length from a recent newspaper piece on the court, noting several passages with undisguised disgust. He lamented the perception that a “‘hard core’ majority” of the Fifth Circuit court had “‘blazed new trails for nearly a decade in the deep south in the civil rights struggle” and had “‘moved at every opportunity” to implement *Brown*, even moving “‘ahead of the Supreme Court” to use *Brown* “‘as a guideline to order desegregation of other facilities.” Cameron also noted the paper’s assertion that the court had “‘repeatedly overruled, and often sharply rebuked, Southern district judges who [had] refused to accept or carry out the Supreme Court’s

¹⁹ Gewin pointed out that Lynne’s order came down before the June 3 Supreme Court decisions, and insisted that any reversal should have been handled after the hearing of the case on the merits. The case was, after all, not one of exceptional or “overwhelming importance.”

²⁰ *Armstrong v. Board of Education of the City of Birmingham*, *Race Relations Law Reporter* 8.2, Summer, 1963, pp. 470-80, see also at 323 F.2d 333 (5th CCA, 1963); *Southern School News*, Aug., 1963.

rulings.” The four judges who had “stood together consistently” in these decisions were, of course, Tuttle, Rives, Brown, and Wisdom. Cameron added, “These four judges will sometimes hereafter be referred to as “The Four.” Cameron then went so far as to accuse Tuttle of gross impropriety, most especially in purposely naming some combination of The Four to all civil rights case panels. He also lambasted Tuttle’s inclusion of only the *Armstrong* panel judges in considering the appellees’ request for an *en banc* rehearing, as well as his agreeing to hear the appeal in the Birmingham student suspensions case by himself. The segregationist judge decried the “crusading spirit” of The Four in general and suggested that the court as a whole had lost the “stature” that it had once enjoyed prior to Tuttle’s chief judgeship. The blistering, personal, and highly unusual dissent was published by West Publishing and leaked to the press in advance. The entire court convened days later to iron out some sort of compromise. Bell and several others were particularly disturbed by the charges against Tuttle. The court agreed to some procedural changes, and Cameron agreed to ask segregationist Mississippi Senator James Eastland to call off an investigation into the court. Cameron had succeeded in tarnishing Tuttle’s image, if not the entire court’s, but The Four were apparently undeterred.²¹

As the historian and former journalist Jack Bass has argued, neither Cameron, nor the other conservatives on the appellate court, nor the reluctant district court judges, could not stop The Four in their drive to “win the battle against delay” of *Brown* implementation. Nor could they stop Tuttle and his three colleagues from transforming the Fifth Circuit into “a powerful force” which, itself, “transformed the legal process by implementing a concept of federalism that finally recognized the full force of federal courts as the primary guardians of constitutional rights.” They were able to weather storms like Cameron’s assault because the law was clear. The segregationist jurists faced a tougher task because the law as the Supreme Court had decided it favored implementation. Delay and intransigence

²¹ *Armstrong v. Board of Education of the City of Birmingham*, *Race Relations Law Reporter* 8.3, Fall, 1963, pp. 890-96, see also at 323 F.2d 333, 352; Bass, *Unlikely Heroes*, pp. 231-47; Frank Read and Lisa McGough, *Let Them Be Judged: The Judicial Integration of the Deep South* (Metuchen, N.J.: Scarecrow Press, 1978), pp. 261-80.

required jurisprudential gymnastics. Once the circuit court's rulings came down in Alabama, there was little that district judges could do, either. As legal scholars Frank Read and Lisa McGough have observed, Lynne and Thomas were typical of southern trial court judges in that they "were deeply concerned about *Brown II*, anxious to delay whenever possible to avoid local upheaval, but nonetheless ready to enforce direct court orders." This was especially so when those orders had been, themselves, the result of orders of the appellate court.²²

Lynne entered an order in *Armstrong* on July 19, as directed, enjoining the Birmingham school officials from operating a segregated school system, including an order to begin desegregating using the Alabama Placement Law. Thomas entered an order in *Davis* on July 26 enjoining the Mobile school board and directing the same. Both the Mobile and Birmingham authorities were ordered to present desegregation plans to the court no later than August 19 in preparation for commencing desegregation in September. The defendant officials in *Davis* appealed for a stay of the order after Cameron, despite not being on the original panel, entered another dissent and request an *en banc* rehearing. The appellate court denied both Cameron's request and the appellees' request, upon which the defendants appealed to the Supreme Court. Justice Hugo Black, a one-time Klansman from Alabama, considered the appeal. Black had already begun to make devout Christian whites in the South wonder if he was a traitor to his region and religion by writing the majority opinion in a landmark case the previous year striking down state-sponsored school prayer. He affirmed to segregationists that he was, at the very least, a traitor to his race, when he summarily denied the Mobile officials' request for a stay on August 16. Just three days prior, Judge Hobart Grooms had been compelled to issue a desegregation order for Huntsville's city schools when the *Hereford* case came before his court on motion for preliminary injunction. Grooms was bound by *Armstrong*, but it was late enough at that point to avoid a requirement for substantial desegregation for the fall. Accordingly, Grooms ordered the school board to

²² Bass, *Unlikely Heroes*, pp. 229-31; Frank T. Read and Lucy S. McGough, *Let Them Be Judged: The Judicial Integration of the Deep South* (Metuchen, NJ: Scarecrow Press, 1978), p. 407.

admit the four plaintiffs, including Sonnie Hereford IV, and to submit by January 1 a plan for desegregation that spring using the placement law. Thanks to the persistent litigation of black activists and the determination of the Fifth Circuit Four, school desegregation, it seemed, was coming at last to Alabama. But the “battle against delay” was far from won. It had only just begun.²³

Frank Johnson and *Lee v. Macon County*

From the time it was filed, the *Lee* case was adjudicated differently than the other school desegregation suits brought in Alabama, simply because it fell on the docket of Frank Johnson. Johnson was the sole federal judge at the time in Alabama’s Middle District. By 1963 he had already proven himself willing to grant relief in civil rights cases when the law was clear, and sometimes when it was not. While he had little tolerance for civil disobedience, he was always sympathetic to the legal struggle to secure constitutional rights. The *Lee* case demonstrated that Johnson was willing to use the full power of the court, even in innovative ways, to ensure that petitioners were able to secure those rights.

Johnson was born and raised in northwest Alabama’s Winston County, where a staunchly independent mountain Republicanism had driven the county’s forebears during the Civil War to seceded, not from the Union, but from the state of Alabama. His father had been a probate judge and, at one point, the lone Republican in the state legislature. The younger Johnson attended law school at the University of Alabama with George Wallace, when a close friendship preceded a lifelong and very public adversarial relationship. He served as an officer in the Army infantry during World War II, saw combat in France and Germany, and was awarded a Purple Heart with an oak leaf cluster and the Bronze Star. He later served in the judge advocate general’s (JAG) corps. He returned to practice law in northwest Alabama and was appointed United States Attorney for the Northern District of Alabama in

²³ *Armstrong v. Board of Education of the City of Birmingham*, *Race Relations Law Reporter* 8.3, Fall, 1963 (*RRLR* 8.3), pp. 888-9; *Davis v. Board of School Commissioners*, *RRLR* 8.3, pp. 901-4, stay denied 84 S.Ct. 10; *Hereford v. Huntsville Board of Education*, *RRLR* 8.3, pp. 908-9. See, for school prayer decision, *Engel v. Vitale*, 370 U.S. 421 (1962).

1953. Eisenhower appointed Johnson to the bench two years later. Johnson's political values and cultural heritage undoubtedly contributed to his judicial commitment to individual rights. But his biographers have recently attributed this obligation more to an "overriding deference to the supremacy of the law" and "an overriding faith in fundamental fairness." These values, they argue, were acquired from family, especially Johnson's father, and reinforced through a learned belief that "fairness could prevail over prejudice," fostered during the judge's time in the JAG corps and as a U.S. Attorney.²⁴

Johnson was a thin, athletic man who invariably sported a pressed, dark blue suit, an understated tie, and an understanding of the issues at law in his courtroom which demanding the respect of all who stood before him. His severe gaze, dangling wire-rim glasses, and deadly serious demeanor intimidated many a young and inexperienced attorney. All who litigated before Johnson, including attorneys for the state, understood him to be a "stern and strict but fair" jurist. Former Civil Rights Division attorney Brian Landsberg described Johnson as a judge who "held attorneys to high expectations, who tolerated no nonsense from either side, and who imparted a sense of dignity and control." He "strictly enforced the laws against discrimination and displayed understanding of the profound effect of racial discrimination on Alabama's African Americans." And he "commanded respect" through his "attire under his black robe, his ramrod posture, his demeanor, his attentiveness, and his familiarity with the issues." Alabama Civil Rights attorney Solomon Seay, Jr. recalled similarly, "If you had a case before Judge Johnson, at the very first hearing, you'd better know everything there is to know about your case, because if you don't, then he's going to know more about it than you. And you're going to be embarrassed." Johnson famously concurred in Rives' opinion in the *Browder* bus boycott case, one of his first. He also wrote the order enjoining interference with the Freedom Rides in

²⁴ Freyer and Dixon, *Democracy and Judicial Independence*, pp. 215-55, 248, 254; see also Jack Bass, *Taming the Storm: The Life and Times of Judge Frank M. Johnson, Jr. and the South's Fight over Civil Rights* (New York: Doubleday, 1993); Tinsley Yarborough, *Judge Frank Johnson and Human Rights in Alabama* (Tuscaloosa: University of Alabama Press, 1981); Frank Johnson, ed. Tony Freyer, *Defending Constitutional Rights* (Athens: University of Georgia Press, 2001).

U.S. v. U.S. Klans, despite his skepticism of civil disobedience and his strong disagreement with the riders' strategy. He forced Wallace to produce voter rolls for the U.S. Civil Rights Commission and threatened to jail the then circuit judge. He refused to grant injunctive relief in *Gomillion v. Lightfoot*, the Tuskegee gerrymandering case, arguing that precedent would not allow it. The High Court reversed, and the relief was granted. When *Lee v. Macon* came before the court, Johnson was the only trial judge in Alabama who had demonstrated that he was sympathetic to rights claims to the point of consistently, if not universally, granting relief in the face of massive public backlash, massive resistance, and near total ostracization for he and his family. His handling of *Lee v. Macon* would show that, when the law was clear and when the injustice was profound, Johnson was willing to stretch the limits of the court's authority to grant meaningful relief.²⁵

Johnson's first innovative action in the *Lee* case came just days after attorney Fred Gray filed, on July 7, a motion for a preliminary injunction. In a highly unusual but not unprecedented move, Johnson ordered the United States to appear in the case, citing similar action in the cases against governors Orval Faubus in Arkansas and Ross Barnett in Mississippi as well as the *Bush* case in New Orleans. Johnson designated the U.S. in this case to appear not just as an *amicus curie*, or friend of the court, "to accord [the] court the benefit of its views and recommendations," but as a "litigating *amicus*," with the "right to submit pleadings, evidence, arguments and briefs, and to participate actively as a party in every phase of said proceedings, including the right [to petition for] such further proceedings for injunctive relief and for contempt of court that may be necessary and appropriate in order to maintain and preserve the due administration of justice and the integrity of the judicial authority of the United States of America." This in effect gave the court the resources of the Justice Department's Civil Rights Division, whose attorneys Johnson greatly respected and trusted. It also meant that Johnson had the additional resources of the Federal Bureau of Investigation (FBI) and, later, the Department of Health, Education, and Welfare

²⁵ Freyer and Dixon, *Democracy and Judicial Independence*, pp. 215-55; Landsberg, *Free at Last to Vote*, pp. 92-3; Landsberg Interview; Seay Interview.

(HEW). The support of the federal executive branch was doubly important at a time when the intervention of Governor Wallace seemed inevitable.²⁶

Lee v. Macon was set for trial on the merits in the fall, but it came up for hearing on the motion for a preliminary injunction on August 13, after such motions had been granted in *Armstrong* and in *Bush*. Johnson would need no unusual maneuvers to grant the injunction, but Fred Gray still had to make his case for desegregation to commence immediately. The hearing was held at the satellite federal courthouse in Opelika, just 25 miles from Tuskegee. Gray represented the plaintiffs, while Assistant Attorney General Gordon Madison represented the defendant school officials. The Civil Rights Division's David Norman represented the United States. Gray called Superintendent "Hardboy" Pruitt and the chairman of the Macon County Board of Education, Harry Raymon, to establish that the Tuskegee Civic Association (TCA) had sent petitions to the board in 1954 and again in 1962. Both men acknowledged that, other than taking the initial petition to the state superintendent for advice, no action had been taken. Gray then introduced records and questioned two of the plaintiff-parents in order to provide an overview of segregated education in Macon County. There were 970 white students in 3 all-white schools and 5,317 black students in 17 all-black schools. The pupil-teacher ratios were generally higher at the black schools. Each white school had indoor toilets, central heating, and hot lunches provided, whereas a good number of black schools still had outhouses, no heat, and no lunchrooms. Black and white children were picked up at the same bus stops, by segregated busses, and blacks were often transported past white schools and taken long distances to black schools. This was particularly relevant for those black students who had to pass two white high schools on the outer edges of the county to come to all-black Tuskegee Institute High in town. The school board's meeting minutes clearly established assignment of teachers by race. Gray also established that the school system received federal funds as part of the impacted areas program and that it put that money into its general

²⁶ *Lee v. Macon County Board of Education*, Order of July 16, 1963, *Lee v. Macon Trial Record*; Landsberg Interview.

fund, from whence it financed hundreds of thousands in construction of segregated schools. It was impossible not to acknowledge that the Macon County system was a compulsory biracial, or “dual,” school system.²⁷

Johnson knew this to be the case, and his ruling was probably a forgone conclusion considering his record and the recent rulings of the Fifth Circuit. Madison had filed a motion to dismiss prior to the *Armstrong* and *Davis* rulings, arguing that the state’s placement law could be applied if black students actually applied under it. Johnson was unmoved. He had, in fact, carefully read the *Armstrong* opinion and probably would have ordered more demanding relief had that decision not been limited to enjoining placement law application pending a full hearing of the case on the merits. At the end of the *Lee* hearing, Johnson turned to Pruitt and Raymon with his characteristically stern and intimidating gaze, through the ever-present wire rim glasses resting on the end of his nose, and he asked if the school system had a plan for effecting desegregation. It did not, of course, but the two officials said they were willing to formulate one. Were they willing to assign students through the placement act, to notify administrators, teachers, and pupils of this possibility, and to generally cease any practice or policy that was designed to require the separation of races? They assured him that they would abide, fully and in good faith, by any order of the court. Pruitt and Raymon had no intention of defying a federal court order, but they would have to have such an order before they would acquiesce to any desegregation. This would prove to be the preferred position of a number of school boards across the state. As Johnson later remembered, school officials would meet with Johnson after proceedings had been initiated and say, “Now judge, we know we are going to have to desegregate our school, but we have to have a court

²⁷ Frank Johnson, Handwritten Notes from Aug. 13, 1963 Hearing in *Lee v. Macon County Board of Education*, in *Frank Johnson Papers: Lee v. Macon Case File*, Container 20, Folder 9; Brian Landsberg, Incomplete Draft of Forthcoming Book on *Lee v. Macon County*, in Possession of the Author (Landsberg, *Lee v. Macon County Board of Education*).

order to do it. We can't live in the community without a court order.'" Johnson recalled that the court would then "give them a court order, get cussed for it," and "they would go back and implement it."²⁸

Johnson obliged the Macon officials on August 22. He found that the board was clearly operating a compulsory bi-racial school system and had taken no steps to desegregate. He also found that Raymon and Pruitt had "recognize[d] and candidly "acknowledge[d] that under the law they [had] the primary responsibility of taking the initiative in bringing to an end the operation of a school system that violates the constitutional rights of a large majority of the citizens in Macon County." They had further assured the judge that they would submit by December 1 a plan for desegregation and that they would immediately, that September, begin to admit black students to white schools using the placement law. Johnson cautioned, "Needless to say, the failure on the part of the Board to administer the Alabama Placement Law without regard to race or color will result in the law's being struck down on the basis of unconstitutionality," per the *Shuttlesworth* decision. Finally, the CRD's Norman asked Johnson to require the defendant officials to report to the court on any transfer applications it received, with explanations as to the action taken thereon. Johnson agreed to modify the order to require the reporting, allowing the court to monitor compliance with the assistance of the Justice Department. Macon County thus joined Huntsville, Birmingham, and Mobile as the sites where school desegregation would become a reality in Alabama's public schools for the first time, in only a few weeks' time.²⁹

Joining those school systems would be a number of schools on federal military bases in the state. The Huntsville impacted areas suit awaited appeal of Judge Grooms' dismissal, but in the meantime, HEW had begun to construct on-base schools at several federal installations where impacted

²⁸ Frank Johnson, Handwritten Notes from Aug. 13, 1963 Hearing in Lee v. Macon County Board of Education, in Frank Johnson Papers: Lee v. Macon Case File, Container 20, Folder 9; Brief in Support of Defendants' Motion to Strike and Dismiss, May 24, 1963, in Frank Johnson Papers: Lee v. Macon Case File, Container 20, Folder 10; Frank Johnson, Handwritten Notes on Armstrong v. Board of Education Opinion, in Frank Johnson Papers: Lee Macon Case File, Container 20, Folder 10; Bass, *Taming the Storm*, see for "cussed" quotation, p.231.

²⁹ Lee v. Macon County Board of Education, Order of August 22, 1963, *Race Relations Law Reporter* 8.3, Fall, 1963, pp. 909-12, see also at 221 F.Supp. 297.

areas suits were not pending. As August drew to a close, new facilities at Ft. Rucker (near Dothan in the Wiregrass region), Ft. McClellan (outside Anniston), and Maxwell Air Force Base (in Montgomery) all prepared for desegregated openings.³⁰ When schools were on-base and educated only the children of federal personnel, there was very little that local officials could do about it. Federal dependents attending off-base public schools were another matter, and in those cases resistance was significant, as at Huntsville and Mobile. Segregationist alarm was thus increased by a letter sent to school officials earlier that month. The Department of Defense (DOD), by way of Secretary Robert McNamara himself, wrote superintendents in impacted areas and informed them that DOD was ordering its base commanders in Alabama to assist interested black service personnel in enrolling their children in local white schools for the coming fall term. The letter from McNamara also asked that the school authorities provide DOD with information regarding their systems' racial policies and transfer procedures. The affected school boards – including Selma, Dothan, and Montgomery – were, in the words of the superintendent of the Selma system, “very non-committal about the whole thing.” They generally hid behind the placement law and turned the letters over to their respective attorneys.³¹

Most whites in Alabama prepared to enter the fall of 1963 with their school systems securely segregated. For segregationists in Huntsville, Birmingham, Tuskegee, and Mobile that August, though, time had run out. Black activists had been forced to carry their rights claims to the federal courts of Alabama. Even there it took the commitment of a group of appellate judges and one trial court judge to grant them the relief they sought. There was no mistaking that desegregation was coming, and coming very quickly. The *Birmingham News* acknowledged as much when it wrote that these cities were about to experience what a number of cities across the South had experienced over the years since *Brown*: “the trickling of the last grain of sand from the legal hour glass.” But the federal courts could not see

³⁰ A desegregated elementary school had actually been in operation, unbeknownst to most segregationists, on Selma's Craig Air Force base for some time.

³¹ *Birmingham News*, Aug. 9, 28, 1963.

white students through the doors of white schools. It was left for the school boards, city officials, plaintiffs' attorneys, community leaders, and most especially the students themselves, to make the court orders something meaningful. Standing against them were sure to be defiant segregationists who refused to accept the decisions of a bunch of "integratin', scalawagin'" federal judges. As the sand settled, there was precious little time for reaction and preparation before a small contingent of black students breached the walls of segregated education.³²

Segregationists React

When the *Armstrong* and *Davis* injunctions came down, law-and-order moderates in Birmingham and Mobile formed community organizations to meet the looming challenges within the confines of the law. One such group, dubbed the Community Affairs Committee (CAC), was created by Birmingham mayor Albert Boutwell and the newly installed city council. The group of community leaders boasted over 200 members, 20 of which were black, and it was headed by Southern Bell Telephone vice president Frank Newton. The committee was intended to be a biracial advisory board for the mayor, much like a similar committee that had long existed in Mobile. Boutwell urged the members at an inaugural meeting in July to look to the past only to "learn its lessons and avoid its mistakes" and to seek "knowledge and understanding on both sides." The mayor's eloquent words faintly masked the begrudged acceptance that characterized ardent segregationists in the aftermath of the federal court rulings that summer. "Here tonight," the once defiant segregationist told the committee, "a dream begins to unfold" which could be the beginning of Birmingham's "finest hour." It was, Boutwell said, a "solemn . . . hopeful and historic occasion." Newton cut more closely to the chase when he told the audience, "The time has come when we must take a position and stand on it . . .

³² *Birmingham News*, Sept. 1, 1963.

united.” According to Newton, the point of departure for everyone ought to be the law. They might not all agree on the law as presently construed, he argued, but in the meantime, the law had to be obeyed.³³

Just outside Birmingham’s City Hall, where the CAC meeting was being held, Robert Shelton gathered with a group of pickets drawn from his statewide United Klans of the Confederacy. When the Klansmen were removed by police, they moved to another meeting of white moderates at the city courthouse, dubbed “Public Education Peacefully.” A group was meeting there to discuss ways to keep schools open amid widespread and longstanding threats of closure. Shelton’s men heckled the attendees, took to the floor themselves, and repeatedly shouted down the meeting’s organizers, disrupting the proceedings to the point that the meeting broke up in futility. Moderates in Mobile at the same time formed a group they called Alabamians Behind Local Education (ABLE). The committee’s president, a Mobile pediatrician’s wife, expressed the sentiment that indicated what little space stood between the state’s moderate segregationists and Shelton’s pickets. “We don’t want to argue the relative merits of segregation or desegregation,” she maintained, “but we believe that each of us has an individual responsibility to let official local leadership and our fellow citizens know that we stand on the side of law, order, and public schools.”³⁴

A number of the state’s newspaper editors – generally among the more educated and moderate segregationists in the state – urged compliance and the maintenance of law and order. Among these was the editor of the *Birmingham News*, who encouraged the city’s leadership to “face up to the reality, finally, of such a decision [in *Armstrong*] affecting this community” and to negotiate with black leaders as to “what shall be done in search of an arrangement to satisfy the court.” The *News* also advised Boutwell and the city council to “deal frankly with the citizenry generally as to the necessity of a concrete compliance if Birmingham schools are to be kept open as they must.” The most fundamental task was to “develop further a full public will to maintenance of order as this new application of law,

³³ *Birmingham News*, July 15, 16, 18, 1963.

³⁴ *Birmingham News*, July 15, 16, 18, 1963; *Southern School News*, Aug., 1963.

however regrettable [to] most, is met [with] a responsible citizen's awareness that compliant action is unavoidable." The *News* later expressed gratitude that the CAC was prepared to meet the challenge head on, as were the city's new police authorities. These people had reaffirmed their "intent to uphold law and order." These were "not tired terms," it argued, "but the basis for our civilization." It was particularly agreeable that "personal feelings . . . not affect obligations to the law." The *Huntsville Times* agreed, admitting that the decision in *Hereford* was "a surprise to no one." It was a decision that, "however popular or unpopular," would have to be "enforced." The Huntsville school authorities had "taken every legal road" possible to avoid desegregating, "in keeping with the wishes of a majority of people" in the city. But "the end of that road [had] been reached." The *Times* urged the city to be "sensible" and to "decide firmly on a course of maturity and dignity." The "law," it wrote, "unpalatable though it may be, must be obeyed." The state's white clergy chimed in as well. The *Alabama Baptist* reported on a meeting of some 800 preachers called by the Birmingham police chief and the Jefferson County sheriff. The lawmen urged the preachers to counsel their congregations on the maintenance of law and order. The *Baptist* applauded the meeting, at which "the merits or demerits of the segregation or integration problem were not discussed." The Christian weekly maintained that "all Christian people should carry out the directions in the Bible to respect those who have authority over them (the state)," which simply meant that Alabamians should "be law abiding citizens," nothing more or less.³⁵

In a letter to the editor of the *Birmingham News*, a Birmingham woman decried this continued reliance on a message of law and order and moderation for sheer lawful compliance's sake. She was among a decided minority willing to say what not even some members of the Council on Human Relations would say publically: that segregation was simply wrong. After attending the "Public Education Peacefully" meeting, she rapped both the state's clergy and its moderates for failing to act as forcefully as the "rabble rousers" like Shelton and his men who incited "mob violence" and gave "lip

³⁵ *Birmingham News*, Jul 15, Aug. 10, 17, 1963, reprinting on Aug. 17 an editorial from the *Huntsville Times*; *Alabama Baptist*, Sept. 5, 1963.

service” to their religion. Ending school segregation was a “moral issue,” and “the clergy should years ago have been taking a united stand and preparing their congregations for this.” She also argued that Alabamians should “let the moderates and those who have shut their eyes to what has been happening also take some of the blame.” Someone needed to, she said, because the state was “surely due for great trouble ahead.”³⁶

As some had predicted, law and order appeared to break down even before the scheduled opening of school in Birmingham that fall, and moderates redoubled their calls for reluctant compliance. In August Klansmen bombed the home of black attorney Arthur Shores. Someone teargassed a downtown department store. And Mayor Boutwell himself began to receive threats of the same happening to his home, prompting an around-the-clock watch of the property. The *News* wrote that Birmingham could not “tolerate any one of these” things, and it especially could not expect a non-violent opening of schools in just days if people continued to “imperil” the same by “flout[ing] law and order.” It was counter-productive, the paper held, for “loud mouths” to continue “whipping people up,” shouting ““Communist!”” and ““resist, resist, resist!”” Everyone knew that “the best constitutional lawyers in the state [had] fought to hold fast to Southern customs and tradition” only to “come to the end of the rope.” If Birmingham were to “have a community where men, women, and children [could] walk in safety,” then it “must have law and order.” If the city did not stop the “misguided zealots” and maintain some sense of “decency and respect for law,” then it could only “expect more trouble as school desegregation forcibly [came] to Birmingham” in only two weeks.³⁷

One week later, as civil rights activists descended on the nation’s capital for the March on Washington for Jobs and Freedom, the CAC began final preparations for the opening of school. The *News* lauded these efforts and praised the group for trying to meet the “painful school order imposed upon the city by the federal courts.” It captured the mood of the city’s whites, writing that “few, if any

³⁶ *Birmingham News*, July 24, 1963.

³⁷ *Birmingham News*, Aug. 21, 28, Sept. 1, 1963.

. . . view the court requirement other than with great concern,” but “equally few” stood for school closure. It was imperative that all work together to uphold the law, “regardless of what any individual may feel about the court’s directive.” It was time, according to the *News*, to “face fact” and to commit to token desegregation rather than to court violence or to listen to the “‘close ‘em!’ people.” School officials had studied the problem carefully for years and had “fought a tough fight to keep desegregation from coming,” the *News* maintained, and they had done it with the help of Joe Johnston and Reid Barnes, two of the best constitutional lawyers in the state. But now there was “nothing to do but to keep schools open and do what the court says has to be done.” And desegregation had to “be done,” even if everyone knew that “almost no whites see this as other than harmful to both races.”³⁸

Whites in Alabama continued to express nuanced positions in frequent letters to the editors of the state’s major newspapers. While some counseled law and order and support for open schools, many urged continued defiance and evasion. The clear majority was in agreement that school desegregation was wholly undesirable. An Albertville man indicated as much when he wrote the editor of the *Birmingham News* to argue that his “racial position” was “very simple.” He did not remember having “ever mistreated a Negro,” and he hoped that God would “continue to give [him] the good judgment not to want to.” But rather than condemn segregation, he chose to condemn black “agitators.” After invoking the Lost Cause and denouncing President Kennedy as a “Northern President who is an arch enemy of the South, bent on destroying us with every means at his command,” he declared, “God bless the colored people who have not been involved in the recent Alabama racial disturbances because they recognized it was wrong [to demonstrate].” A Birmingham man reacted with similar ire, only he directed his at federal judges and the *News* itself. “It seems to me,” he wrote, “that Gov. Wallace speaks for the people of Alabama when he calls the federal judiciary ‘infamous.’” He wondered rhetorically, for whom did the federal judges speak? The answer was clearly not “the people”

³⁸ *Birmingham News*, Aug. 21, 28, Sept. 1, 1963.

of Alabama. Insofar as the *News* had opposed Wallace's stance, it ought to have been ashamed for treating "such an issue and such a man [Wallace] with callous indignity." It was "unforgivable." Another Birmingham man pointed the finger to integrated schools in Washington D.C., wherein "attempted rape, assaults, chasing girls and even teachers, and innumerable sex affronts" were commonplace. How could anyone, he wondered, "dare say that integration here will and can work?" A Birmingham woman condemned the assertion of inevitability. "Inevitability," she argued, "states that we know it isn't desirable, but wrong is going to prevail anyway, so let's just make the best of it." The acceptance of this line of reasoning, and therefore of token integration that fall, would only delay the "amalgamation" of the next generation, and so she could "not accept the fact that anything as wrong as integration is inevitable."³⁹

By far the most favored and effective method of denunciation was to attack law-and-order moderates, particularly those who openly opposed Wallace. State officials who had the audacity to clash with the governor publically were an especially popular target. Lieutenant Governor James Allen had broken with Wallace even before their respective inaugurations and had counseled moderation. Allen in July told a meeting of the Alabama Circuit Solicitors Association that despite the "unholy alliance between the executive and judicial departments," the attorneys of the state needed to stand "four-square against the day of the demagogue" and mold public opinion along "constructive lines." A former Allen campaigner told the lieutenant governor in a letter that he was "distressed" by his "disparaging remarks about our governor." Allen should have been Wallace's "good right arm in his stand for segregation," not his critic. "The people gave you a mandate," he wrote, "to halt the destruction of the white race. History proves that racial integration destroys civilization." Therefore, "when a white man fails to stand for segregation, he is destroying his own children and grandchildren." The former supporter thought that Allen would do well to remember that his "greatest heritage" was his "white

³⁹ *Birmingham News*, July 10, 23, 24, 27; August 25, 1963.

face,” and that “it should mean more than money or political expediency.” Birmingham’s business moderates received similar censure. One *Montgomery Advertiser* reader observed that the city to the north was “about to be betrayed into the hands of the enemy.” In this man’s opinion, “the first step down the road to destruction was in replacing men with courage and a desire to fight for freedom [Bull Conner and Arthur Hanes] with a group of moderates, who [were] too weak to govern Birmingham.” The people should let their elected officials know that Alabamians had “no intention of turning their city over to the Kennedy brothers or to a howling lawless mob of agitators who show no respect for law and order or the rights of others.”⁴⁰

A Lowndes County man captured the core of the defiant segregationists’ fear of the law-and-order moderate segregationists. Lowndes, in the central Black Belt, was home to a large black population that significantly outnumber the county’s whites. Ray Bass was a die-hard Lowndes segregationist and a man keenly aware of the dangerous situation in his hometown of Hayneville. The threat of desegregation would soon allow him to emerge as a county leader by haranguing moderates, organizing resistance, and ultimately courting the favor of Governor Wallace. He told the *Advertiser* that “the situation [was] much more involved than little white children sitting in classrooms with little Negro children,” although that was deplorable enough. “This is merely an initial step,” he wrote, “in the undermining and deterioration of our American system and the complete takeover of our economy and government.” Bass argued, “Once you start giving, you can’t stop till it’s all gone. There will be no compromise.” Birmingham’s Edward Fields, Information Director for the National States’ Rights Party (NSRP), echoed Bass’s sentiments and offered the solution much preferred by many segregationists. The NSRP was an Indiana-born neo-Nazi organization headed by one J.B. Stoner, a local attorney who, by the estimation of one historian, had engaged in more racially motivated bombings than perhaps any other individual in the South. Fields was a chiropractor who ran the NSRP’s headquarters in

⁴⁰ *Montgomery Advertiser*, July 5, 23, 1963.

Bessemer, from which he disseminated its organ, the *Thunderbolt*, in which he variously called for the execution of the justices of the Supreme Court, the expulsion of blacks to Africa, and the expulsion of Jews to Madagascar. He simultaneously headed his own Christian Knights of the Ku Klux Klan. Fields and a group of 200 followers delivered a petition bearing 30,000 signatures to Governor Wallace late that summer, asking that he “close every school that mixes races and help us provide education for students in private schools.” From the capitol steps, Fields cited the great hope of segregationists who favored school closure: Prince Edward County, Virginia, where the local authorities had closed their schools. The private schools in Prince Edward, according to Fields, were “the finest schools the county ever had.” Of course the county’s black children had no such private schools because, in Fields’ understanding, the black community was unwilling to support them. Drawing heavy applause when he derisively referenced “Martin Luther Koon,” Fields argued that “somewhere along the line we must draw the line.” Token integration, he said, would only result in 20 times as many black students in white schools shortly thereafter. The only sensible answer was school closure. Wallace’s close advisor Seymore Trammell quietly assured Fields that the governor was prepared to support action along those lines.⁴¹

In the face of such vehement condemnation, defiant rhetoric, and angry activism, even average law-and-order moderates often felt stifled. A Montgomery woman lamented all of the “emotional ranting and raving” and argued that “nowhere is there an outlet for expression here in Montgomery for the moderate, the liberal, or simply the average man-in-the-street who is thoroughly confused by this problem.” The moderate, she felt, “was not free to discuss the problem with his political or social leaders, his minister, or even friends, relatives and neighbors.” The climate was “so fraught with emotion and hysteria” that the moderate “finds lifelong relationships (even his livelihood) at stake.” Political leaders who were simply “willing to consider both sides of the situation are publically

⁴¹ *Montgomery Advertiser*, July 3, Sept. 1, 1963; Carter, *Politics of Rage*, pp. 164-8.

humiliated and denounced as cowards, even though they make their stand at tremendous odds. It takes far more courage to stand up against your own kind than against outsiders.” In closing she offered the words of the great southern novelist William Faulkner, who had recently counseled moderation, saying, “Segregation is going whether we like it or not. We no longer have a choice between segregation and desegregation. The only choice we have is, how, by what means.”⁴²

A group of white parents in Birmingham petitioned the Fifth Circuit Court of Appeals for a stay of the injunction in *Armstrong v. Board of Education*, claiming that their children were in imminent danger. The situation in Birmingham was tense. Many simply assumed that violence would erupt if schools were desegregated. How could the court subject their children to the threat of physical or emotional harm just to satisfy a group of agitators? Ironically, it was Walter Gewin who wrote the order denying the petition. Gewin had dissented from the appellate court’s initial *Armstrong* desegregation order to the effect that he thought District Judge Lynne’s order was perfectly acceptable. But even he knew the value of law and order. “The issues here have long been settled by decisions of the U.S. Supreme Court,” he wrote, namely by *Cooper v. Aaron*. “Law and order cannot be preserved,” he continued, “by yielding to violence and disorder, nor by depriving individuals of constitutional rights decreed to be vested in them by the Supreme Court.” To even the cautious jurists of the Fifth Circuit, it seemed that certain issues had been settled. Neither parents nor officials could hide behind the threat of violence when the courts had ordered desegregation. Many segregationists accepted, then, that desegregation of certain of Alabama’s public schools that fall was inevitable. George Wallace pretended not to be one of them.⁴³

Wallace and the members of the Alabama state legislature continued to operate as if the question was not settled. Wallace condemned the recent Fifth Circuit rulings in *Armstrong* and *Davis*,

⁴² *Montgomery Advertiser*, July 26, 1963; *Birmingham News*, Aug. 26, 1963.

⁴³ *Armstrong v. Board of Education of the City of Birmingham*, *Race Relations Law Reporter* 8.3, Fall, 1963, pp. 899-901; see *Petition for Intervention and Stay*, Charles H. Smith, et al., Intervenor, at 323 F.2d 333 (5th CCA, 1963).

saying he resented “three judges in their ivory towers who care nothing about the people they govern.” They were, he said, “trying to destroy the freedom of everything that lives within the boundary of this nation except Communists and Socialists and agitators.” The governor praised a bill which had passed the state House earlier that August and which would require classroom segregation by sex in integrated schools. “Should we be faced with integrated classrooms,” Wallace argued, the preferred solution would be that “boys and girls go to separate schools.” There was also a bill pending in the legislature which would throw that roadblock before the forces of miscegenation. But George Wallace had bigger plans for defying the impending court orders than another round of segregationist legislation. As September crept ever closer, and as moderate local officials prepared to implement the courts’ orders in Huntsville, Birmingham, Tuskegee, and Mobile, Wallace began to plot some sort of defiant gesture which might dwarf his first “stand in the schoolhouse door.”⁴⁴

Last Minute Preparations

Preparations underway in all four affected cities in the final week of August illustrated that law-and-order moderates were ready to comply, but only to the extent necessary. In Huntsville the school board had balked at submitting any sort of desegregation plan that proposed any more than the court required. Superintendent Raymond Christian testified at a hearing before Judge Lynne that “mass desegregation would completely disrupt our school system.” He and the school board had gotten the injunction that they required. They could safely go back and face other segregationists in the white community. They were prepared to work to ensure that Sonnie Herford IV, John Andrew Lewis, and David Piggie were peacefully admitted to local all-white elementary schools and that Veronica Person was admitted to a local junior high. Since vehement and defiant opposition to desegregation was less prevalent in the relatively progressive north Alabama city than, essentially, everywhere else in the state,

⁴⁴ *Southern School News*, Aug., 1963.

Christian was not overly concerned that, come the scheduled opening of schools there on Tuesday, September 3, the students could not be successfully enrolled.⁴⁵

Developments in all but Huntsville revealed that defiant segregationists were just as active as law-and-order moderates. And the defiant segregationists had the support and encouragement of the governor. Preparations in Tuskegee, in particular, demonstrated both the frenzied preparations of law-and-order city and school officials and the doggedly defiant resistance of the majority of segregationists. Sam Engelhardt, the former state senator, White Citizens' Council director, and state highway director, had fallen on hard times. His highway department administration had been marred by charges of malfeasance, and the U.S. Civil Service Commission had charged him with violating the Hatch Act. As head of a state agency which operated largely on federal loans and grants, Engelhardt had violated the act by simultaneously serving as the head of the state's Democratic Party. With the once-towering figure of all-out defiance thus forced to the margins, law-and-order moderation began to prevail upon many of Tuskegee's officials. The Macon County school board and superintendent were chief among them.⁴⁶

Just days after Judge Johnson's August 22 order in *Lee v. Macon*, the Macon County school board received nearly 50 applications for transfer from black students. The board members and Superintendent C.A. Pruitt had accepted the force of the federal court order and were ready to move forward in good faith and, as Pruitt himself said, to try to bring "mature thinking into the community." The school board brought the applicant students in and administered standardized tests of mental maturity, of personality, and of scholastic aptitude, and began to whittle down the applicant pool to a number it thought the white community could accept. The school authorities and an observer from the Justice Department combed through the results of the tests, along with those of past standardized

⁴⁵ *Southern School News*, Sept., 1963; *Washington Post*, Sept. 8, 1963.

⁴⁶ *Engelhardt v. United States Civil Service Commission*, 197 F.Supp 806 (MD AL, 1961); see for this and the investigation into Engelhardt's Highway Department, Sam Engelhardt Papers, ADAH, passim.

examinations and observations of the students' behavior during the week's round of testing. Anthony Lee found himself among those accepted, as he showed observers "an ability to adjust with a normal degree of ease" and gave indications that "with the proper motivation [he] would succeed." Twelve others joined Lee on the accepted list, representing grades eight through twelve; they would transfer from all-black Tuskegee Institute High to all-white Tuskegee Public High. Thirty-five other students were denied on account of low test scores or damaging observations. The Justice Department passed recommendation to Judge Johnson on Thursday, August 29 that the board had faithfully executed a reasonable selection process, and the students and the board began to prepare in earnest for the state of Alabama's first desegregated school day less than a week away. Schools were scheduled to open in Tuskegee on Labor Day, Monday, September 2, earlier than anywhere else.⁴⁷

The Tuskegee Civic Association (TCA) quickly organized a meeting for the accepted students and their parents, held that Thursday night at Reverend K.L. Buford's Butler Street Methodist Church. In addition to dispensing with logistical practicalities – such as where the children should gather for the bus in the morning – Buford, Fred Gray, and Detroit Lee all spoke to the families about what to expect, what to do, and what not to do. They could expect to be yelled at, to be spat upon, to be generally harassed, but they were to take no retaliatory action whatsoever. After impressing this upon the students, Buford opened the meeting up to questions. The first raised hand was white. Seated in the very back of the church was John Doar, the Assistant Attorney General for the Justice Department's Civil Rights Division (CRD). Doar was a Wisconsin Republican who had been with the CRD since the Eisenhower administration. He was instrumental in igniting the division's more active enforcement under the Kennedy Administration, and he had quickly become a fixture on the southern civil rights front. He had come to Alabama to ensure that the United States' interest in *Lee v. Macon* was protected, and this

⁴⁷ Norrell, *Reaping the Whirlwind*, pp. 138-9; "Applications for Transfer to Tuskegee Public School, Term Beginning September 2, 1963, Approved and Denied," Frank Johnson Papers: Lee v. Macon Case File, Container 20, Folder 9.

included the protection of the black school children who were about to enter the belly of the segregationist beast. Doar was flanked that night by U.S. Marshals and other attorneys from the CRD. He rose to assure the children and their families that the Justice Department and the Marshals were there, and would remain there, to ensure their safety, even if that meant following the school bus every day – and it would. Doar also reinforced what Buford and the others had said: that despite what may happen, this should be a non-violent undertaking on the students' end. Whether it would be so on the other end remained to be seen.⁴⁸

Across town that same night, the Tuskegee High Parent Teachers Association (PTA) hosted an informational meeting in the high school auditorium to inform white parents about impending desegregation and to answer what questions they might have. Like the school board, the PTA was prepared to foster peaceful compliance despite disapproval. Local Methodist minister and PTA president Ennis Sellers had told the city's whites after the ruling was handed down that it might be "a dose we don't like," but he argued, "let's go ahead and make the most of it." A great many of the 400 white Tuskegeans who attended the meeting that night vehemently rejected this suggestion. Nonetheless, Sellers, Superintendent Pruitt, school board president Harry Raymon, and Tuskegee High principal Ed Wadsworth all tried to make the case for desegregation's inevitability and the need for peaceful and full compliance. When Sellers turned the meeting over to questions, it became immediately clear that such a case had not been convincingly made. Woodrow Ruff, a clerk at the local state-run liquor store, rose to suggest that the school board postpone the opening of school and contact Governor Wallace to see what he could do in intervention. An accountant named David Jenkins and his wife had personally been to see the governor. They told the crowd that Wallace had assured them he could provide bus transportation for white students to attend other schools and that he could call a special session of the state legislature to have the county's schools closed, if that was what the white

⁴⁸ Willie Wyatt Interview; Landsberg, *Free at Last to Vote*, pp. 27-8.

people of Tuskegee wanted. A local salesman named Tip Morgan suggested that the school board had let the Justice Department and the FBI dictate which black students were accepted and all but accused the board members of ignoring Wallace's offer for assistance. Pruitt tried to defend the school authorities by saying that he and Raymon had indeed met with the governor and heard his offers but that there was nothing, they believed, that he could do in the face of a federal court order.⁴⁹

A man in the back stood to assure the group that something could be done, and was indeed being done already. He was Hugh Adams – neither an educator, nor a parent of a Tuskegee student, nor even a resident Tuskegee. He was the assistant director of the State Building Commission and a member of the Montgomery Private School Commission. He told them that Wallace was already planning to close any desegregated schools and to assist in opening private white schools in their stead. Whites in Prince Edward County, Virginia were still operating under such a scheme with impunity. In fact, both the Montgomery Private School Commission and the governor had been in contact with school officials in Prince Edward in the hopes of learning any lessons they might have to offer. The commission had even sent observers to Virginia. Adams urged the Macon school board, in front of 400 angry white residents, to postpone the opening of school until arrangements for private schooling could be made. He offered a direct line to the governor for anyone who wanted reassurance.⁵⁰

A number of moderate local officials rose in defense of the school board and in opposition to postponement and private schooling, including the Macon County commissioner, a city councilman, and the county's state representative. Two teachers also rose in defense of the board and stated their commitment to remain at Tuskegee Public despite desegregation. One of the teachers tried to assure the crowd that the 13 black students were of above average intelligence and could conceivably get along

⁴⁹ Memorandum from Captain R.W. Godwin and Lieutenant E.J. Dixon to Major W.R. Jones, Commander, Investigative and Identification Division, Aug. 29, 1963, Governor's Administrative Assistant Files (GAAF), SG 19974, ADAH; Norrell, *Reaping the Whirlwind*, pp. 140-3; *New York Times*, Sept. 1, 1963.

⁵⁰ Memorandum from Godwin and Dixon to Jones, Aug. 29, 1963, GAAF, SG 19974, ADAH; Norrell, *Reaping the Whirlwind*, pp. 140-3; *New York Times*, Sept. 1, 1963.

very well at the white school. Desegregation was working fine in other places, he argued, could it not work in Tuskegee as well? The most impassioned defense of compliance was then made by local banker, Chamber of Commerce president, and law-and-order moderate Allen Parker. Parker asked, if Orval Faubus had failed to prevent desegregation in Arkansas; if Ross Barnett had failed to prevent it in Mississippi; if even George Wallace himself had failed to prevent it in Tuscaloosa; then what made anyone think Wallace could prevent it now? He could stand in the schoolhouse door at Tuskegee just as he had at the University of Alabama, and the result would be the same. The white school would still be desegregated upon the arrival of federal troops, or perhaps even after an Ole-Miss-style riot. Immediately after Parker sat down, a postal worker rose to demand that the community take a stand against any form of desegregation of the schools, even if the inevitable result was bloodshed. The communists, NAACP, and federal government would not stop until the white race was destroyed, he argued, and so they must not stop in their fight in resistance. Parker and others began to wonder if a reasoned defense of law and order was futile.⁵¹

Unbeknownst to many of those present, there were Alabama State Troopers in the crowd that night at Tuskegee Public. Two officers from the Investigative and Identification Division of the Highway Patrol, Captain R.W. Godwin and Lieutenant E.J. Dixon, had been sent that day to Tuskegee on a fact finding mission, with the directive to “obtain as much information as possible concerning the integration of Tuskegee public schools.” Wallace had recently renamed the Alabama Highway Patrol the “State Troopers,” which revealed the manner in which the governor used the department in matters of civil rights “agitation” – as a personal paramilitary unit. And so it was that the two investigators ended up in Tuskegee interviewing white residents on the morning of August 29, gathering information for the governor. They generally found that whites in the overwhelmingly black city were apprehensive and that “integration of the school did not sit well with the residents of Macon County.” Many were afraid

⁵¹ Memorandum from Godwin and Dixon to Jones, Aug. 29, 1963, GAAF, SG 19974, ADAH; Norrell, *Reaping the Whirlwind*, pp. 140-3; *New York Times*, Sept. 1, 1963.

of losing black business and resentful of what they felt was a federal “show of force.” The lawmen claimed that someone invited the two to the PTA meeting that night. They attended and took detailed notes on what each speaker had to say and reported back to their commander, who relayed the information to Colonel Al Lingo, director of the Department of Public Safety and head of the troopers. Two local state troopers were at the meeting as well and relayed information to the investigators after the meeting about “staunch segregationists” in the community who were planning to take action. Action, they said, might mean parents pulling their children from school or officials making a Wallace-esque stand in the door. One man had claimed he and others were ready to “start killing . . . some Niggers.”⁵²

Lingo reported what he had learned to Governor Wallace. The urgent comments from defiant segregationists were exactly what Wallace wanted to hear and what he had hoped to find when he ordered the investigation. This might have affected what the state policemen had reported, but they also faithfully reported the few comments they received and overheard from law-and-order moderates as well as those from defiant segregationists. In any case, the governor and his advisors had been formulating some sort of response to school desegregation that would allow the governor to make good on his many defiant pledges in the short term, to initiate the establishment of private white schools in the long term, and to accomplish all of this without inviting a contempt citation. The consensus was that the administration should use its many segregationist contacts to encourage disorder, so that the governor could then order the closure of the affected school systems under the guise of maintaining law and order. Thus had word filtered down to Hugh Adams, who went to Tuskegee and unofficially spoke for the governor at the PTA meeting, suggesting school closure and contacting the governor for help.⁵³

⁵² Memorandum from Godwin and Dixon to Jones, Aug. 30, 1963, GAAF, SG 19974, ADAH.

⁵³ Memorandum from Godwin and Dixon to Jones, Aug. 30, 1963, GAAF, SG 19974, ADAH; Thornton, *Dividing Lines*, p. 339; Carter, *Politics of Rage*, p. 167.

A similar process of gubernatorial encouragement was occurring at the same time in Birmingham. Albert Boutwell had committed his administration to fostering reluctant compliance and opposing any sort of school closure. He made a number of public admonitions to maintain law and order, obey the directives of the court, and accept the good faith efforts of the Birmingham school board. In addition to creating the biracial Community Affairs Committee, the mayor organized the creation of a biracial subcommittee of the CAC on schools, chaired by local Methodist minister H. Frank Ledford. It was Ledford who had encouraged police chief Jamie Moore and sheriff Melvin Baily to exhort the city's white ministers to preach law and order. But the forces of defiance were more active. The court's acceptance of the Birmingham school board's desegregation plan on August 19 had brought about the Klan bombing of Shores' home. In the days that followed, Edward Fields and the National States' Rights Party held a series of rallies in support of continued segregation and began to encourage Birmingham's white high school students to boycott classes in any desegregated schools. The week of rallies culminated in the presentation of the petition at the state capitol building in Montgomery. A similar petition was presented to the governor by the white supremacist Birmingham Regional Association for Information and Needs (BRAIN), which also held a rally at Birmingham City Hall. Ku Klux Klan Imperial Wizard Robert Shelton held a rally at Graymont National Guard Armory, across from Graymont Elementary, slated for desegregation. Yet another white supremacist group, The United Americans, began to lobby for school closure. Bull Conner and former mayor Art Hanes continued to complain about their ouster and to encourage resistance to anything the Boutwell Administration did. Wallace and his advisors actively encouraged such efforts and even privately assured Fields and Shelton that any physical disruption of the desegregation of schools would not be hindered by the state troopers. Fields himself later recalled that Al Lingo personally told him that if he "waged a boisterous campaign against the integration of schools and petitioned the governor for the closing of such schools and held demonstrations in front of those schools on opening day, that this would give Governor

Wallace reason enough to close mixed schools." Then Seymore Trammel reiterated the governor's encouragement when Fields and his company marched on the capitol on Saturday, August 31.⁵⁴

When Fields returned from Montgomery to Birmingham on Sunday, September 1, the NSRP set up a command center of sorts a few blocks from Graymont Elementary and Ramsey High School. The Birmingham school board had revealed that it had accepted the applications of Dwight and Floyd Armstrong to attend Graymont, that of Richard Walker to attend Ramsey, as well as those of Patricia Marcus and Josephine Powell to attend West End High. Fields planned to lead flying columns of white supremacist volunteers through police lines and onto the school grounds where they would proceed to destroy the schools rather than allow them to be desegregated. Birmingham schools were set to open on Wednesday. Wallace himself spoke to a crowd of anxious and angry working-class whites in the city that Sunday night and told them he "had a few secrets for Birmingham," where schools were scheduled to open on Wednesday, September 4. The governor said that he had plans for "other places" too. Those "other places" were obviously Tuskegee, Huntsville, and Mobile, where schools were set to open on Monday, Tuesday, and Thursday, respectively.⁵⁵

In Mobile the school board had accepted the force of federal court orders and was moving to comply, albeit as minimally as possible. The plan the board's authorities had submitted to Judge Thomas was just as limited as the others. The board had rejected "any general or arbitrary reassignment of pupils . . . according to any rigid rule of proximity to school or solely by request on the part of parents of pupils" because this would be "impractical and a disservice to the system, to the local schools, and to the pupils transferred." The Mobile officials accepted only two transfer requests, those of Henry Hobdy and Dorothy Davis, who had applied to attend Murphy High. When Judge Thomas's approval of the plan became public and Mobile braced for desegregation, a few voices of moderation could be heard. The city's lone moderate on the city commission, former Folsomite state senator

⁵⁴ Thornton, *Dividing Lines*, 336-40; Carter, *Politics of Rage*, pp. 164-8.

⁵⁵ Carter, *Politics of Rage*, pp. 167-9.

Joseph Langan, called for law and order and peaceful compliance. Langan had long been willing to court the city's growing black vote and was becoming a go-between for the city's white power structure and its black leaders like John LeFlore. His cautious moderation had made him popular among the city's liberal population. At the same time, a group of 26 of the city's more liberal Protestant ministers issued a mild statement calling for prayer and "clear thought," saying "defiance of laws and of court orders is neither the right answer nor the solution to our problems." All but two of the ministers who signed the statement were Episcopal or Presbyterian. The city's Methodist ministers approved the statement by a majority vote but refused to publish the names of those who voted. All but one of the city's Baptist ministers refused to have anything to do with the statement. Finally, the city's newly formed citizens' group calling itself Alabamians Behind Local Education (ABLE) sprang into action. ABLE affiliated itself with the Council on Human Relations and boasted 200 or so upper middle class members, all white, who published pamphlets, organized informational meetings, and produced a brief television spot. The group's professed goals were modest and decidedly law and order: "open schools instead of no schools and a peaceful community instead of racial violence."⁵⁶

Defiant segregationists in Mobile were equally active in their preparations for and reactions to the *Davis* decision. The city was home to an active chapter of the ultra-conservative political advocacy group, the John Birch Society, whose wealthy and influential members had been expressing opposition to desegregation for some time. Fields and his National States Rights party were also active in the city. Fields himself sent thousands of printed petition forms for local NSRP operatives to pass out on downtown streets and at shopping centers. The petition read, "We the undersigned white citizens of Alabama petition you [Governor Wallace] to close every school that mixes races and help us provide an education for students in private schools." Local segregationists also joined forces with Citizens' Council

⁵⁶ Richard Pride, *The Political Use of Racial Narratives: School Desegregation in Mobile, Alabama, 1954-1997* (Urbana: University of Illinois Press, 2002), pp. 38-45; Kirkland, *Pink Sheets and Black Ballots*, pp. 49-51, 88, 114; *Southern School News*, Sept. 1963; *Davis v. Board of School Commissioners of Mobile County*, District Court Approval of Plan, August 23, 1963, *Race Relations Law Reporter* 8.3, Fall, 1963, pp. 907-8.

leaders across the state to successfully organize the city's first active Council. A few days after Judge Thomas's approval of the Mobile school board's plan, on Friday, August 30, 1,000 whites gathered at a Mobile National Guard armory to hear Birmingham's Art Hanes and newly installed state Citizens' Council executive director Leonard Wilson speak against desegregation. The Mobilians might have remembered that Wilson had organized the student wing of the Autherine Lucy riots as an officer in the Tuscaloosa Council and a pre-law student from Selma. The accomplished young segregationist assured them that Alabama law allowed parents the freedom to choose to attend all-white schools and that the Council would appeal for some adherence to that law. The Council was also in the process, he told them, of encouraging a student boycott along the same lines as that being planned in Birmingham, in addition to trying to promote the harassment and intimidation of Hobdy and Davis. Wilson told them flatly, "You don't have to send your children to an integrated school." Hanes' speech was lighter on substance but hit the right nerves for the segregationist audience. The former mayor attacked the Kennedy Administration as soft on communism and encouraging to racial "agitators" bent on "fomenting a race war." The South, he said, was "the last bastion of race pride," and it was "the stronghold of true nationalistic feeling." This is why it was the target of "left-wing abuse. They say the Civil War was fought one hundred years ago," he said, "but I tell you that the Civil War is just starting."⁵⁷

The Second Stand in the Schoolhouse Door

At dawn on the morning of Monday, September 2, George Wallace issued Executive Order Number Nine of the Governor of Alabama. The "threat of forced and unwarranted integration of the public schools of this state," it read, had created "conditions calculated to result in a disruption of the peace and tranquility of this state and to occasion peril to the lives and property of the citizens thereof." The governor had been convinced that there was "reasonable cause to apprehend breaches of the

⁵⁷ *Montgomery Advertiser*, Aug. 23, 1963; *Birmingham News*, Aug. 30, 1963; Pride, *The Political Use of Racial Narratives*, pp. 39-40; *New York Times*, Sept. 1, 1963.

peace by force and violence throughout this state which cannot be speedily suppressed or effectively prevented by law enforcement agencies . . . if the source of trouble is allowed to exist in several localities at the same time.” On these grounds, Wallace ordered the Macon County Board of Education to postpone the opening of Tuskegee High School until the following Monday, “for the sole and express purpose of allowing the Governor . . . to preserve the peace, maintain domestic tranquility and to protect the lives and property of all citizens of the State of Alabama.” He simultaneously issued Executive Order Number Ten, which directed that the Tuskegee Police and Macon County Sheriffs be “organized as a unified force under the control and direction of the governor acting through the Director of the Department of Public Safety,” Al Lingo.⁵⁸

Thus began the opening act of Wallace’s second “stand in the schoolhouse door,” even as schools in Charleston, Baton Rouge, and Memphis were desegregated without such interference. Having built his political image on defiance of federal intervention and outside “agitators,” and a dogged defense of the racial status quo, Wallace could not allow the peaceful desegregation of several of the state’s school systems to pass without some sort of challenge. The *New York Times* wrote that the governor was “trapped by his own words” and could “find no avenue of escape when opposition to massive resistance began to manifest itself across the state.” He desperately wanted to force the Kennedy Administration to make a show of federal force. He just as badly wanted to prevent law-and-order moderates, whom he knew decried desegregation, from complying. He had set up the coming drama by reaching out to the more defiant segregationists, by fomenting that defiance and even violence, and by sending in investigators to confirm the seemingly imminent eruption of the same things he was even then encouraging. The climate he had helped create, therefore, became the legal rationale for his intervention into a local situation in which the local authorities had made no pleas for outside

⁵⁸ Executive Order Number Nine of the Governor of Alabama, in Governor’s Administrative Assistant Files, SG 19974, ADAH; Executive Order Number Ten of the Governor of Alabama, in Governor’s Administrative Assistant Files, SG 19974, ADAH.

assistance. But Wallace felt vindicated by those defiant segregationists who had spoken up at the PTA meeting in Tuskegee, by a petition he had received from Tuskegee residents urging him to intervene, and by a number of other petitions and phone calls he had received. It may have been simply all part of Wallace's latest political chicanery, and the local authorities might have bristled at his interference. But a great many whites in Tuskegee welcomed the arrival of the state police that morning.⁵⁹

A state trooper delivered the governor's order to Superintendent Pruitt at his home as a cadre of just over 100 troopers began to encircle Tuskegee High School. The steel-helmeted police prevented angry parents, including Ennis Sellers, from pushing through the lines with their children as others denounced the governor's intervention. The county solicitor called it the "invasion of Macon County." Allen Parker was also particularly critical, arguing that in foiling the well-laid plans of the law-and-order moderates, Wallace had "alienated his own supporters." Pruitt and the school board summoned the advice of state Attorney General Richmond Flowers, who rushed to Tuskegee that night and told them that not only did Wallace lack the authority to do what he was doing, but allowing him to close the school could result in their being held in contempt. Accordingly, Pruitt announced that he and the others had "determined [that] their primary duty [was] to operate the schools of Macon County." Any other course, he argued, "would bring troops into our county." Wallace sent advisors to Tuskegee to try and persuade the board to ignore Flowers and obey the order, but the officials balked. The governor immediately responded by issuing a statement confirming that Executive Order Number Nine had been issued based upon "clear and convincing evidence gathered by extensive investigation of the Alabama Department of Public Safety." The "erroneous interpretation" of the order by Attorney General Flowers was "unfortunate" and "a pity," the governor said. Wallace surmised that Flowers had probably been intimidated by the Justice Department officials, who had been at the Macon school board offices "constantly." Nonetheless, the governor reaffirmed that it was his duty to "maintain peace and order,"

⁵⁹ *New York Times*, Sept. 8, 1963; Norrell, *Reaping the Whirlwind*, pp. 145-7; Carter, *Politics of Rage*, pp. 162-3; Brauer, *John F. Kennedy and the Second Reconstruction*, p. 292-3.

and that Tuskegee High absolutely “[would] not open before” Monday, September 9. He told the press that he was no Neville Chamberlain; he would indeed “fight like Churchill.” That night he successfully pressured school officials in Huntsville to postpone the next day’s scheduled opening of school there. Wallace was digging in.⁶⁰

Completely lost in the whirlwind surrounding the governor’s charade was the enrollment that Tuesday morning of 12 white students at previously all-black (albeit with all-white instructors) St. Joseph’s Catholic School in Huntsville. Catholic Spring Hill College in Mobile had long been the first integrated institution of higher learning in the state, since admitting blacks for the first time in 1954. But St. Joseph’s became the first private elementary or secondary institution to desegregate when these 12 enrolled. The former director of child development at Huntsville’s Alabama A&M University, Elnora Lanier, remembered that “hardly any of the white families who integrated St. Joseph’s were natives of Huntsville.” NASA and the Army drew migrants to the “Rocket City” from all over the world. Many of these families were able to accept desegregated education on some level or another. The same could not be said for the majority of Tuskegee’s white families, of course.⁶¹

Meanwhile, that Tuesday morning, Wallace had Al Lingo reduce the trooper force at Tuskegee to supplement the larger force being assembled in Birmingham, the next school system set to open and desegregate. The governor’s first choice was to persuade the school board to postpone the opening of schools, but he was prepared to repeat his actions at Tuskegee if necessary. Wallace tried to pressure the longtime segregationist Boutwell into convincing the board to leave the schools closed. Boutwell resisted until Wallace questioned his commitment to white supremacy and reminded him that even one

⁶⁰ *Southern School News*, Sept., 1963; Norrell, *Reaping the Whirlwind*, pp. 144-5; Governor George Wallace, Statement on Executive Order Number Nine, in Governor’s Administrative Assistant Files, SG 19974, ADAH.

⁶¹ Phil Petrie, “Black Catholic School First to Integrate in Alabama,” *The Crisis* 110, No. 6 (Nov.-Dec., 2003): p. 13; “History” of Holy Family School (St. Joseph’s), <http://www.holy-family-school.com>, accessed March 31, 2013; “Spring Hill College,” *Encyclopedia of Alabama* Online (Alabama Humanities Foundation, A Service of Auburn University and The University of Alabama, 2007, Updated 2012), <http://www.encyclopediaofalabama.org>, accessed March 31, 2013; “History of Spring Hill College,” <http://www.shc.edu>, accessed March 31, 2013.

black student in a white school was too many. Boutwell agreed to at least ask the board to join in filing a motion for preliminary injunction on behalf of petitioning parents of white children. The school board's attorney was the segregationist Reid Barnes, who had fought against the *Alexander* and *Nelson* suits. Barnes knew the danger of taunting the court with defiance. He urged the school board not to give in to Wallace, and they did not. That evening the school authorities and the city council presented a united front to the Wallace Administration, arguing that Birmingham did not need state troopers or gubernatorial orders. It could handle desegregation and maintain law and order just fine itself. The school board decided to try and limit the potential danger area to one school the following day. It postponed the enrollments at Ramsey High and West End High and prepared to go ahead only with enrolling Floyd and Dwight Armstrong at Graymont Elementary. Wallace reluctantly ordered the troopers to remain on standby in area hotels. The governor knew that Edward Fields and company, to say nothing of the Klan, were prepared to disrupt the process and prove him right. Burke Marshal flew to Birmingham to assess the situation and quickly returned to Washington to confer with Attorney General Robert Kennedy. Both men knew Wallace wanted a federal intervention. That night the Justice Department released a statement arguing, "Gov. Wallace knows [that] the schools will be opened and the Negro students will attend them in accord with the orders of the courts. We hope it will be accomplished swiftly by the people of Alabama and their officials."⁶²

On Wednesday morning, Birmingham schools opened, and the Armstrong boys registered at Graymont: the first black students to be successfully enrolled at public white elementary or secondary schools in the history of the state of Alabama. Unfortunately for Fields and his posse of 65 volunteers from the NSRP, they started their disruption parade at West End, where there was a strong contingent of Birmingham Police but no black students. When they moved on by motorcade to Graymont, they recruited a number of onlookers and attempted to rush the police line around the school, only to be

⁶² Thornton, *Dividing Lines*, pp. 340-1; *Southern School News*, Sept., 1963; *Los Angeles Times*, Sept. 8, 1963.

repulsed. One protestor was arrested for throwing a rock. After an unexpected and bothersome rain shower, the frustrated motorcade continued to Ramsey, where four more people were arrested for taunting and assaulting the police, who once again held their ground to the horror of the NSRP contingent. Fields retired to his hotel room, ominously accompanied by Klan leader Robert Shelton and Klansman Robert "Dynamite Bob" Chambliss. Mayor Boutwell that afternoon praised the police for maintaining law and order. That night Klansmen again bombed Arthur Shores home, which was still under repair from the August bombing. Shores and his wife escaped serious harm, but blacks took to the streets in Smithfield in larger, angrier numbers than ever before, assaulting responding police and passing whites. When the riot had been successfully quelled, four policemen, six white passers-by, and eleven blacks had been injured, and John Coley, an unarmed black onlooker, had been shot to death by police. Wallace went to work trying to convince Barnes and Superintendent Theo Wright that the board must cancel all classes. Barnes broke first and polled the board, which voted to postpone school indefinitely and to join in the parents' petition for an injunction, which had already been submitted to the court. Wallace had already resolved to call out the troopers to surround the schools, and he finally had the school board's backing and could muscle out the city police to enforce the board's order. Just after 4 o'clock in the morning, Wallace announced that "the Birmingham Board of Education has acceded my request to close temporarily the three schools scheduled to integrate."⁶³

Wallace was also able to convince the school board in Mobile to postpone at least the scheduled attendance that Thursday of Hobdy and Davis, though schools opened for everyone else there, and state troopers remained on standby. The Mobile school board president publically denied being pressured by Wallace. Privately, officials admitted that the governor had used legislative influence as a bargaining chip, in addition to ordering the uninvited state troopers to the city. The Huntsville authorities were proving to be more of a problem for Wallace. The school board flatly rejected another request for delay,

⁶³ Thornton, *Dividing Lines*, pp. 341-3; *New York Times*, Sept. 8, 1963; *Southern School News*, Sept., 1963; Carter, *Politics of Rage*, pp. 169-71.

with one member saying the board wanted “the governor and his troopers to stay out of here.” The mayor of Huntsville said that his city neither needed nor wanted state police assistance. A number of other city officials publically criticized the governor for his interference. One city councilman called Wallace “the dictator of Alabama,” while another shrewdly asserted that the governor was “doing the very thing he [was] accusing Kennedy of doing.” Meanwhile, with schools closed in Birmingham, a large portion of the state trooper contingent there moved on to Huntsville. Wallace again invoked the police power vested in him as governor, for the avowed purpose of maintaining “peace and tranquility.” On Friday morning, the troopers in Huntsville failed to stop a group of 25 angry white mothers who told them they “should be ashamed of [themselves]” and who marched through their lines to enter one school and register. Other parents jeered the troopers, shouting “go home where you belong!” and “I think it’s ridiculous!” Revealing the diversity of the city’s population, a Redstone Arsenal employee wondered in a thick German accent, “Is this America,” because “this reminds me of East Berlin.” The troopers blocked Sonnie Hereford and the three other black students, accompanied by agents from the FBI, from entering the schools to which they were assigned.⁶⁴

The Kennedy Administration was biding its time, knowing that Wallace wanted a federal show of force. A spokesman for the attorney general acknowledged the governor’s actions, saying, “Wallace is trying to provoke us to open the schools by force.” The Justice Department “would rather not accommodate him if it can be avoided.” The federal courts, however, were forced into action that Friday by motions for injunctions against Wallace in *Armstrong* and *Hereford*. The parents’ petition in intervention in *Armstrong* had been submitted directly to the Fifth Circuit. In his designation of a three-judge panel to hear it, Chief Judge Tuttle was perhaps cognizant of the recent public criticism of Judge Cameron. Tuttle designated only Judge Wisdom of The Four, along with Judges Gewin and Bell. Despite the presence of the conservatives, Gewin and Bell, the panel denied the petition. Gewin himself wrote

⁶⁴ *New York Times*, Sept. 7, 8, 1963; *Los Angeles Times*, Sept. 8, 1963; *Southern School News*, Sept., 1963.

the opinion, in which he felt compelled to reiterate his personal opinion that the original order of Judge Lynne should have been affirmed. Nonetheless, Gewin wrote, “The issues here have long been settled by decisions of the U.S. Supreme Court. Law and order cannot be preserved by yielding to violence and disorder, nor by depriving individuals of constitutional rights decreed to be vested in them by the Supreme Court.” Gewin even added an eloquent admonition. “The howling winds of hate and prejudice always make it difficult to hear the voices of the humble, the just, the fair, the wise, the reasonable, and the prudent,” he wrote, but “we must not permit their voices to be silenced by those who would incite mob violence.” On the same day, Judge Lynne responded to Ernest Jackson’s motion for the plaintiffs in *Armstrong* and issued an order for the governor to show cause at a hearing the following week why he should not be enjoined from further interference in desegregation in Birmingham.⁶⁵

Entering the weekend, the immediate prospects for a successful and peaceful beginning to school desegregation looked grim, as law-and-order moderates wondered incredulously what exactly had just happened. The *Anniston Star* concluded that “the planned admission of a handful of Negroes” was an already “touchy situation” which had been “made far worse by [Wallace’s] ranting and raving of the last several months.” His actions of the past week were especially and “entirely uncalled for.” Even the pro-Wallace Grover Hall of the *Montgomery Advertiser* lamented that Alabama was “not a banana republic” and that the *Advertiser* was left no choice but to “sorrowfully [conclude] that, in this instance, its friend has gone wild.” On Saturday night, an undeterred Wallace spoke at a meeting in Birmingham of the segregationist United Americans for Conservative Government. The governor was joined on the podium by Bull Conner and Edward Fields, and he was introduced by Art Hanes. He told the crowd of 500 that he was “willing to take any risk” and ready to “go the last mile” with them in preventing desegregation of the schools. He did not elaborate on what risks he would take, except to say “I shall

⁶⁵ *Armstrong v. Board of Education of the City of Birmingham*, *Race Relations Law Reporter* 8.3, Fall, 1963, pp. 899-901; see *Petition for Intervention and Stay*, Charles H. Smith, et al., Intervenor, at 323 F.2d 333 (5th CCA, 1963); Brauer, *John F. Kennedy and the Second Reconstruction*, p. 293.

continue to resist for you within the law. . . . Every action I've taken," he claimed, "has been in the interest of peace and safety." On Sunday night, the governor appeared in a statewide, televised "report to the people," in which he began to sound even more like a law-and-order moderate himself, despite his behind-the-scenes efforts to promote obstruction. He argued that his "resistance as a constitutional officer" was "legal and lawful," and he reminded Alabamians, "We cannot win this fight if we resort to violence. If you stand with me in this fight," he said, "you will observe law and order and avoid violence." The governor assured the state that closed schools would open the following day. He then paraded a cadre of the attorneys before the camera. They proceeded to defend the legality of the governor's intervention and to revive arguments like, "The 1954 Supreme Court ruling is not the law of the land." One of them cited the Savannah school case, in which the district judge had thrown out a black student's complaint. They failed to mention that the dismissal had been overturned by the Fifth Circuit, and that the case was bound to result in the desegregation of Savannah's schools.⁶⁶

That night Klansmen attempted to firebomb the home of Birmingham's black millionaire businessman, A.G. Gaston. Gaston sat reading in the living room, while his wife lay reading in the bed. One ill-thrown bomb landed on the lawn, while another broke through a window and set a lamp and some Venetian blinds on fire. The attack caused only minor damage to the home and none to the Gastons, who had just returned from a state dinner at the White House. George Wallace was calling publically for law and order while not only defiantly grandstanding for the voters but privately

⁶⁶ *New York Times*, Sept. 8, 1963; *Montgomery Advertiser*, Sept. 7, 8, 1963; *Birmingham News*, Sept. 9, 1963. *Stell v. Savannah-Chatham County Board of Education*, 318 F.2d 425 (5th CCA, 1963); in *Stell* the appellate court admonished the district court for denying a preliminary injunction, writing that the *Brown* decision "should have ended the matter for the district court to the extent that upon its making this determination its duty was then to do what the Supreme Court directed to be done upon the second appearance of the *Brown v. Board of Education* case in the Supreme Court"; it issued a ruling for the plaintiffs upon appeal on the merits in June, 1964, 333 F.2d 55.

encouraging the most dangerous segregationist elements in the state of Alabama to defy along with him. He was playing with fire himself, dancing around in the wiregrass with a burning piece of kindling. For many of Alabama's segregationists, it was just the sort of stand they expected. They loved him for it: for standing up to the Kennedys; for fighting the NAACP and the other "agitators"; for defying the Supreme Court and all the other "scalawagin" federal judges; for defending Alabama's rights. For moderate segregationists who reluctantly accepted that desegregation was imminent, it seemed at times like all they could do was sit back and watch George Wallace and his supporters set the state aflame.⁶⁷

⁶⁷ See, for the Gaston bombing, *St. Louis Post-Dispatch*, Sept. 9, 1963, *Baltimore Afro-American*, Sept. 14, 1963, and Thornton, *Dividing Lines*, p. 344.

CHAPTER 7: "THE PURSUIT OF ALABAMA'S HAPPINESS"

After his Sunday night televised address aired, in the early morning hours of Monday, September 9, George Wallace signed three more gubernatorial executive orders. Schools were again scheduled to open that morning. "Integration of the public schools," he wrote, "will totally disrupt and effectively destroy the educational process." According to the governor, it would constitute "an abridgement of civil rights of other children attending the schools, and [deprive] them of the equal protection of the laws," and "their rights, liberty, and property without due process of law." Wallace directed in identical orders that "no student shall be permitted to integrate the public schools" of Tuskegee, Birmingham, and Mobile. He had conceded Huntsville, where so many law-and-order moderates had voiced their complaints and where Judge Seybourn Lynne had set a hearing that day for Wallace to show cause why he should not be enjoined from interfering. Later that morning, Dr. Sonnie Hereford took his son to Fifth Avenue Elementary, where he became just the third black student to attend public school with whites in Alabama history – the Armstrong boys in Birmingham having done so, for a day, the previous week. The other plaintiff-students in Huntsville soon desegregated Rison Junior High, Terry Heights Elementary, and East Clinton Elementary Schools.¹

Wallace's "most historical moment" had arrived. He was making his second stand, and this time he was making a much bigger show of it. It would have much bigger consequences. His defiant actions and gestures continued into the second week of scheduled classes, but he was ultimately forced to back down, again, by the Kennedy Administration. The Kennedys managed to achieve this without giving Wallace everything he wanted; most especially they avoided sending in federal troops to Alabama. As the governor made the most of his showdown with the federal government, defiant segregationists took their own stands against desegregation, at least in Birmingham, Tuskegee, and Mobile. The governor

¹ Executive Orders Numbers Eleven and Twelve of the Governor of Alabama, in Governor's Administrative Assistant Files, SG 19974, ADAH; *St. Louis Post-Dispatch*, Sept. 9, 1963; *New York Times*, Sept. 10, 1963.

quietly continued to encourage these disruptions. Law-and-order moderates on the affected school boards and in those city governments – who were fearful of contempt citations – tried to comply with court orders despite Wallace’s interference. Their efforts were applauded by law-and-order moderates around the state. Many more segregationists continued in their defiance. In Tuskegee a total boycott of desegregated Tuskegee Public was buoyed by the establishment of a private white academy. In Birmingham an attempted boycott and a week of angry demonstrations gave way to the eruption of defiance and hatred on church goers at Sunday worship.

With these events, the law and order creed began to bifurcate. Everyone in Alabama denounced the bombing of 16th Street Baptist Church in Birmingham. But no one seemed to take from it the lesson that perhaps segregation was, indeed, wrong somehow and ought to be abandoned, or that the societal pillars of white privilege might ought to be examined. As fingers pointed in all directions, more defiant segregationists took up the law and order narrative and channeled it into a move towards private schools. For these people, law and order came to mean anything short of violent resistance. In addition to this “law, order, and private schools” camp, there was a “law, order, and public schools” camp. It included those school and city officials in the four areas affected by desegregation orders, along with other segregationists who saw school closure and the establishment of private schools as an ominous and unfavorable development. Many of these people, like Albert Boutwell, understood that new industry would be awfully hard to recruit with no public schools. Others simply foresaw legal, financial, or logistical problems developing in the establishment of private white schools. While most segregationists fell into either the law-and-order-compliance or the law-and-order-evasion camps, only a very select few across Alabama counseled anything more than abiding the rule of law. As events in the streets caused many to recoil, the battle over schools continued in the courts, where blacks were beginning to realize some measure of success and where the forces of resistance were already beginning to learn from their enemies.

The Fall

At dawn on Monday morning, September 9, 1963, 125 state troopers under the command of Major Joe Smelley, chief of the Alabama State Troopers' Uniformed Division, amassed on the eastern shore of Mobile Bay. They were joined by a contingent of deputized law enforcement officials from various parts of south Alabama. From there the massive motorcade crossed the bay's causeway, entered the city, and surrounded Murphy High School, where two black students – Henry Hobdy and Dorothy Davis – were set to attend. The Mobile police had already barricaded and secured the area. They had not requested assistance, but they were powerless to turn away the state police. When the two students arrived at 7:15, they were accompanied by Rev. Calvin Houston, John LeFlore, and attorneys Vernon Crawford and Clarence Moses. Smelley blocked their path, read a short statement, and handed them a copy of the governor's executive order relative to Mobile. The group reluctantly departed but not before LeFlore and Crawford indicated their intention to notify the Justice Department. LeFlore told reporters that Wallace had "no more right to violate federal law than he [had] to violate state law." Nonetheless, the governor had "forced this upon us," LeFlore said, "and it is now up to the federal government." He added, "Our only alternative is to go into the federal district court here in Mobile and seek compliance with the federal order and to restrain Governor Wallace from further interference We must bring a stop to this sort of thing that we saw just a while ago." Vernon Crawford went immediately to draft a motion for a restraining order and a preliminary injunction, which he then took straight to the clerk at the federal courthouse.²

Mobile Mayor Charles Trimmier issued a statement after witnessing the morning's events himself. The mayor lauded the city for the "progress" it had made in "basic race relationships without violence, hatred, or fear." He said, "It is unfortunate that the courts have forced the integration of our schools, and their action is disapproved by a majority of our citizens." These citizens, he argued, were

² *Birmingham News*, Sept. 9, 1963; Richard Pride, *The Political Use of Racial Narratives*, pp. 40-1; *St. Louis Post-Dispatch*, Sept. 9, 1963; *New York Times*, Sept. 10, 1963, *Southern School News*, Oct., 1963.

nevertheless “respectors of the law” and ought to be congratulated for their “desire to discipline themselves without resorting to violence, which solves nothing.” Trimmier expressed hope that Mobile would be allowed to “work out this and other problems . . . without interference from any quarter whatsoever. No help is needed from Governor Wallace or anyone else.”³

Two hundred miles to the north, Anthony Lee and the twelve other black students scheduled to attend Tuskegee Public gathered at Superintendent C.A. Pruitt’s office to board a bus together. As they approached around 7:30, they saw state troopers lining the school, just as they had the previous week. The 52 troopers had permitted faculty and staff and white students to enter the school for the first time. But when the bus carrying the 13 entered the school grounds at 8:30, a trooper stopped it immediately. The commanding officer on the scene boarded it, along with two other troopers. He identified himself as “Captain C.S. Prier, a peace officer for the state of Alabama” and read a statement similar to that read at Murphy in Mobile: “It is my duty to inform you that by order of the governor of the state of Alabama, you will be prohibited from entering the school.” Prier saw C.A. Pruitt approach the bus, and he stepped off to hand the superintendent a copy of Wallace’s executive order. He returned to the bus, handed each student a copy and instructed the black driver to “take ‘em away.” Prier accompanied the bus back to Pruitt’s office, where the students got back into their parents’ cars and returned home. It was not long before Fred Gray called to inform them that he was already in discussions with the Justice Department about the next step. John Doar was, indeed, back in Tuskegee and had observed the action himself.⁴

Meanwhile, in Birmingham, Patricia Marcus and Josephine Powell approached West End High School with attorneys Ernest Jackson and Oscar Adams. The school had been ringed by twenty carloads of state troopers, who had recently replaced the city and county police already there. Al Lingo himself

³ *Birmingham News*, Sept. 9, 1963; Richard Pride, *The Political Use of Racial Narratives*, pp. 40-1; *St. Louis Post-Dispatch*, Sept. 9, 1963; *New York Times*, Sept. 10, 1963, *Southern School News*, Oct., 1963.

⁴ Memorandum from Captain C.S. Prier to Colonel Albert J. Lingo, Sept. 11, 1963, in Governor’s Administrative Assistant Files, SG 19974, ADAH; Willie Wyatt Interview.

blocked the girls' entry, holding up two hands and saying flatly, "You will not be allowed to enter; leave the campus." Lingo repeated his order as the group debated its next move: "You will leave immediately," he barked, "leave the premises!" Jackson undoubtedly infuriated Lingo by asking, "Do I understand you are asking me to leave?" Lingo replied, "I'm *telling* you to leave immediately." When Jackson, Adams, and the girls retreated, white students jeered them from the schools' open windows. As troopers blocked Richard Walker from entering Ramsey High on the other side of town, white students yelled "Nigger go home!" Lingo moved the few blocks from West End to Graymont Elementary where troopers were barring the Armstrong boys, who were accompanied by Jackson, Adams, and the Reverend Fred Shuttlesworth. Lingo told them, "Governor Wallace's orders are that you will not be allowed to enter." Jackson asked if the trooper commander might consider obeying the federal court order which allowed for the student's attendance. "No, I will not," Lingo said coldly. He then turned to U.S. Assistant Deputy Attorney General Joe Dolan, whom he had served with Wallace's order at West End earlier: "Have you called the White House?" Dolan offered a wry smile and simply said, "No."⁵

When the White House was subsequently informed of the morning's events in Alabama, President Kennedy issued a statement acknowledging that Wallace had "refused to respect either the law or the authority of local officials." The president surmised that "for personal and political reasons," Wallace was "desperately anxious to have the Federal Government intervene" in a situation in which it had "no desire to intervene." Wallace issued a statement in reply, claiming that he was "completely willing to leave it to local communities in this state if President Kennedy, the Justice Department, and the Federal Courts will do likewise." If the administration was still clearly reluctant to give in to Wallace, the federal district court judges in the state had, themselves, had enough. Vernon Crawford requested a temporary restraining order and a preliminary injunction against the governor in *Davis* for his interference at Murphy in Mobile. Judge Thomas immediately granted the restraining order, with which

⁵ *St. Louis Post-Dispatch*, Sept. 9, 1963; *Washington Post*, Sept. 10, 1963; Thornton, *Dividing Lines*, p. 344.

Justice Department officials then flew to Montgomery that afternoon. Jackson had already filed a similar motion in *Armstrong*, but Judge Lynne refused to rule on it until a hearing later in the week. John Doar had set off for Montgomery as well, seeking a temporary restraining order and preliminary injunction in *Lee v. Macon*. Prior to his arrival at the state capitol, though, Doar talked to Attorney General Kennedy, and the two decided to instead file a separate action against Wallace, Lingo, and the other state trooper officers who had barred black students from entering schools that day. Johnson called each federal district judge in the state that afternoon – Allgood, Lynne, and Grooms in the Northern District, Johnson in the Middle District, and Thomas in the Southern District – all of whom had adjudicated proceedings in the four desegregation cases. The five judges concurred in the issuance of a temporary restraining order in what was styled *United States v. Wallace*, along with an order to show cause as to why it should not be enlarged into a preliminary injunction.⁶

Johnson wrote the order, in which he recounted how the governor had issued the various executive orders. Wallace had “purported to order and direct” the various school authorities to forestall desegregation, despite the fact that all such authorities were under court orders themselves in the various cases. The court enjoined the governor, along with Lingo, Prier, Smelley, and the other participating state trooper officers, from “implementing or giving force or effect to the executive order[s] of September 9, 1963”; from “physically preventing or interfering with students, teachers, or other persons” entering or leaving the affected schools; from “interfering with or obstructing” the three boards of education; and from “failing to maintain peace and order within and around” the various schools. Johnson signed the order at 5:15 p.m. on behalf of all five judges.⁷

⁶ Brauer, *John F. Kennedy and the Second Reconstruction*, p. 294; *Birmingham News*, Sept. 10, 1963; *Montgomery Advertiser*, Sept. 10, 1963; *United States v. Wallace*, Civ. A. No. 1976-N (MD, AL, 1963),

⁷ Brauer, *John F. Kennedy and the Second Reconstruction*, p. 294; *Birmingham News*, Sept. 10, 1963; *Montgomery Advertiser*, Sept. 10, 1963; *United States v. Wallace*, Civ. A. No. 1976-N (MD, AL, 1963), Temporary Restraining Order of Sept. 9, 1963, *Race Relations Law Reporter* 8.3, Fall, 1963, pp. 816-18, see copy also in Governor’s Administrative Assistant Files, SG 19974, ADAH; Thornton, *Dividing Lines*, p. 344.

U.S. Marshalls in Birmingham, Montgomery, and Mobile immediately set out to serve the governor, Lingo, and the named troopers with the restraining order. Lingo and the troopers were all served that night, but Wallace proceeded to engage in what the *Birmingham News* called a “taut game of hide and seek.” Lingo had telephoned the governor’s office to warn him of the impending service, and a Wallace staffer had answered a subsequent telephone call from the White House that had been accidentally misdirected to the state capitol. The Kennedys were trying to phone state Attorney General Flowers’ office, where they hoped to find John Doar, who had been shuffling between there and the city’s Federal Building most of the day. Duly alerted to the impending service and irate at Flowers for cavorting with the enemy, the governor then retreated to his office and surrounded it with his state trooper bodyguard. Just after 9 p.m. marshals arrived at the capitol, entered, and knocked on the outer door to the governor’s offices. One of Wallace’s trooper-bodyguards told the marshals that the governor was not in. In fact, Wallace *was* in and was drafting yet another executive order, in which he declared that he was “unwilling . . . to subject . . . faithful and courageous men” such as the state troopers to “fine and imprisonment at the hands of the federal judiciary.” Wallace activated the Alabama National Guard in order to “cope with circumstances and actions reasonably calculated to result in a breach of the peace and in public disorder.” These circumstances and actions had been created by the federal courts’ efforts to “admit certain students not entitled to attend” the affected schools. He ordered National Guard units to move into Mobile, Tuskegee, and Birmingham and to replace the state troopers.⁸

As Wallace’s order went out, U.S. Marshals lingered outside the capitol waiting for the governor to leave. A crowd began to gather as a larger contingent of troopers arrived and assembled in front of the building. One trooper claimed to the press that if the marshals wanted to “get [Wallace], they

⁸ *Birmingham News*, Sept. 10, 1963; *Montgomery Advertiser*, Sept. 10, 11, 1963; Executive Order Number Thirteen of the Governor of Alabama, in Governor’s Administrative Assistant Files, SG 19974, ADAH; Thornton, *Dividing Lines*, p. 344.

would “have to come over” him. “I love that little man,” he said, “he means a lot to me.” After Guardsmen arrived at the building to supplement the troopers, Wallace’s finance director and close advisor Seymore Trammell walked out and read a statement from the sacred Jefferson-Davis-tread Confederate Star. He told the press, “Governor Wallace is working in the office tonight.” Trammell said that they had received word that U.S. Marshals were preparing to “besiege” the capitol building. Governor Wallace, he urged, “wants peace, and you cannot have it in this type of condition. . . . This is intimidation.” Knowing that three marshals were standing nearby, Trammell asked “unauthorized persons” to leave the grounds. If they did not leave, he added, the National Guard would “make them.” When Trammell directly confronted the marshals, one attempted to enter the capitol building, whereupon the guardsmen collectively funneled him back to the street. Another marshal who had clandestinely wandered off was subsequently flushed out from behind a bush by troopers. Finally satisfied that the federal officers had been dispersed, and that the Guard was mobilizing for the following morning’s school openings, Wallace emerged under heavy guard at 1:30 a.m., got in a car with Trammell, and went home.⁹

The governor evidently thought that his actions would buy him at least one more day of successful defiance – one more feather to put in his cap of defiance, as proof that George Wallace meant what he said. He had “stood up for Alabama,” and he could continue to do so. Unfortunately for Wallace, word of the National Guard’s mobilization had very quickly spread to the Pentagon. The Defense Department alerted the Attorney General, who then woke the President in the early morning hours. From his White House bedroom, the president signed a Presidential Proclamation commanding “all persons engaged in . . . unlawful obstructions of justice, assemblies, combinations, and conspiracies” to “cease and desist therefrom and to retire peaceably forthwith.” Knowing that such an order would not be obeyed, the President also issued an executive order authorizing Secretary of Defense Robert

⁹ *Birmingham News*, Sept. 10, 1963; *Montgomery Advertiser*, Sept. 10, 11, 1963; Thornton, *Dividing Lines*, p. 344.

McNamara to take “all appropriate steps,” including the use of federal troops or the federalization of the Alabama National Guard, to “remove obstructions of justice in the State of Alabama.” Just after dawn, McNamara ordered the National Guard units back to their respective armories and thereby returned control of the various campuses to local police.¹⁰

That morning, court-ordered desegregation was finally allowed to proceed in all of the affected schools. This occurred without violence, but not without incident. The beginnings of a continuing defiant resistance were evident in all three cities even from the very start. At Murphy, Henry Hobdy and Dorothy Davis entered the school for the first time flanked by over 20 local law enforcement officers and were welcomed by the school’s principal, Bruce Taylor. Hundreds of additional sheriff’s deputies and local police officers were stationed around the campus. Taylor had sent letters to parents the previous week in the hopes that they might counsel their children on avoiding disruption when the inevitable became a reality. He announced the black students’ presence over the schools public addressing system, urging the 2,777 member student body not to do anything “to embarrass our school.” Taylor’s efforts appeared to be successful as he escorted the two students to their homeroom. After this the two attended their first class, which was aptly entitled “Problems in Democracy.” They were accompanied the remainder of the day, and over the coming weeks, by faculty members acting as “observers.” They encountered little direct hostility. The efforts of the Mobile Citizens’ Council soon began to reap rewards, however. The day after the initial desegregation, students held demonstrations outside the school, chanting and urging students to boycott classes. What began as a small demonstration on Wednesday turned into a throng of 300 rowdy whites on Thursday. The students marched about the campus, chanting “two, four, six, eight, we don’t want to integrate!” One smaller group eventually took to the streets of Mobile. When 54 of the demonstrators were arrested,

¹⁰ Presidential Proclamation 3554, “Obstructions of Justice in the State of Alabama,” and Executive Order 11118, “Providing Assistance for Removal of Unlawful Obstructions of Justice in the State of Alabama,” in *Race Relations Law Reporter* 8.3, Fall, 1963, pp. 919-20; *Birmingham News*, Sept. 10, 1963.

commissioner Joe Langan turned up at the jail to admonish them. The Citizens' Council bailed them out. The students were charged with violating a city-wide anti-demonstration measure which had been recently put in place in anticipation of school desegregation-related disturbances. The arrests, the disciplining of 12 of the demonstrators by the school, and the placement of teachers and police around the campus kept Friday's demonstrations at around 20 students. This was quickly brought under control. Isolated incidents the following week were similarly snuffed out, even as the Citizens Council frustrated compliance-minded moderates by holding a large rally and explicitly inviting students.¹¹

In Birmingham the initial results were mixed, but the week became more tumultuous by the day. Richard Walker desegregated Ramsey High without significant fanfare. This was not the case at Graymont and West End, on the working-class side of town. The Armstrong boys returned to Graymont to find attendance there down by about 60 percent. But their day was decidedly uneventful compared to that of Patricia Marcus and Josephine Powell. When the two girls arrived at West End at 7:45, they were escorted in through a side door where few students saw them. A few of those who did see them began crying. As news of their arrival spread, students began filing out of the school. Some left with parents who had heard news of the developing walkout. Others were happy to stay on campus, as a group of 300 students lingering on the lawn outside grew to over 1,000 within the hour. The chanting began: "two, four, six, eight, we don't want to integrate!" "Two, four, six, eight, who do we appreciate? Wallace!" "We hate niggers!" Then "We hate Kennedy!," followed by "We want Wallace!" A frightened Marcus and Powell could overhear as the chanting shifted to a sustained "Get the niggers out! Get the niggers out!" Teachers could be seen looking on approvingly from the windows. Similarly situated student onlookers found themselves the targets of the demonstrators' scorn as they were subjected to cries of "nigger lover!" and admonitions to join the growing horde. Students and teachers answered the call to the delight of the crowd. Before long a march about the campus ensued as students began

¹¹ *Birmingham News*, Sept. 10, 12, 17, 1963; *Montgomery Advertiser*, Sept. 13, 14, 1963; *Pride, Political Use of Racial Narratives*, p. 43; *New York Times*, Sept. 11, 14, 1963.

waving Confederate battle flags and singing the school's alma mater. One student repeatedly played the great anthem of the Lost Cause, "Dixie," on his trumpet. A crowd of 200 or so adults, including members of Edward Field's National States' Rights Party, gathered on the lawn in front of the school and began cheering the demonstrators and urging those still in the school to leave. Black residents down the street began to gather at a distance and observe. By 8:45 the majority of the school's 1500 students had left the building and joined the demonstrations. A Birmingham Police captain then attempted to diffuse the situation, telling the students by bullhorn to either go back to class or go home. He told the adults to either move away from the school or be moved away. Some of the adults took umbrage to this, and the ensuing disagreement resulted in ten arrests. The students were forced away from the front of the building only to reconvene on a football field around back and then charge back to the front of the school. The arrival of busloads of police in riot gear finally resulted in the dispersal of the crowd before lunch. Meanwhile, in Montgomery, Wallace finally accepted service of the five-judge restraining order, while grumbling that the president was trying to jail him for contempt because he was a potential political opponent. "I don't know what anyone can do but observe the [federal court] orders," Wallace said, "I can't fight bayonets with my bare hands."¹²

The next day NSRP leaders, KKK leaders, and their student recruits organized a motorcade that rode from high school to high school and encouraged students to join in a city-wide student boycott in preparation for a move to private schools. What began as a small group swelled on Thursday and became an angry, roving mob. More than 100 carloads of segregationists gathered in West End, running with their lights on, honking their horns, and waving Confederate flags. Many carried placards and bumper stickers that read, "Keep your children out of integrated schools"; "Kan the Kennedy Klan"; "We've been betrayed"; "We want private schools"; "Close mixed schools"; "We want a white school"; and "Obey little, resist much." One pickup truck carried two caskets in its bed and drug an effigy of a

¹² *New York Times*, Sept. 11, 1963; *Washington Post*, Sept. 11, 1963; *Montgomery Advertiser*, Sept. 11, 1963; *Southern School News*, Oct., 1963; Thornton, *Dividing Lines*, p. 345.

black person from its trailer hitch. Birmingham police followed the motorcade about town as it descended upon not just Ramsey High, but still-segregated Ensley High on the west side of town and Woodlawn High and Phillips High further east. Police had to break up a fight that ensued when teachers and student leaders at Woodlawn tried to turn the group away. The police tried to avoid the same at Phillips, only to see the group storm the football stadium and begin chanting “Eight, seven, six, two, we don’t want a jigaboo!” One group even drove over Red Mountain on the city’s southern edge to suburban Shades Valley High, where several students lowered the American flag and replaced it with a Confederate one.¹³

Students from each high school joined the demonstrators, and many simply stayed home on Friday. Eight adults were arrested as a result of the week’s disturbances, including Fields and the NSRP’s attorney, J.B. Stoner. But no total boycott materialized, despite cajoling and threatening phone calls from students to influential cheerleaders and football players. Attendance at West End had leveled off at around 30 percent by Friday. That day a group of 500 students gathered to protest outside City Hall, led by representatives from BRAIN and the United Americans. At one point, the group turned its ire on mayor Albert Boutwell, who happened to be at lunch at the time. It might have seemed incredibly ironic for the one-time arch-segregationist and devout Christian to discover that white students protesting desegregation stood outside his office yelling, “Eight, six, four, two, Albert Boutwell is a Jew!” Some of the contingent decided that chanting was not enough and stormed the mayor’s office, where they put out cigarette butts in his carpet and climbed atop his desk to wave the battle flag. Boutwell returned from lunch to find the group still there. He assured them that he, too, was opposed to integration, but that federal court orders simply had to be obeyed. He implored them to continue to observe law and order.¹⁴

¹³ *New York Times*, Sept. 14, 1963; *Southern School News*, Oct., 1963; Thornton, *Dividing Lines*, p. 345.

¹⁴ *New York Times*, Sept. 14, 1963; *Knoxville News-Sentinel*, Sept. 23, 1963; *Birmingham News*, Sept. 24, 1963; *Southern School News*, Oct., 1963; Thornton, *Dividing Lines*, p. 345.

Days later, students at Woodlawn High heeded Boutwell's advice and initiated a challenge to desegregation in what they thought was "the 'only legal way.'" Woodlawn senior David Littleton had been among those who had resisted the calls to leave when the motorcade had visited his school. Littleton "deeply sympathize[d] with the students of all integrated schools throughout Alabama." Like many of his fellow students, he had wanted to ride with the protestors. He had thought better of it, though, and had seen fit to instead initiate a petitioning campaign. Littleton was perhaps unaware that he was mimicking the technique employed by the first black activists to challenge segregated education in the state when he called on students to "use one of [the] most important privileges given to us by our forefathers in the Bill of Rights." He circulated a petition at Woodlawn and took out an ad in the city paper begging students across the state to circulate similar documents. His read, "We the undersigned . . . protest forced integration of Birmingham schools and the schools of Alabama. We . . . pledge ourselves to the American ideal of self-government" and "believe the Almighty God has given each of us the responsibility and the duty to choose between what we feel is right and wrong." No "governing body" had the right to "infringe a wrong on the majority just because a minority demands such." The signatories pledged their "full support to Gov. George Wallace and the sovereign state of Alabama to protect and defend our age-old traditions for the right of life, liberty, and the pursuit of Alabama's happiness." They also gave their "moral support" to Wallace and "any and all judgments" which he might make "to help protect [their] liberties in the American way." The law and order creed was a versatile one. Even as it undergirded reluctant efforts at compliance, it began to sanction defiance in the name of all that was sacred: the Constitution, states' rights, Christianity, self-government, liberalism.¹⁵

¹⁵ *Birmingham News*, Sept. 20, 1963.

Exodus, Tuskegee

If defiant segregationists in Birmingham had a hard time marshaling all of the city's thousands of white high school students for a boycott, segregationist leaders in Tuskegee did not. On Tuesday when Anthony Lee and the 12 other black students first attended Tuskegee Public, 167 white students showed up for classes. The vast majority of these were students at the campus's elementary school. Only 32 white high school students showed up. Expected attendance that day for both schools was nearly 600. On Wednesday around 20 white high school students arrived at school that morning, only to leave by the end of the day. By Thursday, Tuskegee Public High School was under a total white boycott; only the 13 black students remained. The Macon County school board acquiesced in some of the white Tuskegee students attending other schools in the county. One hundred-thirty of the 400 or so boycotting students transferred to Shorter High School on Macon's western border with Montgomery County. Thirty-four others transferred to Macon County High at Notasulga in the county's northeastern corner. Peer pressure and fear undoubtedly helped the boycott develop. The Tuskegee High football team voted to disband on Tuesday, and a number of its members transferred to Notasulga. The team's captain announced that "an overwhelming majority" of the team had voted "not to play another game as representatives" of the school, because they said, "We object to the forced integration of our school." The team's fall schedule was cancelled, followed by the basketball team's. By Wednesday afternoon, even law-and-order moderates who had spoken out against defiance, like Allen Parker, had allowed their children to withdraw. Some parents were genuinely concerned for their children's welfare in the midst of all the angry segregationist rhetoric that had been thrown about. A few of these parents were holding their children out until the perceived crisis had passed. Others simply believed that their kids should be allowed to follow their friends. Many more who had allowed their children to withdraw on

Monday or Tuesday simply could not stand the thought of their children going to school with not one, not two, but thirteen black students.¹⁶

For all of those families whose children withdrew with no intention of returning, the rapid establishment of a segregated private school provided immediate motivation and encouragement. A group of 20 or so staunch segregationists had begun to organize the previous week, while Tuskegee Public was closed by order of the governor. The group had been encouraged by the advice of Hugh Adams at the informational meeting over the weekend. Adams and other officials from the Montgomery Private School Association also attended the midweek meeting and told the Macon Countians that the Montgomery organization was alive and well and ready for desegregation, should it come to Montgomery. The Montgomery group had patterned its efforts after those of Virginians in Prince Edward County, where the school board had elected to close schools and allow locals to establish a vibrant private white school system in its place. The federal courts had yet to strike down such local-option school closure, Adams assured the Macon association's president, Mrs. W.T. Wadsworth. Another of the Montgomery officials told the group that the state's liberal newspapers and local school officials were hiding the fact that Alabama law allowed for student and teacher financial assistance in such cases.¹⁷

Earlier that day, Wallace himself had telegraphed Wadsworth his assurance that state-provided grants-in-aid to private schools could follow upon school closure and private school establishment. Wadsworth had telegraphed the governor on Adams' advice the day before, advising him that "due to the friction, danger, and ill will generated by the threat of forced public school integration, a private, non-denominational, accredited freedom-of-choice school [was] being established in Macon County." She requested from the governor "clarification of methods by which the Macon

¹⁶ *Tuskegee News*, Sept. 12, 1963; *Southern School News*, Oct., 1963; Norrell, *Reaping the Whirlwind*, pp. 148-9.

¹⁷ *Tuskegee News*, Sept. 5, 1963.

County school board or other officials may request grants-in-aid for eligible students under existing law." Alabama had, of course, passed laws providing for such grants, Wallace assured her. "It is my hope," Wallace wired, "that the Macon County Board of Education will not refuse to make arrangements for you to receive these grants-in-aid of which you inquire." Similar grant laws had already been struck down in federal courts at that point, notably in Louisiana. Alabama had patterned its own law after Louisiana's, but in the culture of defiance that had developed, such signs of potential futility were rarely heeded.¹⁸

After the initial, informal organizational meeting of the Macon County private school organization, Wadsworth issued a statement. She wanted to ensure that no one took the law-and-order style moderation of the school board, Pruitt, and Parker as an indication of how most whites in Tuskegee felt about desegregation. "The picture has been painted all over the country that Macon County is ready and willing to accept integration in their schools [*sic*]," she wrote, but "there are a lot of people here who do not agree with the statements that have been made." She assured Tuskegee's white parents that her group was "planning ways and means for providing a school that parents may choose in lieu of an integrated school as prescribed by Alabama law. . . . We believe that we are acting in the interest of all people," she concluded. In a separate statement, Wadsworth reiterated, "we have no hatred; we just believe this is right." She told a reporter not to "underestimate our strength. We want to put a private school within reach (financially) of everybody as an alternative to an integrated school." Whites in Tuskegee listened. On Thursday, September 12, the second organizational meeting of the private school association drew over 700 people to the local Veterans of Foreign Wars (VFW) post. The group named itself the Macon County Private School Foundation and tapped local postmaster John Fletcher Segrest as president. The World War II veteran and former prisoner of war told the crowd that it would be "a tough fight," but he added, "We have the power and the forces to win this battle."

¹⁸ *Tuskegee News*, Sept. 5, 1963; *Hall v. St. Helena Parish School Board*, 197 F. Supp. 649 (ED, LA, 1961), affirmed per curiam, 368 U.S. 515 (1962).

Segregationist attorney Hugh Locke was also on hand to share his observations of Washington, D.C.'s integrated public schools. Locke argued that desegregation "not only ruins the school but ruins the community" and was usually "followed by migration of the white people from the area."¹⁹

The foundation chose an unoccupied mansion across the street from Tuskegee Public as the site of the future Macon Academy. It chose former state Attorney General MacDonald Gallion as legal counsel and resolved to send Gallion, Segrest, and Tuskegee's mayor and state representative to Prince Edward to observe private schools there. The foundation members nominated committees to oversee any building that might be necessary and to begin organizing fund-raising efforts. Students were already registering by the dozens, and contributions were pouring in. Wallace himself made a \$100 contribution. He also pledged the "full resources" of his office to assist the foundation and encouraged Alabamians to do the same. The governor even requested donations from state employees, who donated over \$2,000. His office maintained a list of contributors and maintained a file of letters from citizens interested in establishing similar schools. One woman told the governor she wished to make a \$7,000 donation towards the improvement of education in the state and asked him where she should send it. Wallace advised, "You may wish to contact the Macon Academy in Tuskegee . . . a private school which was set up by individuals in Macon County who were not satisfied with the Federal Court order which did away with their rights to run the schools in that County as they saw fit." Gallion told Wallace that Tuskegee could be the shining example of segregation's future in Alabama, and the governor agreed. It soon became evident that many others in Alabama agreed, as well.²⁰

By week's end, a group of white parents in Birmingham had set up a West End Parents for Private Schools in light of the Macon Countians' efforts. With Wallace's encouragement, this group soon founded Jefferson Academy and Hoover Academy – the latter being named for William Hoover,

¹⁹ *Tuskegee News*, Sept. 5, 19, 1963; *Southern School News*, Oct., 1963; Norrell, *Reaping the Whirlwind*, 148-50.

²⁰ *Tuskegee News*, Sept. 5, 19, 1963; *Southern School News*, Oct., 1963; Norrell, *Reaping the Whirlwind*, pp. 103-5, 148-50;

formerly of the American States' Rights organization. A Tuscaloosa man gave further credence to Gallion's suggestion when he wrote the *Tuskegee News* days later to express his approval of efforts in Macon. "Hats off to the brave people of Tuskegee and Macon County," he wrote, "who are going forward with plans for a private school instead of bowing to the tyrannical race-mixers of Washington or heeding the advice of Alabama's big city scalawag newspapers, which have tried for so long to brainwash us into acceptance." The success of Macon Academy, he argued, would "come as the bitterest gall to the enemies of the South" and would simultaneously "serve as an inspiration and a guidepost to all who are inclined and willing to follow the example." Tuskegee's whites had displayed "courage, attachment to principle, and sacrifice." This was, he wrote, "the fighting South at its very best."²¹

"Bitter Fruit"

In the early morning hours of Sunday, September 15, a group of Klansmen led by "Dynamite Bob" Chambliss planted a bomb underneath the side steps of Birmingham's 16th Street Baptist Church – one of the epicenters of that spring's civil rights demonstrations. The bomb detonated at 10:22 that morning as 200 people filled the church for services. Preparing for Sunday school in a basement bathroom were Cynthia Wesley, 14, Addie Mae Collins, 14, Carole Robertson, 14, and Denise McNair, 11. They were crushed to death when the blast destroyed a large portion of the church structure. Enraged blacks began rioting downtown in the immediate aftermath of the killings, setting at least two major fires and assaulting passing whites, many of whom had descended upon the area around the church to gawk, honk, and shout in celebration. A Birmingham police officer responded to one

²¹ *Tuskegee News*, Sept. 19, 1963; see, for Gallion's suggestion to Gov. Wallace, Governor's Administrative Assistant Files, Macon Academy, SG 19969, ADAH.

disturbance and ordered Johnnie Robinson, a 16 year-old black youth, to stop. When Robinson turned to run, officer Jack Parker shot him in the back, killing him.²²

The NSRP had planned a large rally in the industrial western suburb of Midfield in preparation for yet another motorcade that afternoon through the west side to downtown Birmingham. The Jefferson County Sheriff's Department prevailed upon the NSRP leadership to cancel the parade. Birmingham Police Chief Jamie Moore similarly convinced the West End Parents for Private Schools to cancel its planned participation in the demonstrations (a Baptist minister leading the parents simply mounted a stationary protest behind city hall). Two Phillips High School students who had planned on joining the mass motorcade, 16 year-old Eagle Scouts Michael Farley and Larry Joe Sims, resolved to ride their scooter to NSRP headquarters and retrieve a Confederate flag for their own motorcade. As they prepared to parade the flag through the streets of a black neighborhood, friends warned them of two black children throwing rocks around the corner. Brothers James and Virgil Ware – 16 and 13 respectively – were in fact riding their bicycle up the street, returning from a junkyard in search of spare parts for a second bicycle which they hoped to use for a paper route. Farley had told his friends that he and Sims would “get them.” When the two white youths motored towards the two pedaling black youths, Farley handed a .22 pistol to Sims, who then shot Virgil Ware twice, killing him.²³ State troopers and national guardsmen returned yet again to Birmingham that night to quell the rioting, as periodic gunfire continued and fires burned.²⁴

²² *Montgomery Advertiser*, Sept. 16, 1963; Carter, *Politics of Rage*, pp. 181-2; Thornton, *Dividing Lines*, pp. 146-7; Eskew, *But for Birmingham*, pp. 318-21.

²³ Sims would later claim both self-defense and that he had shot with his eyes closed in an attempt to scare the two. He and Farley were each charged with first-degree murder but were convicted only of second degree manslaughter, serving seven month suspended sentences. See Allen G. Breed and Holbrook Mohr, Associated Press, “FBI Says the End is Near for Investigations into Civil Rights Era Cold Cases,” *Huffington Post*, Nov. 5, 2011, http://www.huffingtonpost.com/2011/11/05/fbi-says-the-end-near-in- n_1077703.html, accessed March 20, 2013.

²⁴ *Montgomery Advertiser*, Sept. 16, 1963; Carter, *Politics of Rage*, pp. 181-2; Thornton, *Dividing Lines*, pp. 146-7; Eskew, *But for Birmingham*, pp. 318-21.

Everyone in Alabama denounced the bombing. The killing of Wesley, Collins, Robinson, and McNair – thereafter universally referred to as the murder of “four little girls” – was something no one could condone, even if most said little about the subsequent killings of Robinson and Ware. Albert Boutwell burst into tears when he learned of the bombing. He called the act “inconceivable” and “shocking.” He went on television that night and urged the residents of Birmingham not to compound the “tragedy of this Sunday morning” by creating “more senseless trouble tonight.” He asked them to stay home that night and to “pray and think.” Boutwell implored, “I urge as strongly as I know how for the children of Birmingham to get about the business of their education and leave this fearful task to the School Board and their attorneys, and to our law enforcement officers.”²⁵

If everyone could agree that the killings were unfortunate, the question of where to place the blame was something to disagree about. Dallas County Citizens’ Council founder Walter Givhan blamed the church bombing on black “agitators” themselves, arguing that they had planted the bomb in order to blame whites and had simply mistimed the blast. Historian Dan Carter has argued persuasively that “a distinct minority,” if not “a majority,” of Alabama’s whites sincerely believed this to be the case. When the Talladega *Daily Home* asked God’s forgiveness and wrote, “The guilt and the shame are ours in common,” it saw fit to single out “the agitators who have cried for trouble even as they have pretended to counsel for love and peace.” Even the Alabama *Baptist*, which called the act “deplorable,” speculated that the perpetrators “could be radical Negroes who seek to stir up trouble.” Governor Wallace denounced the bombing as a “dastardly act” undertaken by someone with “hatred in his heart,” but he and many others throughout the state blamed the situation in general on President Kennedy and the Supreme Court. The Cullman *Times* echoed these sentiments, and even incorporated the belief that black “agitators” were themselves to blame: “There can be no doubt that the Kennedys, Martin Luther

²⁵ *Southern School News*, Oct., 1963; *Birmingham News*, Sept. 21, 1963; Thornton, *Dividing Lines*, p. 347. See, for the most influential use of the short-hand, collective representation of Wesley, Collins, Robinson, and McNair, the Spike Lee-produced documentary film *Four Little Girls* (Home Box Office, 1997).

King, and numerous others have promoted the issue for their own personal gain.” Those who had done so, it concluded, had “blood on [their] hands.” Some people blamed Wallace. National condemnation certainly centered on the governor, when it did not indict all of southern white society. *Time* magazine ran a picture of a bombed out, stained glass church window with a picture of a defiant-looking Wallace superimposed upon it, suggesting the governor’s culpability. The Huntsville *Times* condemned “leaders who made political hay of promises they knew they couldn’t keep.” The Talladega *Daily Home* pleaded, “May God forgive the politicians who have wittingly or unwittingly set man against man and race against race.” The Tuscaloosa County *Graphic* perhaps most clearly implicated the governor when it suggested that Wallace “had better face the facts and settle down to being governor, the office to which he was elected,” because his “charade of meaningless defiance” and his “political demagoguery” were “costing Alabama support every day.”²⁶

The editorial from the *Graphic* demonstrated a disturbingly familiar trend in the statewide reaction among whites to the bombing: the foremost lesson to be learned from the terrible tragedy was that Alabamians must double down on law and order. It was not to examine the righteousness of segregation and white supremacy. The *Graphic* was “saddened and sickened” by the act, but the most significant outcome was that it was “costing Alabama support every day.” Federal District Judge Clarence Allgood ordered a specially-called federal grand jury to indict anyone who had obstructed school desegregation or who had participated in any way in the bombing, lambasting the unknown perpetrators in a 15-minute charge. Allgood said that the court was “sickened as a court of law” and that he was saddened “as a native Alabamian.” He argued that there was “nothing ‘traditional’ in this country that says a person may murder, or intimidate, or mock the judgment of the law, or curse those who have chosen to respect a law – no matter how distasteful or unpopular that law may be.” If the

²⁶ *Southern School News*, Oct., 1963; *Birmingham News*, Sept. 21, 1963, reprinting editorials from the cited state newspapers; *Alabama Baptist*, Sept. 19, 1963; Carter, *Politics of Rage*, pp. 181-2; Thornton, *Dividing Lines*, p. 347.

bombers thought that they were “serving the cause of segregation,” then they were “traitors to their cause” and were doing “the South a disservice.” Albert Boutwell had sent the same message when he went on television the night of the bombing: Birmingham did not need yet another stain on its image. With this latest and tragic stain, Boutwell argued, “we are all victims.” Similarly, the *Montgomery Advertiser* was certain that whoever was responsible for the bombing “hates Alabama and its people, black and white,” because they had given Alabama “an injury that will not heal in a long time and which is almost certain to generate evil consequences.” In Birmingham, 53 lawyers joined in a statement to the city’s citizens, in which they argued that the “rule of law is essential to our way of life. . . . Each of us,” they added, “has on occasion felt that a particular case should have been decided differently, but whether we agree or disagree with the result in any case, the court’s decision is the law and must be obeyed.”²⁷

The Alabama *Baptist* admitted that it had “never endorsed integration,” but that it was “certainly for law and order.” It thus commended Governor Wallace for denouncing the violence. Moderates across the state approached the tragedy in the same way. The *Tuscaloosa News* insisted that “pleas for law and order” needed to be “backed up with more than empty words,” because it was “lawless disregard for duly constituted law and its enforcement” which bred “disorder.” The *Northwest Alabamian* argued that “we must return to law and order, for only then will we have an atmosphere conducive to reasonable solutions of the problems which will be with us for a long time.” The *Selma Times-Journal* carried this a step farther when it maintained that there were “decent, civilized people” who could no longer easily “express what is in their hearts” because of “the situation that exists in Birmingham today.” What was in those hearts was a need to defend segregation. This was a matter of principle to so many whites, even if they only inherently understood it to be a need, above all, to

²⁷ *Birmingham News*, 21, 1963, reprinting editorials from the cited newspapers; see, for full-text of Allgood charge to the grand jury, *Birmingham News*, Sept. 16, 1963; *Southern School News*, Oct., 1963; *Montgomery Advertiser*, Sept. 17, 1963; Carter, *Politics of Rage*, p. 181-2; see, for lawyers’ statement, *Birmingham News*, Sept. 29, 1963.

maintain white supremacy. “Nobody has to abandon principle,” the Selma editor wrote, “to take and maintain a stand for law and order.”²⁸

Even in the wake of the cold-blooded murder of church-going teenagers, precious few Alabamians could find the strength, or even the desire, to hasten any sort of moral awakening. Murder was, of course, reprehensible, but it was the work of a lawless few. Recognition of such acts as wrong did not necessitate any sort of admission that segregation was wrong, or that white supremacy should be abandoned. Compliance with court-ordered token desegregation was a “bitter pill” – one that moderates were willing to swallow only to abide by the law and to avoid violence, either because violence was wrong, because it was harmful to the state’s prospects for progress, or both. In other words, no one swallowed the pill because they realized that segregation and white supremacy were wrong. Very few were the white people like Mrs. William Linn of Birmingham. Linn wrote to the *Birmingham News* to argue that while “the great majority of Birmingham’s white citizens were quick to admit that they found the bombing of a church and the willful murder of children appalling,” they were “even quicker to attempt to excuse those acts with accusations hurled at the Supreme Court, the NAACP, the Kennedy brothers, etc. How can responsible, clear-thinking white people,” she wrote, “possibly believe that there is any excusing such acts or for that matter any excusing their own prejudice against their own race?”

Fewer still were those like Charles Morgan, a young Birmingham attorney who went before the city’s Young Men’s Business Club shortly after the bombing and delivered a tirade against politicians, preachers, business leaders, and everyone else white in Birmingham who had failed to provide moral leadership. Morgan would go on to open the first office of the American Civil Liberties Union in Atlanta. He had the appearance, some thought, of a rural Alabama sheriff, because he “was overweight, smoked two packs of cigarettes a day, and his voice carried the sound of the Deep South.” At the podium before

²⁸ *Birmingham News*, Sept. 21, 1963, reprinting editorials from the cited newspapers; *Southern School News*, Oct., 1963; *Alabama Baptist*, Sept. 19, 1963.

the business club, he indicted white Alabama society in general. "We are a mass of intolerance and bigotry, and stand indicted before our young," he argued, and "we are cursed by the failure of each of us to accept responsibility, by our defense of an already dead institution." He pointed the finger at "every person in this community who has in any way contributed during the past several years to the popularity of hatred." They were "at least as guilty as the demented fool who threw the bomb." He asked flatly, "Who did it? Who threw that bomb?" And he answered, "We all did it," through hypocrisy and inaction. No one clapped when he sat down. When the *New York Times* ran a piece quoting Morgan's speech, someone asked Governor Wallace to comment. Wallace called the remarks "asinine" and reminded the reporter that Morgan represented the NAACP and was, therefore, himself partly to blame. Morgan – who had indeed begun to represent black clients in civil rights cases – soon had crosses burned on his lawn, began to receive death threats, and was subsequently ostracized by the white community. Even rhetorical attempts to indict whites as a whole for their moral failings were met with this kind of reaction.²⁹

Birmingham businessmen James Head and Charles Zukoski understood this. Like Morgan, they spoke out anyway, framing the problem in traditional business moderate terms, but adding that rare moral imploration. In exasperation they penned a letter to the white people of the city via the *Birmingham News*, which was later reprinted and disseminated by the Southern Regional Council. Head and Zukoski rebuked the city's segregationists for failing to face up to certain "basic truths," even as the name of Birmingham was festooned across newspapers mastheads the world over, above the broken glass of a church and the broken lives of innocent youngsters. First, they insisted the city's whites must acknowledge that "the Negro is a human being, with all of the feelings, the hopes, the aspirations of his white fellow man." Whites knew "in their hearts" that segregation was their way "of keeping the Negro

²⁹ *Birmingham News*, Sept. 19, 1963; *Southern School News*, Oct., 1963; *Washington Post*, Jan. 9, 2009 (Morgan Obituary, describing him as an "Alabama sheriff"); Carter, *Politics of Rage*, p. 181-2; Eskew, *But for Birmingham*, 318-21.

in his place.” In light of this, the notion that nearly every white person held fast to – that there could be Constitutional equality of the races under segregation – was “just a self-serving denial of fact.” The Supreme Court, they argued, had not “violated our system of law.” And the federal government was not “attempting to order all of our affairs”; it was attempting to enforce Constitutional law. There was “no rational hope” that *Brown* would be overturned in the foreseeable future, and yet, whites in Birmingham were squandering their “opportunity” to take advantage of the deliberate speed afforded by the *Brown II* implementation decree. The “community’s bitter-end resistance” had “threatened [its own] economy with destruction.” And why? Whites had listened to “misguided prophets” like John Patterson, Albert Boutwell, and George Wallace, of course. But there was more to blame than the obvious. “Ever since the school cases,” Head and Zukoski wrote:

We have been told, day in and day out, that the Supreme Court has been guilty of unconstitutional violation of our rights, and the federal government is some kind of alien power seeking to deprive us of our liberty, and that if we would hold fast, we could in the end maintain our traditional way of life. Even when, as the pressure grew, some few wise citizens were bold enough to face the inevitable and come out with a plea for law and order, there was no heart in their voices and their words were unaccompanied by any moral conviction.³⁰

They concluded, “Unless Birmingham begins to face up to the great moral issue involved, and to recognize the rightness as well as the inevitability of change, it will indeed be dead.”³¹

In the wake of the tragedy, Alabama came to what seemed like an exhausting end to a decade-long struggle. The FBI quickly identified Robert Chambliss as the lead perpetrator of the 16th Street church bombing and set about surveilling him and building a case against him. Sensing this, Al Lingo arrested Chambliss and his accomplices to ensure that their case would remain in state court, where

³⁰ *Birmingham News*, Sept. 30, 1963, reprinted as Southern Regional Council Report L-46, Nov. 15, 1963, *Facts on Film, 1963-64 Supplement*, Miscellaneous Materials.

³¹ *Birmingham News*, Sept. 30, 1963.

they were sure to be acquitted of the murders. They plead guilty to a misdemeanor instead and served no jail time. The FBI eventually abandoned its case. In the days just after the bombing, the school-front demonstrations and motorcades in Birmingham died down. Students in the city settled into the first desegregated school year in Alabama history, just as students did in Huntsville and Mobile. In Tuskegee the white exodus continued. The five-judge court enlarged the restraining order against Wallace into a preliminary injunction, after hearing testimony from John Doar, who argued that the governor was trying to use state police power “to paralyze the supreme law of the land.” State and local officials, the plaintiffs’ attorneys, and the Justice Department prepared to litigate the Wallace case on its merits in the coming months. Litigation in all four school cases also remained to be fully adjudicated.³²

It was no end, really. The tempestuous events of the fall of 1963 were simply the early rumblings of a gathering storm. As the state entered the winter of 1964, the defiant path blazed in the 1950s and extended by Wallace remained open to those who refused to accept desegregation. Only then, defiant segregationists no longer had to rely on Montgomery. They still looked to the governor and the legislature for support, of course, but Macon County had shown the way towards maintaining segregated education, and others looked to follow. There were those by that fall who had capitulated on massive resistance, only when federal court orders threatened local officials with fines or jail time. These law-and-order moderates were a surging force in the areas affected by injunctions, but they confined their compliance efforts to doing only that which the courts required, and doing that only very reluctantly. And what of those school systems not yet threatened with litigation? Only four school systems in the state were under court order in the fall of 1963. None of the others was prepared to desegregate on its own accord. Black activists were ready, however, to follow the example set by

³² Chambliss escaped justice until the late 1970s when state Attorney General Bill Baxley re-prosecuted his case and secured a guilty verdict. Carter, *Politics of Rage*, pp. 189-95; Thornton, *Dividing Lines*, p. 145; *Southern School News*, Oct., 1963; United States v. Wallace, Preliminary Injunction of Sept. 24, 1963, *Race Relations Law Reporter* 8.3, Fall, 1963, pp. 920-4, see also in Governor’s Administrative Assistant Files, SG 19974, ADAH.

activists in Huntsville, Birmingham, Tuskegee, and Mobile, and to force the issue in court. And so new battles loomed all over the state.

When swept up in those battles, many segregationists would reluctantly give in to the force of the federal courts, agreeing with the Northwest *Alabamian* that there was a need to maintain “law and order” for the sake of an “atmosphere conducive to reasonable solutions.” Some would seek out defiant solutions within the law, arguing like the Selma *Times-Journal* that there was no need to “abandon principle” in order to “take and maintain a stand for law and order.” Most ominous of all were those moderates who gave lip service to black activists’ goal of “equal treatment,” but chafed and recoiled when the movement’s leaders moved “too quickly.” The Union Springs *Herald* admitted that there were “moral overtones” to the movement in Alabama that “[could] not be denied.” But the “means which [were] being employed” to achieve the movement’s goals were disturbing to the Black Belt paper. More “senseless slaughter” ought to be avoided, of course, but if the movement’s leaders continued to act “irresponsibly,” then the “tree of civil rights” would “bear a bitter fruit indeed.”³³

One Birmingham man could see the coming harvest, growing as it was from the seeds planted that turbulent year. H.H. Perritt was a PhD, a veteran of World Wars I and II, and a career U.S. naval officer from the upscale Cottdale section. His grandfathers, like so many southerners’ ancestors, had fought for the Confederacy. He wrote the *Birmingham News* after the 16th Street bombing and wondered “have [the murders] shocked us enough? Have they shocked us,” he asked, “into speaking out for freedom of the oppressed, opportunity for the deprived, and love for the despised among us,” especially those “who by accident of birth have darker skin” than whites? “Hatred will continue,” he predicted, “murder will continue, unless we admit our mistakes and undertake positive action to eliminate from our laws and customs the wrongs we have committed against our fellow Americans for generations.” He concluded:

³³ *Birmingham News*, Sept. 21, 28, 1963, reprinting editorials from the cited newspapers.

We cannot have respect for “law and order” while at the same time using every available means short of violence to circumvent or defy the law of the land as interpreted by the courts. Only by positive steps, beginning with admission of our sins, can we begin to purge our society of the sickness in its soul.³⁴

³⁴ *Birmingham News*, Sept. 23, 1963.

PART II: THE LITIGIOUS ASSAULT AND THE REARTICULATION OF RESISTANCE, 1964-73

They have laid down their lives on the bloody battle field.
Shout, shout the battle cry of Freedom!
Their motto is resistance – "To the tyrants never yield!"
Shout, shout the battle cry of Freedom!³⁵

CHAPTER 8: "NOW A SINGLE SHOT CAN DO IT": *LEE V. MACON* AND THE CONCEPTION OF THE
STATEWIDE INJUNCTION, SPRING, 1964

On January 23, 1964, Governor George Wallace stopped by Macon Academy in Tuskegee to address the 140-member student body in the school's newly dedicated assembly hall. The all-white private school had been formed the previous fall to avoid the court-ordered desegregation of Tuskegee High. Segregationists across the state monitored the situation closely. Could whites build private schools from the ground up on short notice and adequately support them? When segregationists in Tuskegee looked to Montgomery for help, Wallace was eager to do everything he could to foster defiance of desegregation and to vilify the NAACP and the federal government for bringing it upon Alabama. After visiting classrooms and passing out inaugural day coins – which he told the students were Confederate money that "might be worth something someday" – the governor addressed the school's first assembly in its new hall. He told the students that their high school had been "taken by unwarranted and illegal action from people who [had] no interest in education in this state, black or white." The federal government, he argued, was not interested in their sacrifice; it was more interested in passing the civil rights bill pending before Congress. Wallace said the bill would "take away . . . a basic

³⁵ "Battle Cry of Freedom"; see the lyrics to the Confederate adaptation of the popular Union war song, at "Sheet Music for the Song Battle Cry of Freedom ca. 1864," National Archives and Records Administration, Online Public Access, <http://research.archives.gov/description/3819352>, accessed June 5, 2013.

human right”: their right to own property. Returning to the issue of schools, he said the key question they were faced with was whether “people in Washington, a thousand miles away, [could] take over and run a local school system.” He assured them that help from state officials was on the way. “We can’t win all of the battles,” he said, “but we can awaken the American citizens to the dangers of an omnipotent federal centralized government.” The ambitious Wallace said “we,” and some of those gathered *might* have believed he meant more than “I” when he added “we are going to make our mark yet on the American scene.”³⁶

Just over a week before the governor spoke to the Macon Academy students, on January 14, 1964, Macon County Superintendent C.A. Pruitt had appeared in Judge Frank Johnson’s courtroom in Montgomery to answer questions from attorney Fred Gray regarding Macon’s forthcoming desegregation plan. Gray had asked for a subpoena so he could ascertain what progress the school board had made in formulating the plan, due to the court in March. The short answer Pruitt freely gave to that primary question was ‘none.’ In fact, Pruitt told the court, “we are asked to work out a plan that would preserve the public school system in the county, but under the circumstances that exist today I can conceive of no plan at this time that would be submitted that would be accepted by the white people.” Pruitt argued that a comprehensive plan such as that requested by the plaintiffs would “end the public school system in the county as far as white people are concerned.”³⁷

The circumstances in Macon County seemed to support Pruitt’s conclusion. When Judge Johnson had the previous fall granted the plaintiffs’ request for an injunction and ordered the desegregation of Tuskegee High, all the white students had eventually left the school. Anthony Lee and his 12 colleagues (minus one who was expelled before the exodus for allegedly whistling at a white girl), attended classes all fall by themselves, under instruction from a few loyal teachers who stayed behind. Most of the whites had scattered to Shorter High and Macon County High at Notasulga on the western

³⁶ *Tuskegee News*, Jan. 30, 1964; *Southern School News*, February, 1964.

³⁷ *Birmingham News*, Jan. 14, 1964.

and eastern edges of the county, respectively, or to Macon Academy. Some had enrolled in white schools in neighboring counties. In Macon – where blacks outnumbered whites almost five-to-one – even token desegregation was unacceptable. Of course, Macon had been ordered to transfer significantly more black students in its first desegregated year than the other systems then under injunction: Mobile, Birmingham, or Huntsville. Pruitt argued that whites in Tuskegee seemed to have no appreciation for the pressure he and the school board members had been under in these circumstances. They had been ostracized for their minimal compliance efforts. Under friendly cross-examination by Assistant State Attorney General Gordon Madison, Pruitt said that he and his wife had stopped attending the local Methodist Church because the harassment he received for his compliant stance made it “unbearable.” A school board member, he added, had seen his local business boycotted the entire fall for the same reason.³⁸

Pruitt’s contention that the school authorities could not conceive of a workable plan was not a revelation, then. What the superintendent admitted regarding the pressure the school officials had received from Montgomery, however, revealed an undercurrent which would soon sweep the *Lee v. Macon* case up into a statewide storm. “We have been placed in the position,” Pruitt told the court, “of complying with a court order and being charged with defying a very popular governor, but we have done it.” Initially, the Macon County school board had defied the governor by acquiescing to the court and allowing Tuskegee High to open. Wallace had sent his closest advisors to Tuskegee to urge Pruitt to keep the school closed despite the injunction. The advisors, including Wallace’s right-hand-man Seymore Trammel, had interrupted a meeting between the superintendent and State Attorney General Richmond Flowers to convince Pruitt to publically back the governor’s executive orders. Under questioning from Gray, Pruitt also revealed that shortly after school opened, state Superintendent Austin Meadows had ordered the board to provide bus transportation to the white students who had

³⁸ *Birmingham News*, Jan. 14., 1964; *Montgomery Advertiser*, Sept. 17, 1963; Norrell, *Reaping the Whirlwind*, pp. 153-60.

fled to Shorter and Notasulga. Pruitt produced a letter from Meadows, in which the state superintendent wrote, "In order to provide educational opportunity to the maximum extent possible, the Macon County Board of Education is to extend county school bus transportation service to all children who live two miles or more from the public school they are attending." The Macon officials reluctantly complied with Meadows' directive until Gray alerted the court to the situation. Johnson told the school board in October to phase out the county bussing by the end of the year. In January, when the board refused Wallace's request to resume the transportation, the governor arranged to have the students taken over to Shorter and Notasulga in state trooper patrol cars. This lasted until mid-month, when the governor then offered state trade school busses for the task. Fred Gray began to wonder who was effectively running the Macon County school system. Wallace liked to demonize the federal government "a thousand miles away" for making decisions which affected local school systems, but what about Montgomery, 30 miles away?³⁹

Answering that question would soon become the central concern of the district court, the plaintiffs, the defendants, and the U.S. Justice Department. It would eventually make *Lee v. Macon* the most far-reaching post-*Brown* school desegregation case in the United States. By the summer of 1964, it was clear to everyone in the Alabama that the state was facing more than the desegregation of a few select school systems. Statewide desegregation became the goal of Fred Gray, the NAACP-LDF, the state NAACP, and the Justice Department's Civil Rights Division. White resistance remained as strong as it had ever been, within and outside the courtroom walls. The governor and the legislature continued on the same path of defiance upon which they had embarked years before, courting the law-and-order moderates who looked to school closure and private school establishment as a lawful and sensible means of avoiding desegregation. Meanwhile, those law-and-order moderates like Pruitt who were

³⁹ *Birmingham News*, Jan. 12, 14, 1964; *Lee v. Macon County Board of Education*, Amended and Supplemental Complaint, Feb. 3, 1964, and Writ of Injunction, Temporary Restraining Order, Feb. 3, 1964, Frank Johnson Papers: *Lee v. Macon* Case File, Container 28, Folder 5.

threatened with contempt citations continued to try and satisfy the demands of the court. There, in the courtroom, the plaintiffs pressed on for desegregation in the face of nearly universal resistance of one form or another.

The State of Desegregated Education, Early 1964

Desegregated education had been an isolated experience for Anthony Lee and the students who attended Tuskegee High in fall and early winter of 1963-4. Students desegregating schools in Birmingham, Huntsville, and Mobile experienced something quite different. They sometimes met with cautious attempts at friendship. More often than that, they endured outright hostility. But most often of all, they were met with general indifference and neglect. The litigation that allowed them to desegregate their respective schools continued to wind through the courts, chipping away so very slowly at the edifice of the Jim Crow schoolhouse. Meanwhile, they learned to adapt. Floyd and Dwight Armstrong at Graymont Elementary in Birmingham began to stand behind one another to get water at the white water fountain to avoid getting punched by white students, or to stand behind a white boy during baseball games to avoid getting hit by a flying bat. Most students simply ignored them. Patricia Marcus and Josephine Powell at West End High in Birmingham started a collection of hairpins, paper clips, chalk, erasers, and pencils thrown at them by white students (they chose not to save the rotten eggs). The two girls struggled in classes: Patricia got an F in math, and Josephine a D in English. If the petty harassment was not enough of a distraction, the education they had received at their former school had apparently not prepared them to compete at a high level in a better-funded school with more highly trained teachers and a more strenuous curriculum. Richard Walker, though, did well at Ramsey High in Birmingham. An honor student at his former school, Walker got Bs and Cs in challenging classes like Physics, Economics, and French. He would have liked to have played basketball but knew this to be impossible at the white school. The Birmingham students met some kind acquaintances, but

made few if any friends. One white girl at West End captured the mood of most white students towards Powell and Marcus, telling a reporter, "I forget they are even here; then when I see them in the hall, I'm startled. By far the most of us just leave them alone," she said, "and act as if they weren't here." It was easy enough to do. The plaintiffs in *Armstrong* petitioned the court for mid-year further desegregation, but Judge Seybourn Lynne denied the request. Powell, Marcus, Walker, and the Armstrongs were alone at least until the fall of 1964.⁴⁰

In Huntsville ten children of federal personnel at the Marshal Space Flight Center and Redstone Arsenal joined Sonnie Hereford and the three others in white schools late in January. Per Judge Hobart Grooms' order, the Huntsville school board had submitted a plan at the first of the year. It called for the desegregation of the 12th grade at several schools that semester and the system-wide desegregation of the 11th and 12th grades the following fall.⁴¹ The board proposed a grade-a-year stair-step plan thereafter. Judge Grooms approved it over the objection of the plaintiffs. The ten students applied and were accepted under the placement law. The Huntsville authorities managed to pull off the additional desegregation without any special difficulties. Nonetheless, Governor Wallace used the situation to grandstand, demanding "strong resistance, opposition, and indignation on the part of local people" to the efforts of these "nonresident" federal personnel who were trying to "destroy the policies, customs, and traditions of this state." He argued that "where resistance is low, federal authorities and incendiaries follow a steady course of intimidation that ultimately will destroy our entire educational structure." If the Huntsville local officials had expressed a desire to comply with court orders, the governor maintained that it was because of this "intimidation." He offered "additional state assistance

⁴⁰ James Armstrong, Interview for the Birmingham Civil Rights Institute Oral History Project, in *Foot Soldiers for Democracy: The Men, Women, and Children of the Birmingham Civil Rights Movement*, Ed. Horace Huntley and John W. Mckerley (Chicago: University of Illinois Press, 2009), pp. 4-3, 35-46; *Knoxville News-Sentinel*, Oct. 24, 1963; *Armstrong v. Birmingham Board of Education*, see summary at *A Statistical Summary of School Segregation-Desegregation in the Southern and Border States, 1964-5* (Nashville: Southern Education Reporting Service, 1965), pp. 4-6.

⁴¹ The schools opened to desegregation that January were Butler High, Huntsville High, Westlawn Junior High, and Madison Pike Elementary.

and further courses to be followed in attempting to save the Huntsville school system.” Those “further courses” were blueprints for private school creation, which Wallace’s administration shared with anyone who requested it, and with some who did not. For its part, the state board of education passed a resolution which necessitated the approval of local boards and the state board for the admission of “non-resident” students. These students’ families, the reasoning went, shopped at the post exchange on base, and therefore paid no Alabama sales taxes. They ought not to have access to public schools without some sort of approval. Everyone understood the actual thrust of the move. Meanwhile, most segregationists in the “Rocket City” accepted the inevitable and adjusted without fanfare to the court-ordered presence of the now 14 black students in white schools. Also, in the nearby small cities of Sheffield and Florence, in the state’s northwestern corner, schools were voluntarily token desegregated. Since tiny Spring Hill College in Mobile had done so a decade before, these were the lone instances of school systems’ voluntarily desegregating. So it would remain.⁴²

Both Huntsville’s city school board and the Madison County school board were sure to receive more requests to transfer that spring and summer under the placement law. The Fifth Circuit Court of Appeals that month upheld Judge Grooms’ ruling in the “impacted areas” case. The appellate court dismissed the Justice Department’s contention that segregated public schools were a burden upon the United States’ exercise of the war power. Nor was the court convinced that the states had implicitly agreed to assign the children of federal personnel to schools on a non-racial basis. The Justice Department had argued that the states were contractually bound to do so by virtue of agreeing to educate those students on the same basis as others in the state when they agreed to accept impacted areas money from the federal government. The three-judge court – also considering two cases in Mississippi – included Circuit Judges Richard Rives and Dick Cameron and District Judge Edwin Ford

⁴² *Southern School News*, Feb., 1964; *Hereford v. Huntsville Board of Education*, see summary at *A Statistical Summary of School Segregation-Desegregation in the Southern and Border States, 1964-5*, pp. 4-6; see, for Sheffield and Florence, *Southern School News*, May, June, 1965.

Hunter, Jr. Rives wrote for the unanimous court, observing that “no one would be so rash as to claim that a local school board in either of the ‘hard core’ states of Alabama or Mississippi would intentionally enter into a contract which it understood to provide for even partial desegregation of the races in the public schools under its jurisdiction.” The Justice Department attorneys could not argue the veracity of this point; still they maintained that the contracts provided for the children to be educated “in accordance with the laws of the state,” which ought to be, themselves, bound by the *Brown* decision. Rives argued that this was a question for the Office of Education to probe, not the Justice Department. The not-altogether unexpected defeat for the plaintiffs allowed the individual families to focus on working through the other two suits brought by private individuals (blacks had initiated a private suit against Madison County, in addition to *Hereford v. Huntsville*). It also allowed the Civil Rights Division to focus on supporting the cases in which it was an *amicus*, including *Lee v. Macon*.⁴³

Mobile was affected by the impacted areas ruling as well. The Justice Department had sought to force the desegregation of schools serving the children of federal personnel at the Air Force’s Brookley Field. Blacks seeking transfer to white schools could then theoretically apply for transfer under the placement law, assuming litigation would bring a permanent injunction against the Mobile school board. The *Birdie Mae Davis* case was awaiting a ruling by Judge Daniel Thomas on the merits of such an injunction, while a preliminary injunction provided for the desegregated education of only Henry Hobdy and Dorothy Davis. The hearing on the merits had been held in November of 1963, the week before President John Kennedy was assassinated in Dallas. Legal Defense and Education Fund attorney Derrick Bell had argued forcefully in favor of the plaintiffs’ desegregation plan, which would have desegregated the entire Mobile City-County system in three years. The Mobile Board of School Commissioners had

⁴³ United States v. Madison County Board of Education, Jan. 7, 1964, *Race Relations Law Reporter* 9.1, Winter, 1964, p. 165, see also at 326 F.2d 237; *Southern School News*, Feb., 1964. The private action initiated against the Madison County school board was *Bennett v. Madison County Board of Education* (ND, AL, 1964), see summary at *A Statistical Summary of School Segregation-Desegregation in the Southern and Border States, 1964-5*, pp. 4-6.

proposed a much more drawn-out plan. The board had argued that there was a “distinct and educable difference” between black and white children which was “genetic in origin,” and that this was a perfectly good reason to segregate them in initial school assignments. The defendant school officials had called psychologists and guidance counselors from the Mobile and Birmingham school systems to testify to these differences. The school board had also called Dr. Wesley Critz – the former anatomy professor from the University of North Carolina whom Governor John Patterson had enlisted to craft the state of Alabama’s initial courtroom defense several years prior. Critz testified that the “the Negro” had a smaller brain than that of the white man and that he was “less capable of abstract reasoning and hard intellectual functions.”⁴⁴

All of this had occurred over the objection of Derrick Bell. Despite Judge Thomas’ policy of maximum delay and antipathy to civil rights actions, Bell was still dumbfounded that the judge allowed the testimony to be presented, since it seemed to fly in the face of the original *Brown* ruling of nearly ten years prior. After the hearing, Thomas sat on the case for several more months, as Hobby and Davis carried their lonely sojourn into 1964. The Fifth Circuit would again have to rule in the case before any other black students joined them in white schools in Mobile.⁴⁵

Blacks in the northeastern Alabama city of Gadsden had also brought a suit in late 1963. Gadsden was a satellite of Birmingham, just a 45 minute drive to the east. It had been the site of an active protest movement for months. Activists in the city sought the admission of 12 students to all-white schools as soon as the rulings in *Armstrong*, *Davis*, *Hereford*, and *Lee* indicated that relief could be found in the federal trial courts. Judge Grooms ruled in their favor in December but allowed the school

⁴⁴ United States v. Mobile Board of School Commissioners, *Davis v. Mobile Board of School Commissioners*, see summaries at *A Statistical Summary of School Segregation-Desegregation in the Southern and Border States, 1964-5*, pp. 4-6; *Birmingham News*, Nov. 9, 1963; *Montgomery Advertiser*, Nov. 13, 16, 1963; *Pride, The Political Use of Racial Narratives*, pp. 48-53.

⁴⁵ United States v. Mobile Board of School Commissioners, *Davis v. Mobile Board of School Commissioners*, see summaries at *A Statistical Summary of School Segregation-Desegregation in the Southern and Border States, 1964-5*, pp. 4-6; *Birmingham News*, Nov. 9, 1963; *Montgomery Advertiser*, Nov. 13, 16, 1963; *Pride, The Political Use of Racial Narratives*, pp. 48-53.

board until the following fall to initiate desegregation. This brought the number of Alabama school districts facing desegregation to six. There were 114 districts in the state.⁴⁶

The prospect of desegregating each and every one of those 114 districts was grim, and it would fall to local activists, the NAACP, the LDF, and the Civil Rights Division to get it done. Across the South, Alabama trailed only Louisiana, South Carolina, and Mississippi in the fewest number of desegregated school districts (“hard core” Mississippi had managed to avoid any desegregation altogether). The City of New Orleans had over 100 black students in white schools, so in terms of the fewest number of black pupils in white schools, Alabama trailed only South Carolina and Mississippi. Region-wide the percentage of black pupils attending school with whites was just above one percent. Dismal as this was for black reformers and their allies, the state of Alabama’s .004 percent put into perspective the lengths to which segregationists would go in the Deep South to avoid undermining segregated education and threatening white supremacy. Developments in Tuskegee that year began to reveal both the increasingly alarming tenacity of that resistance and the promise of continuing litigation.⁴⁷

Moses and the Burning Bush in Tuskegee

For the Tuskegee students, the situation was fundamentally dissimilar from that of the students in Huntsville, Birmingham, and Mobile. The Macon County litigation itself would soon become unique among the state’s cases as well. There were no white students to assault Anthony Lee and the others – no white students to compete with in class, no white students to verbally harass them, no whites to pretend that they were not there – because there were no white students there at all. Each morning the 12 would arrive on the Tuskegee Public campus and see white students milling around. It never

⁴⁶ Miller v. Board of Education of Gadsden (later styled Miller v. Love), November 18, 27, 1963, C.A. 63-574 (ND, AL, 1963), *Race Relations Law Reporter* 8.4, Fall, 1963, pp. 1403-6. *A Statistical Summary of School Segregation-Desegregation in the Southern and Border States, 1963-4*, pp. 4-6.

⁴⁷ *A Statistical Summary of School Segregation-Desegregation in the Southern and Border States, 1963-4*, pp. 4-6.

occurred to one of them, Willie Wyatt, exactly what the whites were doing there, unless they were waiting to go across the street to Macon Academy. Many of them were, in fact, going to the new private school, but eventually Wyatt realized that the busses leaving the campus in the morning were taking some of the white students to Shorter and Notasulga, per the state superintendent of education's order. Wyatt, Lee, and their ten comrades attended a re-segregated Tuskegee Public the remainder of the fall just that way. Since they were spread out among different grades, a typical class included two or three students and a white teacher who had opted not to quit or join Macon Academy's growing faculty. The largest "class" Willy Wyatt attended had three students: himself, Lee, and fellow senior Robert Judkins.⁴⁸

This situation became even more absurd in January, when the county chose to stop transporting the white students across the county from Tuskegee to Shorter and Notasulga. Wallace ordered state trooper patrol cars and, later, state trade school busses to take up the task. Then, seeing the continuing white exodus as way to force the black students back to all-black Tuskegee Institute High, the state board of education simply ordered the closing of Tuskegee Public High on January 30. The state board was composed entirely of Patterson and Wallace appointees who were happy to frustrate the efforts of the black plaintiffs in *Lee* by invoking a state board policy of closing schools "where the teacher load is insufficient to justify paying teachers." The state board also ordered the Macon County school board to resume providing "school bus transportation to the students attending the Shorter-Notasulga schools in Macon County." Lest anyone think this meant the 12 black students from Tuskegee, the state board directed that *they* be transferred to "other schools in the Tuskegee area," that is, to all-black Tuskegee Institute High. C.A. Pruitt and the Macon school board consulted state Attorney General Flowers, who

⁴⁸ Willie Wyatt Interview; Anthony Lee Interview; Norrell, *Reaping the Whirlwind*, p. 159.

advised them that the state board was acting on appropriate authority, and on January 31, the Macon officials issued a statement announcing the closure of Tuskegee Public.⁴⁹

Fred Gray said that at that point the realization hit him “like the burning bush speaking to Moses.” If the governor and the state board of education had the authority to close Tuskegee Public High School and to order the transportation of white students to other schools in the county, and if they could order the black students back to Tuskegee Institute High, then surely they had shown that they had “general control and supervision over all of the public schools in the various counties in the state of Alabama.” This was language taken directly from Alabama law delineating the state board’s responsibilities, and Gray was prepared to use it against the state officials. And this was to say nothing of the governor’s actions the previous fall, when he had directed the various temporary school closures by executive order, inviting the Justice Department’s action in *U.S. v. Wallace*. In that case, Wallace was theoretically using the state’s police power and his authority as governor to maintain “law and order.” In this case, Wallace could be brought into the *Lee* suit for his influence as *ex officio* president of the Alabama State Board of Education, which was, itself, clearly obstructing desegregation orders. Gray recalled that he “saw the opportunity to do more with this one lawsuit . . . than had been done in any other single [desegregation] lawsuit.” The public school systems of Alabama were supposed to be autonomous, which was why the NAACP had prepared years before to file petitions and lawsuits in every single one. The state legislature had gone to great pains at times to make sure that the situation remained diffuse. But there was the state school board not only preventing court-ordered desegregation, but doing so in a way which clearly demonstrated that it, in fact, controlled local boards of education across the state. The blunder Wallace and the state officials had made was not lost on others. An unidentified source in the state government admitted to the *Montgomery Advertiser* after

⁴⁹ Lee v. Macon County Board of Education, Amended and Supplemental Complaint, Feb. 3, 1964, and Writ of Injunction, Temporary Restraining Order, Feb. 3, 1964, Frank Johnson Papers: Lee v. Macon Case File, Container 28, Folder 5; Norrell, *Reaping the Whirlwind*, p. 160.

the Tuskegee closure order that the state authorities had made “a tactical error.” Since the *Brown* decision, the source said, “the theory . . . has been to spread this out as much as possible, so any court action taken is a scattergun action. Now,” he said, “a single shot can do it.”⁵⁰

On Monday, February 3, Fred Gray took aim. He had the full support of the Justice Department, which had again dispatched John Doar to Tuskegee. Doar pledged every resource at DOJ’s command to ensuring that the United States’ interests in the case were protected. Shortly after the 12 students arrived at Tuskegee Public to find that the doors had been locked and the school was indeed closed, Gray filed an amended and supplemental complaint in *Lee v. Macon* recounting the interference of the governor and state board of education – from the initial school closure and state trooper blockade, to the state-ordered bussing of whites to Shorter and Notasulga, to the more recent closure of Tuskegee and the order to resume busing. He argued that the state clearly controlled local boards of education and was pursuing a policy “of operating the public school system in each of the various counties of the state of Alabama on a racially segregated basis.” Using the line of reasoning in *Armstrong*, Gray maintained that the defendant state officials operated a “bi-racial” school system in which initial assignments were made based on dual racial attendance zones. This went around the logic of the Alabama Pupil Placement Law. The Macon County authorities could even claim they had transferred the 12 black students back to the black school by virtue of the placement law. And the state board might even have had reasonable justification for ordering the closing of a school with 12 students in it. But the combination of the two moves, along with the history of state interference and obstruction, clearly demonstrated that the whole charade was intended to “circumvent and evade the Order of this Court dated August 22, 1963,” according to Gray. He therefore asked that the state board of education, its individual members, and the governor as its president, be added as parties defendant in the case. Gray and DOJ asked for a temporary restraining order and an injunction against the board and governor,

⁵⁰ Gray, *Bus Ride to Justice*, pp. 213-14; Amended and Supplemental Complaint, Feb. 3, 1964, Frank Johnson Papers: Lee v. Macon Case File, Container 28, Folder 5; *Montgomery Advertiser*, Feb. 4, 1964.

barring them from any further interference in Macon County, either by voiding the closure of Tuskegee High or by ordering the transfer of the 12 black students to Shorter and Notasulga. Gray also dropped a bombshell, asking the court to consider entering an order directing the state board to desegregate all of the school systems in the state not already under court order.⁵¹

Frank Johnson immediately issued a limited temporary restraining order. He refused to restrain the closing of Tuskegee High, the operation of which had become “unfeasible,” but he added the state board, its members, and Wallace (in his capacity as president of the board) as parties defendant in the case and restrained them from any further interference in Macon County. This included interference in the transfer of the 12 students to Shorter and Notasulga. Fred Gray had worked out an arrangement with the students to have 6 apply to one school and 6 to the other. Johnson ordered the local school board to admit the students to Shorter and Notasulga and to see that they had access to transportation to the two schools on the same basis as the white students. The judge set a date of February 13 for a hearing on the merits of enlarging the restraining order into a preliminary injunction, but with a caveat. At that hearing, the court would only consider the issue of state interference in Macon County and the transfer of the 12 students to the two remaining white schools. “The Court specifically leaves for a later hearing,” Johnson wrote, “the other relief sought by the motion for preliminary injunction – particularly the part of the complaint and motion seeking the desegregation of all public schools and public school systems in the State of Alabama” Johnson knew that such a statewide school desegregation order aimed at a southern state government would not only be unprecedented, it would generate an unprecedented revolt from segregationists. Such an issue deserved a full trial on the merits before any relief could be entered.⁵² The issue of restraining interference in the transfer of petitioning black

⁵¹ Lee v. Macon County Board of Education, Amended and Supplemental Complaint, Feb. 3, 1964, Frank Johnson Papers: Lee v. Macon Case File, Container 28, Folder 5; *Birmingham News*, Feb. 3, 1964; *Montgomery Advertiser*, Feb. 4, 1964.

⁵² A three-judge court – including Judge John Minor Wisdom – had previously enjoined statewide implementation of a Louisiana tuition grant scheme in *Hall v. St. Helena Parish*, 147 F.Supp. 649 (ED, LA, 1961). And

students in a clearly “dual” school system was clear cut enough to grant immediate relief pending a hearing and trial.⁵³

George Wallace bitterly denounced the restraining order and pledged the resistance of the people of Alabama. At an emergency meeting, called and presided over by Wallace, the state board of education followed suit, adopting a resolution in which it held:

The State Board of Education deplors the Order of Judge Johnson and pledges every resource at our command [*sic*] to defend the people of our State against said Order and will defend the people of our state against every Order of the Federal courts in attempting to integrate the public schools of this State and will use every legal means at our command to defeat said integration Orders and pledges our full support to the local boards of education in supporting public school systems as now constituted within the law, and will give every assistance possible to support every effort to maintain our way of life and high educational standards for all citizens of the State.⁵⁴

At the same meeting, the state board adopted a resolution directing the Macon County school board “to forthwith, February 4, 1964, provide financial assistance to parents or guardians of students under the grant-in-aid law of the state of Alabama.”⁵⁵

Caught up in the tug of war again, the Macon County school officials turned to their counsel – state Attorney General Flowers. Flowers advised the board to petition the court for instructions before

a district court in Delaware had even earlier ordered the state school board there to initiate statewide desegregation in *Evans v. Buchanan*, 152 F.Supp. 886 (DC, DE, 1957), affirmed 256 F.2d 688 (3rd CCA, 1958). However, the Delaware litigation was aimed at an easily assailable state law requiring segregation in schools, the type of which Alabama had long since jettisoned. And the injunction in the Louisiana case was limited to enforcing the tuition grant statute. So, a statewide order in Alabama which not only enjoined interference but actually required the state to initiate desegregation of each local system, would have gone against the theretofore universally accepted practice, sanctioned by *Brown II*, of leaving individual district’s cases up to trial courts on a one-on-one basis.

⁵³ *Lee v. Macon County Board of Education*, Writ of Injunction and Temporary Restraining Order, Feb. 3, 1964, Frank Johnson Papers: Lee v. Macon Case File, Container 28, Folder 5.

⁵⁴ *Lee v. Macon County Board of Education: Amendment to Amended and Supplemental Complaint*, Feb. 10, 1964, Frank Johnson Papers: Lee v. Macon Case File, Container 28, Folder 5; Memorandum Brief of the United States in Support of Plaintiffs’ Motion for a Preliminary Injunction, March 13, 1964, Frank Johnson Papers: Lee v. Macon Case File, Container 19, Folder 9.

⁵⁵ *Lee v. Macon County Board of Education: Amendment to Amended and Supplemental Complaint*, Feb. 10, 1964, Frank Johnson Papers: Lee v. Macon Case File, Container 28, Folder 5; Memorandum Brief of the United States in Support of Plaintiffs’ Motion for a Preliminary Injunction, March 13, 1964, Frank Johnson Papers: Lee v. Macon Case File, Container 19, Folder 9.

doing anything else. The board then advised Johnson that it “desire[d] to comply with the lawful orders of the State Board of Education and to grant aid if proper and legal.” But it was “in doubt as to the action which [it] as a board may take,” specifically as to whether complying with the state board would mean that it had “violated any of the orders and decrees of [the] court.” The attorney general also advised Macon Academy not to take “a penny” of grant money from the state until the matter had come before the court. Flowers understood that the state board and the governor had made a terrible mistake. They had gone against his will and behind his back, obtained their own private counsel, and created what the attorney general told the press was a potential “catastrophe” which would probably mean “total integration for Alabama.” He called the issuing of the grant-in-aid and school closure orders, collectively, “the biggest blunder that has ever been pulled in our fight against integration,” adding that it was “foolish,” “ill-planned,” and worst of all, “outside the law.” He vowed, therefore, to “resist it forever.” Meanwhile, upon the request of Notasulga Mayor James “Kayo” Rea, Wallace once again prepared to send the Alabama State Troopers into Macon County. This action Flowers defended, saying, “That’s the most explosive situation I ever saw.”⁵⁶

After Johnson issued the order to desegregate Shorter and Notasulga, the two towns began to prepare for the arrival of the 12 black students from Tuskegee on the morning of Wednesday, February 5. Violent trouble was not necessarily expected from the Black Belt planter community of Shorter, but Notasulga was a hill country town home to mostly poor farmers and textile workers. It was more volatile. Late on the night of Monday, February 3, Notasulga’s Mayor Rea, a lawyer, arranged the hasty passage of two city ordinances: a “Civil Disturbance Ordinance” and a “Safety Ordinance.” The former gave the mayor the authority to “close any public facility, including but not restricted to churches, schools, lodge halls, taverns, dance halls, and factories,” whenever “[their] continued operation . . .

⁵⁶ Lee v. Macon County Board of Education, Amendment to Amended and Supplemental Complaint, Feb. 10, 1964, and Petition Seeking Instructions, Feb. 6, 1964, Frank Johnson Papers: Lee v. Macon Case File, Container 28, Folder 5; *Montgomery Advertiser*, Feb. 6, 1964.

would result in riots, violence or physical injury to persons or property . . .” The “safety” ordinance created the “Office of Safety and Fire Prevention Inspector” and gave this officer the authority to set maximum capacities at all public facilities. Rea was immediately appointed by the town council to said office. He then had the town clerk contact the high school’s principal to ascertain the school’s average daily attendance, which he was told was 174, including teachers. Rea then acted in his capacity as the town’s “Fire Prevention Inspector” and established a maximum capacity for the school of 175. The following night, three buildings on a Macon County school board member’s farm went up in flames (a tenant farmhouse and two barns, one containing ten tons of ammonia). The county fire department quickly determined the incident was the result of arson. That weekend Klansmen had burned crosses on the lawns of three other school board members. The new fire prevention chief seemed unconcerned.⁵⁷

At both Shorter and Notasulga, some segregationists pushed for a full boycott of classes. Despite resolutions signed by the senior classes urging students to remain, a number of students began to announce their intention to leave. Macon Academy started receiving enrollment requests from Shorter and Notasulga parents as soon as the order came down. Some parents and students simply would not allow any breach of the color line in which they played a passive role. Other parents feared what might happen if violent segregationists decided to challenge the effort. The rumblings about town seemed to give credence to their fears. Outside Macon County High School at Notasulga on the afternoon of the 5th, a man sat in his car fingering the blade of a knife. He told passing reporters, “This all could have ended at Oxford (Mississippi) if it had been bloody enough.” Many segregationists in Notasulga evidently shared this sentiment. He said he doubted if the 6 black students would even make it to the school the next morning. State trooper chief Al Lingo called the town a “powder keg” and

⁵⁷ United States v. Rea, 231 F.Supp. 772 (MD, AL, 1964), pp. 773-4, see also at *Race Relations Law Reporter* 9.1, Spring, 1964, pp. 156-8; Notasulga, Alabama, Ordinances of February 3, 1964, *Race Relations Law Reporter* 9.1, Spring, 1964, pp. 154-5; *Southern School News*, Feb., 1964; *Birmingham News*, Feb. 5, 1964.

“worse” than Tuscaloosa or Birmingham. Mayor Rea told reporters, “We believe in law and order, but it may be touch and go at times.”⁵⁸

Yet another public showdown over desegregated education occurred that Wednesday morning. It did not receive the same publicity as Little Rock, Oxford, Tuscaloosa, or even Wallace’s second stand in the schoolhouse doors the previous fall. But it revealed the same intransigence. Coming as it did after all of these previously unsuccessful showdowns, it demonstrated – more than any other to its date – the doggedness of segregationists at the state and local level in the Deep South. The Alabama State Troopers showed up in Macon that morning and cordoned off the area around each school at dawn – 65 of them at Shorter and 75, plus Colonel Al Lingo and Dallas County Sheriff Jim Clark, at Notasulga. Clark had no business being there (the Dallas County seat of Selma was 90 miles away), but he had a knack for showing up anytime there was racial trouble afoot. James Rea would later claim to have invited him. A little over half the white student body showed up to Shorter (75 of 125), where Heloise Billes, Carmen Judkins, Janice Carter, Ellen Henderson, Harvey Jackson, and Wilmer Jones were successfully enrolled, accompanied by U.S. Marshals and Justice Department officials. Fourteen white students left upon the black students’ arrival. It was at Notasulga, though, that the real commotion took place. A few Notasulga residents lined the streets of the tiny town to watch the bus arrive carrying Anthony Lee, Willie Wyatt, Robert Judkins, Patricia Jones, Martha Sullins, and Shirley Chambliss. One man raised a shotgun from behind the window of his hardware store as the bus passed, temporarily putting a shock into the U.S. Marshals following the bus, and a few of the students on it, who happened to see him. A cold rain kept many townspeople away from the school itself, as did advance knowledge of Mayor Rea’s planned mini-stand in the schoolhouse door. Journalists and an angry crowd of about 30 white men, though, gathered across the street from where Lingo and the troopers had surrounded the school. They

⁵⁸ *Birmingham News*, Feb. 5, 6, 1964; *New York Times*, Feb. 6, 1964.

watched intently as the bus drove onto the school grounds and past a flagpole bearing only the Alabama state flag and the Confederate battle flag.⁵⁹

Notasulga policeman E.A. Harris flagged the bus down just inside the driveway at the entrance to the school grounds. Lingo had gotten word somehow that a white photographer had snuck aboard the bus and accompanied the children the nine miles from Tuskegee into town. Harris and Clark, especially, were eager to make him pay. Vernon Merritt, a University of Alabama student working for the *Black Star* Agency of Birmingham, had indeed snuck aboard the bus. Unknown outside of Alabama at the time, the 23-year-old Montgomery native would go on to distinguish himself covering the Vietnam war and as a staff photographer for *Life* magazine. There was much about Merritt for white Alabamians to dislike: he was a southern liberal journalist flouting law enforcement's maintenance of law and order while seeking to, they would have argued, paint the South in a negative light. He was a white traitor and the ultimate *persona non grata*. Harris was the first to board the bus and flush Merritt out. Clark, who had no jurisdiction in Macon County but who had an increasingly infamous horse-mounted posse of angry segregationists, followed Harris onto the bus. The two lawmen proceeded to assault Merritt, who was crouched in the aisle trying to hide. Harris began beating Merritt with a long cane. After smashing his camera against the side of the bus, Clark proceeded to repeatedly beat the photographer with his electric cattle prod, dragging him off the bus, screaming at Merritt the entire time, for effect, "Don't you strike me!"⁶⁰

State troopers held other journalists back across the street, obstructed their view, and ordered them not to take pictures. The U.S. Marshals and the Justice Department officials remained in their

⁵⁹ *New York Times*, Feb. 6, 1964; *Jackson Daily News*, Feb. 6, 1964; Lee

⁶⁰ *New York Times*, Feb. 6, 1964; *Birmingham News*, Feb. 6, 1964; *Montgomery Advertiser*, Feb. 6, 1964; *Jackson Daily News*, Feb. 6, 1964; *St. Petersburg Times*, Feb. 6, 1964; Willie Wyatt Interview; Anthony Lee Interview; *Southern School News*, Feb., 1964; *Hartford Courant*, Sept. 2, 2000 (Merritt Obituary), <http://articles.courant.com>, accessed Nov. 14, 2012; Norrell, *Reaping the Whirlwind*, p. 161; for an audio recording of the Merritt beating and an interview of James Rea, see Paul Goode Papers, 1963-4: Emory University Manuscript, Archives, and Rare Book Library (Atlanta, Georgia), Container: "Alabama."

vehicles behind the state trooper line. Lee, Wyatt, and the others sat silent and horrified on the school bus as Merritt lie bleeding and moaning on the sidewalk. As Merritt began to gingerly walk away from the school, the angry whites across the street began to jeer at him and threaten him, shouting “Nigger lover!” and “Come on over here, and we’ll fix you!” Lingo ordered two troopers to pick him up and whisk him away before the crowd could have its way. The angry whites then turned on the journalists in their midst, prompting the troopers to redouble their efforts to prevent a melee. Meanwhile, the bus pulled further down the u-shaped driveway to the front door of the school, where Rea met it. The mayor stood like Wallace at Tuscaloosa and announced to the students that the town’s recently passed fire safety ordinance prevented their entry into the school. “I have determined,” he said, “that the maximum safe capacity of Notasulga High School is the present enrollment. The school cannot safely accommodate any more pupils.” Gathered outside the school, a group of students cheered as the bus turned back for Tuskegee.⁶¹

Attorneys from the Civil Rights Division immediately drove to Montgomery to draft and file a complaint against James Rea, seeking a preliminary injunction against the use of the bogus town ordinances and against any further interference. Fred Gray began preparing another amendment to his recently amended complaint in *Lee v. Macon*. Meanwhile, in the days after the Notasulga incident and the successful enrollment at Shorter, the white exodus began anew. Mayor Rea briefly closed Notasulga’s schools because a suspicious fire at the town’s water treatment plant had created a “shortage” of water, which he deemed a fire hazard. When the schools were reopened, those students who elected to return began to feel the peer pressure from those who had left. And Macon Academy, already overcrowded and underfunded, announced that it would accept all comers (white ones anyway). Aware of the continuing departure of whites for the segregationist academy, Gray asked the

⁶¹ *New York Times*, Feb. 6, 1964; *Birmingham News*, Feb. 6, 1964; *Montgomery Advertiser*, Feb. 6, 1964; *Jackson Daily News*, Feb. 6, 1964; *St. Petersburg Times*, Feb. 6, 1964; Willie Wyatt Interview; Anthony Lee Interview; *Southern School News*, Feb., 1964; Norrell, *Reaping the Whirlwind*, p. 161.

court to void the tuition grant-in-aid statute which the state board had recently invoked. He sought a preliminary injunction against the use of the law and against any school closure efforts in Macon, or any other action which frustrated or circumvented the prior orders of the court. As Gray filed the amended complaint on Monday, February 10, someone called in a bomb threat to Shorter High School, shutting it down. A near-100 percent boycott was then underway at Notasulga, where mayor Rea had publically conceded the black students' admission. Gray was not prepared to send the children to the school, however, until the U.S. secured its injunction against the mayor.⁶²

Just three days prior, a three-judge court had been appointed to hear *Lee v. Macon*. Johnson had approached Montgomery's resident circuit judge, his good friend Dick Rives, shortly after Gray filed the initial complaint in January, 1963, about the possibility of requesting a three-judge court to hear the case. Rives then submitted the query to Fifth Circuit Chief Judge Elbert Tuttle, admitting that it was a "close question" and that neither he nor Judge Johnson were "convinced either way." The plaintiffs had not asked for a three-judge court. Neither had they asked for an injunction against the discriminatory application of the placement law; thus, they had not challenged the constitutionality of a state statute, the usual grounds for assigning a three-judge court to a case such as this. But the Fifth Circuit had granted relief in that way in *Armstrong* and *Davis* – by enjoining unconstitutional application of the placement law – and the circumstances were quite different a year later, in any case. At the time of Johnson's initial query, Tuttle had advised Rives that it did "not seem . . . that a three-judge court [was] indicated" based on recent Fifth Circuit rulings. But the Chief Judge told Rives that "if Judge Johnson requests such a court because he feels it is appropriate, or because he would prefer it," then Tuttle would "be glad to give every consideration to such a request." When Fred Gray filed the amended complaint in February of 1964, Johnson made the request. On February 7, Tuttle granted it. The Fifth

⁶² United States v. Rea, 231 F.Supp. 772 (MD, AL, 1964), 773-4, see also at *Race Relations Law Reporter* 9.1, Spring, 1964, pp. 156-8; *Lee v. Macon County Board of Education, Amendment to Amended and Supplemental Complaint*, Frank Johnson Papers: Lee v. Macon Case File, Container 28, Folder 5; *Montgomery Advertiser*, Feb. 6, 1964; *Birmingham News*, Feb. 6, 7, 1964; *Jackson Daily News*, February 10, 1964; *New York Times*, Feb. 13, 1964.

Circuit chief appointed Judges Rives and Grooms to join Judge Johnson on the *Lee v. Macon* panel. It was a promising court for the plaintiffs and the CRD.⁶³

Wallace had begun to realize the colossal mistake that he had made. His administration initiated a clumsy backtracking maneuver. Wallace first made a show of requesting an advisory opinion of the Alabama Supreme Court. The governor wanted to know whether or not the state board of education had the authority to assign and transfer pupils and teachers, to close schools, to direct local boards to provide transportation, and to require local boards to provide grants-in-aid. These were all of the things that the state board had, of course, already very recently done. The state Supreme Court dutifully reported to Wallace on February 18 that the state board had no authority under the state constitution to do any of these things, and that in fact all such powers rested with the local boards of education, by way of powers conferred by the state legislature. “However broad may be the powers of the State Board of Education,” the court wrote, “we think it clear that the authority to exercise general control and supervision over the county and city boards of education does not include the authority to exercise powers and authority which the Legislature has specifically conferred upon such local boards.” On the same day, the state board of education met in an emergency session called by Wallace. It issued a resolution “in accordance with the Opinion of the Justices” which resolved to “expressly rescind and repeal” the resolutions ordering the closure of Tuskegee High, the transfer of the students back to Tuskegee Public, the transportation of students to Shorter and Notasulga, and the order directing payment of grants-in-aid. The board had earlier amended the resolution requiring local and state board approval for the admission of “non-resident” students, eliminating the state requirement. These were obvious attempts to shield the board from a potential statewide injunction. Even as Superintendent Meadows chaired the emergency meeting of the state board (Wallace himself did not attend), Fred Gray

⁶³ Richard Rives to Elbert Tuttle, Jan. 30, 1963, and Elbert Tuttle to Richard Rives and Frank Johnson, Feb. 3, 1964, Frank Johnson Papers: *Lee v. Macon* Case File, Container 21, Folder 1; *Lee v. Macon County Board of Education*, Feb. 7, 1964 Order of the Fifth Circuit Court of Appeals Designating a Three-Judge Court, *Lee v. Macon* Trial Record, Federal District Court, Montgomery, AL.

and attorneys from the Civil Rights Division were down the hall inspecting the board's records in advance of the approaching hearing in *Lee v. Macon*. State Attorney General Flowers, ostracized by the Wallace-ite board, announced that the rescinding actions would "possibly enable [him] to save them from the [their] blunder." Fred Gray and John Doar certainly hoped not.⁶⁴

Even before the hearing in *Lee v. Macon*, in the case the Justice Department had brought against James Rea, Judge Johnson enjoined the mayor from interfering in the admission of the Lee, Wyatt, and the others to Macon County High School at Notasulga. Johnson held that Rea had clearly orchestrated the passage of the safety and civil disturbance ordinances for the purpose of "using [them] as a devious means of interfering with this Court's order of February 3, 1964." More specifically, he explained, "the passage and the use of these ordinances . . . was a subterfuge [designed] to interfere with and obstruct the admission of the six Negro children in the Macon County High School, which admission was ordered and required by this Court's order of February 3, 1964." It was not even necessary to examine the laws under strict scrutiny, for Johnson held that the laws clearly "had no rational basis" to begin with. Accordingly, he ordered Rea to stay out of any and all further attempts to carry out the court's orders, except insofar as he ought to maintain peace and order.⁶⁵

The six students were soon enrolled in the school, accompanied by Doar, other Justice Department officials, and U.S. Marshals, and under the supervision of the Alabama State Troopers and local police. James Rea watched from across the street as the six entered the school for the first time. The white students were already gone, many making plans even then to attend Macon Academy or

⁶⁴ Alabama Supreme Court Advisory Opinion, February 18, 1964, titled "Opinion of the Justices," *Race Relations Law Reporter* 9.1, Winter, 1964, pp. 159-61; see also Alabama Supreme Court, No. 180, 160 So.2d 648; see hard copy at Frank Johnson Papers: Lee v. Macon Case File, Container 21, Folder 6; Resolution of the Alabama State Board of Education, February 18, 1964, Frank Johnson Papers: Lee v. Macon Case File, Container 21, Folder 6; *Birmingham News*, Feb 8, 1964; *Montgomery Advertiser*, Feb. 19, 1964; on Flowers' ostracization, see Hayman, *Bitter Harvest*, pp. 182-5 and CHs 5-6, supra.

⁶⁵ *United States v. Rea*, 231 F.Supp. 772 (MD, AL, 1964), see also *Race Relations Law Reporter* 9.1, Winter, 1964, pp. 156-8; *Southern School News*, March, 1964.

nearby white schools in other counties.⁶⁶ The president of the Macon County Private School Foundation, which ran Macon Academy, observed that the injunctions forcing the admission of the students at Shorter and, especially, at Notasulga, “gave us Macon County.” He reported that the school had enough applications from Shorter and Notasulga students, just under 200, to double its enrollment. Hastily-approved state accreditation assured many parents, and by spring the private school’s enrollment of 375 students made it the largest white high school in the county’s history. The academy hired additional teachers and began preparations for double-shift class days, with half the student body coming in the morning, the other half in the afternoon. Parents in Shorter worked with the school’s organizers to establish a “branch” elementary school in a former residence in Shorter, in anticipation of the desegregation of the elementary school at Tuskegee Public. If parents or students wanted to avoid desegregation, the private school officials demonstrated a remarkable willingness and ability to provide them with an escape hatch at every turn.⁶⁷

Meanwhile, Wallace unsurprisingly lobbed denunciations at the federal court, arguing that it had succeeded in “destroying schools for the white people in Macon County” by “transporting Negroes 16 miles to a white, non-accredited school instead of the Negro school, which is the only remaining accredited school in the County.” In a prepared statement, he called his old friend Frank Johnson a “judicial tyrant” and a “rash, headstrong, and vindictive” man whose actions were “unstable and erratic” and aimed at sowing “strife and discord.” The order of the court was “based on no evidence, only on the affidavit of a Negro attorney, which is the same as the NAACP.” Johnson’s order was, he said, a “judicial tantrum” which would be “resisted by the people of Alabama and Macon County.” Wallace figured that the judge was trying to “run this state by usurpation of authority and the threat of bayonets.” He no doubt got the attention of the CRD and the LDF when he added, “We are charged

⁶⁶ Specifically, Reeltown High in Tallapoosa County and Auburn High in Lee County.

⁶⁷ *Montgomery Advertiser*, Feb. 15, 1964; *Birmingham News*, Feb. 14, 16, 1964; *Tuskegee News*, Feb. 20, 1964; Norrell, *Reaping the Whirlwind*, p. 161.

with the running of the schools of this state, and this we shall continue to do.” The governor closed his statement by recommending that Johnson be impeached. In another address days later, Wallace said the governor’s office would use the semi-personal governor’s “mansion fund” and “spend whatever money we have to help” Macon’s whites, especially to help white students enroll in other schools. He exhorted all other white Alabamians to support the fledgling Macon Academy in any way they could. He suggested that the two remaining public high schools might have to be closed, just as Tuskegee Public had been – for “economic reasons” – since there were only six students in each school. That was precisely what he and the state board wanted.⁶⁸

Lee v. Macon before the Three-Judge Court

With the 12 students making the most of a once again isolated existence, *Lee v. Macon* came before the newly tapped three-judge panel in Montgomery on February 21 for an initial hearing. As Judge Johnson had announced weeks before, the court was not prepared to rule on the issue of a statewide desegregation order; the main order of business was the potential enlargement of the temporary restraining order, relative to Macon County, into a preliminary injunction. Nonetheless, recent events had only underscored the centrality of alleged state interference to all future proceedings, and the court began to hear evidence which would be used to support the plaintiffs’ and the United States’ arguments for statewide relief. Fred Gray represented the plaintiffs along with NAACP-LDF General Counsel Jack Greenberg and LDF attorney Charles Jones, who had flown in from New York for the proceedings. The Civil Rights Division’s St. John Barrett and Robert Owens represented the United States. Attorney General Flowers represented the Macon County school board and made an attempt to represent the state by entering a motion to dismiss the issue of a statewide injunction. Dismayed by

⁶⁸ *Auburn Plainsman*, Feb. 12, 1964; *Birmingham News*, Feb. 11, 16, 1964; *Montgomery Advertiser*, Feb. 15, 1964; see full text of Wallace statement on the Feb. 3 Shorter-Notasulga injunction order at *Lee v. Macon County Board of Education*, Memorandum Brief of Plaintiffs in Support of their Motion for a Preliminary Injunction, March 23, 1964, Frank Johnson Papers: *Lee v. Macon* Case File, Container 19, Folder 9, p. 38, fn. 2.

the recklessness of Wallace, Flowers made a half-hearted, obligatory challenge which rested on the assumption that the state board's repudiation of its prior acts would be enough for the court to let it off the hook. Assistant Attorney General Gordon Madison attempted to deflect scrutiny away from the Macon County officials and towards state Superintendent Meadows and the state board, both of whom had, of course, publically denounced Flowers for his lack of sufficient defiance.⁶⁹

Representing Wallace and the state board were a number of top Alabama attorneys, most notably Montgomery's Maury Smith and Joe Goodwyn and Birmingham's Joe Johnston. The state officials' team entered a motion to dissolve the temporary restraining order and to dismiss the complaint. They argued that the board members had "misapprehended their powers of closing schools and ordering transportation to be furnished to students." The state officials also claimed to have mistakenly acted in directing the payment of tuition grants. Those orders had been rescinded, they argued, as soon as the Alabama Supreme Court had issued its "Opinion of the Justices." In any case, the state board had supposedly "not pursued, and [did] not intend to pursue a policy, and are not authorized by law, to operate a public school system of Alabama in any of the counties of the state on a racially segregated basis." The state board, according to its attorneys, had exercised the "general powers" afforded it by Alabama law strictly "in a consolatory and advisory capacity and not administratively." The defendants were forced to admit to the veracity of state Superintendent Meadows' September, 1963 memorandum to the Macon County school board in which Meadows directed the board to provide bus transportation to the white students at Shorter and Notasulga and to reassign teachers and pupils. But they focused on the language of Meadows' opening paragraph in

⁶⁹ *Birmingham News*, Feb. 21, 1964; *Montgomery Advertiser*, Feb. 21, 23, 1964. Lee v. Macon County Board of Education, Motion of Richmond M. Flowers as Attorney General of the State of Alabama, Frank Johnson Papers: Lee v. Macon Case File, Container 28, Folder 5.

which he “*recommended* that the just and proper disposition of the matters was” to see that these things were done.”⁷⁰

Fred Gray called a number of witnesses, including C.A. Pruitt, Meadows (who was also deposed before the hearing), the headmaster and the treasurer of Macon Academy, the principals at Shorter and Notasulga, a bus driver, a few of the black student-plaintiffs, and even the former captain of the Tuskegee High football team who read Wallace’s letter pledging assistance. Meadows himself was on the stand for much of the hearing, reading the various resolutions of the state board into the record. At one point the no-nonsense Johnson admonished a clearly annoyed and flustered Meadows for reading too quickly. “Read it right,” Johnson instructed. Meadows slowed down. Gray was trying to establish that the state board did, indeed, have control over local systems, that it was trying to exercise that control, and that the state, furthermore, was directly contributing to the success of Macon Academy. The evidence clearly indicated that the state officials had ordered the closure of Tuskegee High, the transportation of white students to the other two schools, and the payment of tuition grants. Gray also showed clearly that state employees had contributed nearly \$7,000 financially to Macon Academy, along with Hoover and West End Academies in Birmingham, at Wallace’s behest, and that the state had facilitated the Tuskegee academy’s dubious accreditation proceedings. Even more damning were the string of public statements, introduced at the hearing by members of the press, in which Wallace and the state board pledged defiance of the court and of desegregation in general.⁷¹

From Frank Johnson’s perspective, though, it was the United States which presented the most intriguing evidence. St. John Barrett called a former employee of the state department of education,

⁷⁰ *Birmingham News*, Feb. 21, 1964; *Montgomery Advertiser*, Feb. 21, 1964. Lee v. Macon County Board of Education: Answer of Defendant Alabama State Board of Education, Feb. 20, 1964; Motion to Dissolve or Modify Temporary Restraining Order, Feb. 5, 1964; all in Frank Johnson Papers: Lee v. Macon Case File, Container 28, Folder 5.

⁷¹ Frank Johnson, Hand-written Notes from Feb. 21-2 Hearing in Lee v. Macon County Board of Education, Frank Johnson Papers: Lee v. Macon Case File, Container 28, Folder 5; *Birmingham News*, Feb. 22, 1964; *Montgomery Advertiser*, Feb. 22, 1964.

State Senator George Yarbrough, who had consulted with the state board on matters of desegregation. He testified that when the United States Department of Health, Education, and Welfare (HEW) had contacted local school boards in Alabama the previous fall regarding federal “impacted areas” students, the state board had replied *for* those boards, rather than allowing the local boards to reply themselves. Yarbrough admitted that he had sent a memorandum to all the impacted areas districts, in which he wrote that they “should refer the Washington Office [of Education] to the Alabama State Board of Education since there are at present no independent school districts operating in the state of Alabama.” On friendly cross examination, Goodwyn tried to allow Yarbrough to equivocate on the phrase “independent school district.” Yarbrough claimed he meant a district established within a county that is completely independent of the county school system’s administration. While the distinction, given the benefit of the doubt, might have lessened the blow of such a bold statement, the fact remained that the state board had assumed the responsibility of the local school authorities in what should have been bilateral communications.⁷²

Despite the strong evidence offered by the plaintiffs and the United States, the court moved cautiously after the hearing. It called for briefs to be filed within 50 days on six issues: should the temporary restraining order be enlarged into a preliminary injunction; should the Alabama grant-in-aid statute be declared unconstitutional; should the governor, state superintendent, and the state board be enjoined from interfering in desegregation throughout the state; should the court enter an order desegregating all of the schools in the state “based upon the assumption or usurpation of [local] authority” by the defendant state officials; had the use of “public funds, public interference, and public services” been to such an extent that Macon Academy ought to appear as a party defendant in the case and be given an opportunity to be heard as to whether it was effectively a public institution; and finally,

⁷² Frank Johnson, Hand-written Notes from Feb. 21-2 Hearing in Lee v. Macon County Board of Education, Frank Johnson Papers: Lee v. Macon Case File, Container 28, Folder 5; *Birmingham News*, Feb. 22, 1964; *Montgomery Advertiser*, Feb. 22, 1964.

whether the court should declare the Alabama Pupil Placement Law unconstitutional in its statewide application.⁷³

In March the Civil Rights Division filed a 104-page brief, signed by Burke Marshall, St. John Barrett, several other CRD attorneys, and Alabama's Middle District U.S. attorney, Ben Hardeman. Much of it was devoted to summarizing the evidence and arguments presented at the hearing. The brief filed by Fred Gray and joined in by Greenberg, Jones, and Constance Baker Motley, was remarkably similar in its presentation of facts, arguments, marshaling of precedent, and recommendations. Judge Johnson ultimately used the United States brief as a model for his opinion and decree, as was his custom. Everyone knew that the state of Alabama had an official policy favoring racial segregation in schools and was presently operating a dual school system based upon race. This was not difficult to illustrate. Nor was the fact that the Alabama Placement Law was being applied unconstitutionally really in doubt. It was only being applied to black students after an initial racially segregated pupil assignment based on dual racial zones, and this policy was actively encouraged by the state. The Fifth Circuit ruling in the *Bush v. Orleans Parish* case, along with similar judgments in other circuits as well as the recent *Armstrong* and *Davis* rulings, made this judgment easy to make.⁷⁴ Nor was it difficult to show that the state was assisting Macon Academy in fundraising and promoting the payment of tuition grants for whites to attend it. It was similarly clear beyond any doubt that the state had interfered with the carrying out of court-ordered desegregation in Macon County.⁷⁵

Where it began to get interesting for the court was the CRD's presentation of evidence that the state board of education and the state superintendent were exercising general control and supervision

⁷³ Lee v. Macon County Board of Education, Issues on Which Briefs are Requested, Frank Johnson Papers: Lee v. Macon Case File, Container 28, Folder 4.

⁷⁴ Bush v. Orleans Parish School Board, 308 F.2d 491 (5th CCA, Aug, 1962), see CH 4, supra.

⁷⁵ Lee v. Macon County Board of Education: Memorandum Brief of the United States in Support of Plaintiffs' Motion for a Preliminary Injunction, March 13, 1964, pp. 1-35; Memorandum Brief of Plaintiffs in Support of their Motion for a Preliminary Injunction, March 23, 1964; both in Frank Johnson Papers: Lee v. Macon Case File, Container 19, Folder 9.

over local school systems. The U.S. argued that the state exercised its greatest measure of control via the “purse strings,” that is, through the allocation of funding to local systems based on “teacher units.” State funds accounted for the overwhelming majority of local systems’ budgets, and the state controlled how much they got by assigning teacher unit numbers (an indicator of how many teachers a school system needed). This was a process in which the state officials had broad leeway. The Justice Department attorneys uncovered a memorandum in the state department of education files in which Meadows himself told state board members, “This Board of Education has control of the elementary and high schools of this state” through its control of state funding. The CRD attorneys also argued that the state board had demonstrated statewide control through instructing systems to unconstitutionally apply the pupil placement law; Meadows suggested at one point that they apply it “for all it is worth.” The state board was also responsible for the approval of all local construction contracts, the approval of certain local transportation procedures, the purchasing and approval of textbooks, the demand that “the Holy Bible [be] read in each and every public school at least once a day” (after the Supreme Court had declared such practice unconstitutional), and even the demand that schools teach the dangers of cigarette smoking.⁷⁶

The U.S. argued that, in light of *Cooper v. Aaron*, the court could not “permit the conditions that the state has here created to be used as an excuse for returning the Negro plaintiffs to” segregated Tuskegee Institute High. In other words, white boycott or not, Shorter and Notasulga could not be allowed to close like Tuskegee Public. Furthermore, the Macon County school board’s plan to desegregate only the 12th grade the next year would be “a step back” in light of the diverse grades represented by the 12 students already transferred. Additionally, the Supreme Court had held in

⁷⁶ Lee v. Macon County Board of Education, Memorandum Brief of the United States in Support of Plaintiffs’ Motion for a Preliminary Injunction, March 13, 1964, pp. 1-35, quoting from pp. 14, Frank Johnson Papers: Lee v. Macon Case File, Container 19, Folder 9. The Supreme Court declared school-sponsored Bible-reading unconstitutional in *Abington School District v. Schempp*, 374 U.S. 203 (1963); Alabama native Hugo Black wrote the opinion in this case, proving to many Alabamians that he was a ‘traitor’ to the South.

Watson v. City of Memphis and *Goss v. Board of Education of the City of Knoxville* that “deliberate speed” could not “countenance indefinite delay.” Barrett and his team called the state school board’s rescission of its prior resolutions a sham and argued that the state’s *ex post facto* claims to inculpability had “no foundation in fact or in law.” More specifically, the U.S. argued that:

All of the rescinding action was not only initiated after the filing of the plaintiff’s complaint against unlawful interference, but was initiated after the filing of the amended complaint asserting that the defendant state officials were exercising control over local school districts and that they should be required to desegregate on a state-wide basis.⁷⁷

There could not have been a more clear and concise statement of the state’s blatant disingenuousness, and its inclusion was one of the reasons Frank Johnson valued the DOJ attorneys. There was strong and long-standing precedent in the law for holding defendants accountable despite the “voluntary abandonment of unlawful conduct after suit has been filed.” In any case, the state board had not rescinded its statements decrying the order of the court and pledging defiance generally, only those resolutions ordering the specific measures already targeted by the plaintiffs.⁷⁸

As to the constitutionality of the Alabama grant-in-aid statute, the CRD team located the origins of the most recent tuition grant statute in the flurry of post-*Brown* segregationist legislation. It then argued that the law was intended to be used in places where public education had become “unavailable,” which in Alabama inevitably meant in places where schools had been closed to avoid desegregation. And it was meant to apply to students in private, non-sectarian schools which in reality functioned as substitutes for the closed public system. Citing a recent decision of the Fifth Circuit in a case involving hospitals in North Carolina (in which both the LDF’s Jack Greenberg and the CRD’s St. John

⁷⁷ Lee v. Macon County Board of Education, Memorandum Brief of the United States in Support of Plaintiffs’ Motion for a Preliminary Injunction, March 13, 1964, Frank Johnson Papers: Lee v. Macon Case File, Container 19, Folder 9, pp. 36-45, quoting from pp. 39, 43 (block quotation); *Watson v. City of Memphis*, 373 U.S. 526 (1963); *Goss v. Board of Education of Knoxville*, 373 U.S. 683 (1963).

⁷⁸ Lee v. Macon County Board of Education, Memorandum Brief of the United States in Support of Plaintiffs’ Motion for a Preliminary Injunction, March 13, 1964, Frank Johnson Papers: Lee v. Macon Case File, Container 19, Folder 9, pp. 36-45, quoting from p. 44.

Barrett had participated), the CRD argued that if these private schools were to be considered *constitutional* substitutes for the closed public system, they could not segregate on the basis of race. The U.S. asked the court to enjoin the payment of tuition grants to such schools that did. The court need not enjoin the private schools' own discrimination, only the transferal of state support from closed public schools to such private schools – a “transparent effort at evasion” which had also been struck down in proceedings in *Cooper v. Aaron*. The U.S. did not know it at the time, but local school closure and transparent public support for private schools was about to be struck down by the Supreme Court even more clearly in a case involving the national pioneer in locally-initiated school closure, Prince Edward County, Virginia. The case was argued just two weeks after the U.S. submitted its brief in *Lee v. Macon* and decided in May. The *Lee* court would have to consider it when making its judgment.⁷⁹

Finally, the DOJ attorneys addressed the ability of the plaintiffs to seek statewide relief and the possible issuance of a statewide desegregation order. They argued that regardless of the plaintiffs' standing to seek relief statewide, the United States was entitled to statewide injunctive relief based on the state board's and the governor's repeated statements pledging to “stand against every order of the federal courts in attempting to integrate the public schools.” A statewide desegregation order was warranted in addition to enjoining the state officials from interference because, the U.S. argued, “by asserting plenary authority over the Macon County School Board, the state officials have practically demonstrated their plenary authority over all local school boards.” The brief suggested that, therefore, “the Court may order [the state officials] to exercise that authority to abolish Alabama's segregated

⁷⁹ *Lee v. Macon County Board of Education*, Memorandum Brief of the United States in Support of Plaintiffs' Motion for a Preliminary Injunction, March 13, 1964, Frank Johnson Papers: *Lee v. Macon* Case File, Container 19, Folder 9, pp. 46-64, quoting from 47, 63; *Simkins v. Moses H. Cone Memorial Hospital* 323 F.2d 959 (5th CCA, 1963); *Cooper v. Aaron*, 358 U.S. 1 (1958), pp. 17-19; *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964).

school system.” This is what Fred Gray had argued and what more cautious segregationists like Flowers had feared.⁸⁰

The federal attorneys added another wrinkle, however. Regardless of the obvious interference in Macon County, they wrote, “we believe that [the state authorities] possess, and have always possessed, sufficient authority under state law to require local boards to protect the constitutional rights of Negro children by abolishing racially segregated systems.” A decree to that effect was entirely appropriate, they argued, “based on the State Board’s authorized involvement in practically every aspect of local public school education and the State Board’s continuous participation in the operation of segregated schools [throughout] Alabama.” Indeed it was “through the exercise of a statewide power” that the defendants had “participated in the perpetuation of segregated schools in Macon County”; therefore, it was “that power and not some lesser power involving only Macon County, that must be exercised to provide the relief sought by the plaintiffs.” The Fifth Circuit had found in a case involving Ft. Worth schools that any time a court grants relief based on an unconstitutional practice, it must grant relief to all who suffer from that practice. Therefore, if the court found that Alabama had an official policy favoring segregated education, that it was operating a dual school system, and most importantly, that the defendant state officials possessed supervisory authority, it necessarily followed that the court not only could, but ought to, grant statewide relief. The defendants had “in the name of the state . . . done whatever they felt was necessary to insure maintenance of the segregated system within each school district”; therefore, they were the “appropriate state officials to undo in behalf of the state what they have actually accomplished in the name of the state.”⁸¹

⁸⁰ Lee v. Macon County Board of Education, Memorandum Brief of the United States in Support of Plaintiffs’ Motion for a Preliminary Injunction, March 13, 1964, Frank Johnson Papers: Lee v. Macon Case File, Container 19, Folder 9, pp. 65-71, quoting from 65, 68, 70, 71.

⁸¹ Lee v. Macon County Board of Education, Memorandum Brief of the United States in Support of Plaintiffs’ Motion for a Preliminary Injunction, March 13, 1964, Frank Johnson Papers: Lee v. Macon Case File, Container 19, Folder 9, pp. 65-71, quoting from 65, 68, 70, 71; see, for Ft. Worth, Potts v. Flax, 313 F.2d 284 (5th CCA, 1963). For good measure, the CRD added a pronouncement by the Supreme Court, in Cooper v. Aaron, that

Wallace responded to news of the Justice Department's brief in customary fashion, telling the people of Alabama, "It is just a brief that they filed," and "We are going to continue to have segregation in the public schools of Alabama just as they do in most states of the union." The state board of education's brief in answer was similarly unsurprising. The state's team argued that state code and case law placed authority in the hands of local boards of education. "We must candidly admit," they wrote, that "the actions of the State Board upon which the Temporary Restraining Order was issued were taken improvidently and contrary to law." But as the defense had argued at the hearing, these actions had been rescinded upon the issuance of the Opinion of the Justices. The brief included testimony from the hearing from the principal of Shorter High School and from Superintendent Pruitt, to the effect that the administration of the Macon County school system was a function entirely carried out by the county school board and county superintendent. Neither the local nor state officials, though, could prevent the white withdrawal from desegregated schools. The United States and the plaintiffs, it seemed, were "obviously seeking forced integration and not simply cessation of state activities which may be discriminatory on account of race." Grants-in-aid, they argued, had not at that point actually been issued to anyone, and so this was not a question that could be properly decided. They noted significant distinctions between Alabama's situation and the Prince Edward case then pending before the U.S. Supreme Court: the Prince Edward officials had provided grants-in-aid as well as tax credits for charitable donations to the school foundation; they had leased public school buildings; and they had allowed teachers at the private school to retain their public school pensions. Alabama officials had supposedly done none of this. The defense further argued that the United States was trying to make

state authorities were bound by *Brown* to initiate desegregation, and by a three-judge court in a Louisiana case, *Hall v. St. Helena Parish*, that education was clearly a statewide function in practice, not a local one; *Cooper v. Aaron*, 358 U.S. 1 (1958), p. 7; *Hall v. St. Helena Parish*, 147 F.Supp. 649 (ED, LA, 1961). The CRD also addressed *Evans v. Buchanan* 152 F.Supp. 886 (DC, DE, 1957), affirmed 256 F.2d 688 (3rd CCA, 1958) (see also at note 49, supra) the Delaware case which resulted a statewide desegregation order, albeit one aimed a state law requiring segregation in education, the likes of which Alabama had done away with after *Brown*.

“strange law indeed” in that its aim was to have the court respond to the defendant’s admittedly unlawful seizure of authority by having the court “not only . . . allow him to keep that [power] which he has unlawfully usurped, but [to] actually compel him to do so.” Finally, they argued that the plaintiffs had no standing to represent a statewide class, and that the U.S. did not have standing to represent rights which went beyond those of the plaintiffs. Flowers filed a separate brief as attorney general in which he presented a substantially argument.⁸²

In its reply brief, the United States stated simply, “The answering briefs of the defendants have failed to present any reason, either in fact or in law, why the conclusions urged by the United States and by the plaintiffs in their opening briefs should not be adopted by the court.” The CRD attorneys proceeded to eviscerate most of the potentially effective claims of the defense. For example, the state board’s team had cited several decisions of the Alabama Supreme Court in support of its contention that local school boards had the ultimate authority over local schools. Upon actually reading these decisions, the U.S. was able to demonstrate that “none of them support the position of the defendants” because none of them “involve the disposition of authority as between the State Board of Education and the various local boards of education.” Barrett and company similarly dismissed precedent cited in support of the state board’s claim that it ought not be enjoined from interference statewide. To this point the state officials had argued that the state did not have the legal authority to do that which the U.S. and plaintiffs petitioned the court to order. The U.S. replied that “whatever the limit on the legal authority of the State Board of Education, these limitations did not inhibit it from effectively interfering with desegregation in Macon County.” The court could not simply take the state authorities at their word that they would not repeat such actions. Nor in the case of the pupil placement law could the court “despite the evidence on the record . . . somehow remain ignorant of what every other person in

⁸² *Montgomery Advertiser*, March 14, 17, 1964; *Birmingham News*, March 17, 1964; *Lee v. Macon County Board of Education*, Memorandum Brief of the State Board of Education, April 10, 1964, Frank Johnson Papers: *Lee v. Macon* Case File, Container 19, Folder 9, pp. 7-41, quoting pp. 25, 26, 32-3.

Alabama must know.” In closing, the CRD attorneys offered a simple statistic taken from the files of the state board itself: for the 1961-62 school year, all 527,075 white students in the state attended “white” schools, while all 280,012 Negro students were in “Negro” schools.⁸³

As the court took the briefs under advisement in April and mulled the question of a statewide desegregation order, segregationists in Macon County made clear their intention to continue in resistance locally. Someone hung life-sized effigies in downtown Tuskegee of desegregation pioneer Detroit Lee – represented by a blackfaced, minstrelsy-style effigy with the name “Lee” – and moderate county sheriff Preston Hornsby – represented by a white effigy with toy gun and holster and the name “Preston”. The two were set to run for probate judge in the local upcoming Democratic primary. A number of Tuskegee’s blacks were set to test the increased voting strength of blacks in the election, giving some segregationists an even greater cause for alarm, perhaps, than the school case. The continuing threat to the county’s schools was not lost in the anxiety over the coming election, however. Segregationists in Notasulga made sure of that. At two o’clock on the morning of April 18, arsonists set fire to Macon County High, effectively destroying a large section of the school, including the cafeteria, before volunteer firefighters arrived to put out the blaze. The adjoining all-white elementary school was unfazed. Less than 24 hours prior to the arson, Anthony Lee and his fellow students had been greeted at the school with graffiti painted on the outer walls reading, “Nigger,” in three-foot-tall letters, along with “Go to Hell,” “Judge Johnson’s and Bobby Kennedy’s School,” “Step by Step One More Day Nigger,” “Detroit Lee S.O.B.,” “Go Home, Damn Nigger, Damn Nigger, Damn Nigger,” “You Have Been Told Once – and That’s All,” and “Godfathers of all Niggers.” These messages had been painted on white paint

⁸³ Lee v. Macon County Board of Education, Reply Brief of the United States in Support of Plaintiffs’ Motion for a Preliminary Injunction, April 22, 1964, Frank Johnson Papers: Lee v. Macon Case File, Container 19, Folder 9, pp. 8, 11, 21.

used to cover similar signs painted a month earlier, which had read, “Nigger go home” and “Nigger you had better leave while the leaving is good.” Meanwhile, a few days after the fire, two white teenagers were arrested for stealing thousands of dollars-worth of science, music, and athletic equipment from Tuskegee Public. The boys were never indicted, as it seemed a number of white parents in the city felt the equipment belonged at Macon Academy anyway. It had been purchased, they reasoned, with their tax money.⁸⁴

Macon’s segregationists enjoyed a brief triumph. The county school board, on the advice of Flowers, transferred the 6 Notasulga students back to Tuskegee Institute High, effectively declining to reopen Tuskegee Public or to send them to Shorter with the other six. Fred Gray filed a motion for additional relief, asking the court to order the school board to provide facilities at the partially destroyed Notasulga school or to enroll the six “in some other school in the said County other than those restricted to attendance for Negro children.” After a brief hearing, the court issued such an injunction four days later. The Macon authorities elected to make room for the six among the ashes at Notasulga. There Anthony Lee, Willy Wyatt, and Robert Judkins finished out their senior year of high school, “brown-bagging it” every day since there was no cafeteria anymore. The Thursday before their last scheduled day, principal Clements called the six into his the auditorium, where he presented the three seniors with their diplomas. A ceremony scheduled for Friday never took place.⁸⁵

In contrast, Macon Academy held a graduation ceremony a few weeks later. Fifty-three seniors were able to receive their diplomas with all of the pomp that would have accompanied Tuskegee Public,

⁸⁴ Lee v. Macon County Board of Education, Plaintiffs’ Motion for Additional Relief, April 24, 1964, Frank Johnson Papers: Lee v. Macon Case File, Container 28, Folder 4; Memorandum Opinion and Injunction, April 28, 1964, Lee v. Macon Trial Record, Federal District Courthouse, Montgomery. See, for effigies, *Tuskegee News*, April 9, 1964. See, for the equipment theft, Norrell, *Reaping the Whirlwind*, p. 161; *Montgomery Advertiser*, May 1, 1964.

⁸⁵ *Montgomery Advertiser*, March 13, April 18, 19, 24, 1964; *New York Times*, March 14, 1964; *Birmingham News*, April 18, 19, 21, 1964; Anthony Lee Interview, Willie Wyatt Interview.

or Shorter, or Notasulga graduation in years past. The school's foundation ran a full page ad in the local newspaper congratulating the class:

The entire county hails you, first graduates of a splendid new school that symbolizes the characteristics of the spirit that gave this nation its beginnings. The manner in which you, with your instructors, have created such a fine educational institution cannot help but give you added strength of character for the battles you will face as you go forth into the future. We know that the problems that you have overcome at Macon Academy will be a vital factor in molding you into the leaders of tomorrow.⁸⁶

James Kilpatrick, editor of the Richmond *News-Leader*, gave the commencement address. Kilpatrick had favorably covered the efforts of segregationists in Virginia to pioneer school closure and private school establishment. He chose to speak to the Macon students about the world in which they might find themselves in 1984, a nod to George Orwell's novel. The students would be shaping policy in a "strangely different world," he said, one in which people lived crammed into "high-rise hives" in the cities, and in which old city boundaries did not have the same meaning anymore. The government would be regulating more and more, including water consumption and air pollution. He asked "can individual freedom survive in such a world?" These were, indeed, the very people who would be leading the state into the 1970s and 80s, asking that very same question, from that same point of departure.⁸⁷

The Tuskegee Civic Association held a ceremony at Tuskegee Institute the following day for the 12 black students who had braved the county's first desegregated schools. The featured speaker there was Margaret Anderson, a teacher and guidance counselor from Clinton, Tennessee, one of the first school systems in the South to be desegregated. Anderson urged the 12 to remain committed to their

⁸⁶ *Tuskegee News*, May 7, June 11, 1964.

⁸⁷ *Montgomery Advertiser*, June 13, 1964.

education and to the struggle for equality, to continue trying to “break this cycle of ignorance, poverty, and prejudice.” “Boys and girls,” she said, “there are many roads to the top of the mountain, but once you reach the top, the view is the same.”⁸⁸

⁸⁸ *New York Times*, June 14, 1964.

CHAPTER 9: RUSSIAN ROULETTE, ALABAMA STYLE: *LEE V. MACON*, THE CIVIL RIGHTS ACT, AND THE HEW
GUIDELINES, 1964-65

May 17, 1964 marked the tenth anniversary of *Brown v. Board of Education*. John Leflore in Mobile was hosting a commemoration event through the local black longshoremen's union. As president of the union, Leflore had invited the NAACP Legal Defense Fund's (LDF) Jack Greenberg to be the keynote speaker. Greenberg spoke to the crowd of 1,000 about continuing to "press hard for integration" and for equal rights for all Americans. "The very root of all our cases," he said, "is the conception of human dignity." He joked about members of the National States' Rights Party (NSRP), who always referred to the LDF lawyer as "Jew Jack"; even then they were picketing outside the union hall and outside the hotel where they thought he had stayed.¹

In fact Greenberg had not stayed at the Sheraton as the NSRP suspected. He had flown in that morning and had been ushered to a waiting Mobile police car on the tarmac. Two of the city's newly hired black officers drove Greenberg to the house of attorney Vernon Crawford, where the group shared drinks before driving over to the union hall. There Greenberg was quickly shuffled through a back door and up to the podium. He left on a charter flight minutes after delivering the speech. The unusual arrangements were the result of a report the Federal Bureau of Investigation had given the Department of Justice days before the scheduled speech. Assistant Attorney General Burke Marshall had informed the LDF that segregationists in Alabama planned to assassinate Greenberg in Mobile. The New York lawyer insisted on going to give the speech anyway. The LDF notified the Mobile police, and Greenberg himself had an associate scour the hall before the rally.²

No attempt on Greenberg's life ever materialized, but the threats against him underscore not only the unwillingness of many segregationists to accept the implementation of the *Brown* decision, but

¹ Greenberg, *Crusaders in the Courts*, pp. 301-2.

² Greenberg, *Crusaders in the Courts*, pp. 301-2.

the lengths to which some would consider going to avoid that fate. In 1964 and 1965, pressure on segregated education from local activists, the LDF, the Justice Department's Civil Rights Division (CRD), and the federal courts increased. The most significant increase in such pressure came, though, through the threat of federal funding cut-offs authorized by the U.S. Congress. This pressure brought many local officials over to the side of law, order, and minimal compliance. But at the state and local level, law-and-order style defiance continued. If state officials, in particular, were playing a deadly game with the future of Alabama school children's in their hands, it was not the first time. Only in 1964, in the wake of the injunction in *Lee v. Macon*, they were endangering their own cause as much as anything else.

"It's Only a Matter of Time"

To Jack Greenberg and Fred Gray, some of the issues before the court in *Lee v. Macon* in the summer of 1964 seemed clear-cut enough, especially given the composition of the court. Gray and his partners with the LDF were confident that the court would grant at least some of the relief the plaintiffs sought. The issue of statewide injunctive relief in the form of a desegregation order, however, was another matter. Gray and Greenberg realized that the court might not be prepared to take the necessary leaps: that the plaintiffs could represent a statewide class, that the state board had effectively demonstrated statewide control, and most especially, that the state board was well-placed to enforce what would be an unprecedented order. In that state of uncertainty, the LDF attorneys resolved to continue bringing suits against individual Alabama school districts where parents and students were willing and able to come forward. In May Gray filed *Harris v. Bullock County Board of Education* and *Carr v. Montgomery Board of Education*. Bullock was a predominantly black county in the southeastern Black Belt, just below Macon County. Montgomery was, of course, the state capital and site of the first attempt to desegregate an Alabama school, ten years earlier. That both of these were in the state's

Middle District was no coincidence. The LDF wanted to file suits in Judge Frank Johnson's court, where they knew they would get fair and efficient proceedings.³

The legal context in which Johnson, Rives, and Grooms would decide upon the six issues pending in *Lee v. Macon*, meanwhile, was significantly altered by decisions of the United States Supreme Court and Fifth Circuit Court of Appeals in May and June. In May the Supreme Court issued its most significant desegregation rulings since the 1963 *Watson v. City of Memphis* and *Goss v. Board of Education of the City of Knoxville* decisions. Like those decisions, these were intended to belatedly emphasize the "speed" in "deliberate speed." In both *Griffin v. County School Board of Prince Edward County* and *Calhoun v. Lattimer*, the Justice Department "piggy-backed," as Greenberg put it, on LDF-initiated litigation and appeared as an *amicus curiae*. Not until the Civil Rights Act was passed later that year could the Justice Department bring school desegregation suits itself, so "piggy-backing" was necessary. In *Griffin v. County School Board of Prince Edward County*, the Court addressed a direct affront not unlike it had in *Cooper v. Aaron*. As legal scholar Harvie Wilkinson has explained, "Here was [Prince Edward County], a party to the original *Brown* decision, back in Court a decade later, with its private schools segregated and public schools shut down," and there was "the entire federal judiciary, seemingly unable after ten years to help." On May 25, 1964, the Court held in *Griffin* that the maintenance of private schools with public funds, where public schools had been closed, was a violation of the Equal Protection Clause. The Court determined that local closure itself was a violation of equal protection when other schools in the state were allowed to remain open. The district court was ordered to enjoin the payment of tuition grants to segregated private schools, to enjoin the granting of tax credits on donations to such schools, and to order the school district to reopen the public schools on a non-segregated basis.⁴

³ *Southern School News*, June, 1964.

⁴ *Watson v. City of Memphis*, 373 U.S. 526 (1963); *Goss v. Board of Education of Knoxville*, 373 U.S. 683 (1963); *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964); *Calhoun v. Lattimer* 377 U.S.

The Court's decision in *Calhoun v. Lattimer* was a similar "expression of exasperation," as Wilkinson has characterized it. It was issued on the same day as *Griffin*. The Court in *Calhoun* vacated the district court's approval of Atlanta's grade-a-year, reverse stair-step desegregation plan. In a brief *per curiam* opinion, the Court said that the Atlanta school board had made a "commendable effort to effect desegregation," but that the district court was nonetheless obligated to "test the entire Atlanta plan" by the considerations in *Watson*, *Goss*, and now *Griffin*. In other words, it agreed with the LDF, the United States, and the plaintiffs that the plan was too slow, now that the context was "significantly altered" by the passage of a decade since the original *Brown* decisions.⁵

On June 18 the Fifth Circuit issued its first school desegregation rulings in that context, as altered by the *Griffin* and *Calhoun* decisions themselves. In a joint ruling affecting four school systems directly, including Mobile via *Davis v. Board of School Commissioners of Mobile* and Birmingham via *Armstrong v. Birmingham Board of Education*, the appellate court held that grade-a-year plans were too slow.⁶ *Davis* and *Armstrong* were finally on appeal on the merits; the Fifth Circuit's previous rulings in the two cases had come upon appeal only of the trial court's denials of preliminary injunctive relief. The three-judge panel hearing both cases included Judges Gewin and Bell, two of the more reluctant jurists on the circuit when sitting on desegregation panels (it also included Judge Albert Maris of the Third Circuit). One year prior, such a panel might have upheld the trial court's approval of the school systems' plans. But Judge Gewin was obliged to cite *Watson*, *Goss*, *Griffin*, and especially *Calhoun* – the latter being within the Fifth Judicial Circuit. The court ordered the four school systems to desegregate four grades (the 10th, 11th, 12th, and 1st) that fall, followed by two more grades each successive year. The court also ordered the systems to place newly incoming students into initial school assignments without

263 (1964); Wilkinson, *From Brown to Bakke*, pp. 98-101, quoting from 100; Greenberg, *Crusaders in the Courts*, p. 581, fn. 382.

⁵ *Calhoun v. Lattimer* 377 U.S. 263 (1964); Wilkinson, *From Brown to Bakke*, pp. 98-101, 100.

⁶ The other cases were *Stell v. Savannah-Chatham County and Glynn County (Brunswick, GA) Board of Education*; see both at 333 F.2d 55 (5th CCA, 1964).

regard to previously established dual racial zones. The same panel rejected evidence presented by the defendants in the *Stell v. Savannah* case, and subsequently in the *Davis* and *Armstrong* cases, that blacks were genetically inferior to whites and that their lack of achievement constituted a reasonable reason to segregate them in initial assignment. The court held that it did not “read the *Brown* decisions as relating only to the facts presented therein but instead as flatly proscribing segregation in the public education process on the stated ground that separate but equal schools for the races were inherently unequal.”

Gewin added:

The real fallacy, Constitution-wise, of the classification theory is that many of the Negro pupils overlap many of the white pupils in achievement and aptitude but are nevertheless to be segregated on the basis of race. They are to be separated, regardless of how great their ability as individuals, into schools with members of their own race because of the differences in test averages as between the races. Therein is the discrimination. The individual Negro student is not to be treated as an individual and allowed to proceed along with other individuals on the basis of ability alone without regard to race.”⁷

The effect of the Supreme Court and appellate court rulings upon district court proceedings that summer was immediate. Judges Thomas and Lynne ordered the Mobile and Birmingham school boards to submit revised plans as ordered. Interpreting the Fifth Circuit decisions as a call for uniformity within the circuit, Judge Grooms then applied the new standards to the Huntsville, Madison County, and Gadsden cases. In the Huntsville case, this led Grooms to dismiss a separate case brought by parents employed by Marshal Space Flight Center and Redstone Arsenal in the wake of the dismissal of the Justice Department’s impacted areas suit. Grooms demanded a specific amendment that allowed for the federal dependents’ inclusion in any desegregation plan – a response to the efforts of the governor and state legislature to exclude them. A few weeks later, Judge Johnson heard the Montgomery and Bullock County cases and issued orders similar to those of Judge Grooms. In each case, school officials

⁷ *Southern School News*, July, 1964; *Armstrong v. Birmingham Board of Education*, 333 F.2d 47; *Davis v. Board of School Commissioners of Mobile County*, 333 F.2d 53; see both the *Armstrong* and *Davis* rulings also at *Race Relations Law Reporter* 9.2, Summer, 1964, pp. 620-6; *Stell v. Savannah-Chatham County Board of Education*, 333 F.2d 55, 61-2; see the *Stell* ruling at *Race Relations Law Reporter* 9.2, Summer, 1964, pp. 656-64.

were ordered to prepare to desegregate four grades that fall, to present plans to carry out further desegregation the following year, and to notify the public of the possibility of transfer within a specified window. The addition of Madison County, Gadsden, Bullock County, and Montgomery to the list of enjoined school districts doubled the number of systems under court-ordered desegregation plans in Alabama that fall. But by far the most important decision rendered that summer was that of the three-judge court in *Lee v. Macon County Board of Education*.⁸

The court issued its opinion in *Lee v. Macon* on July 13, accepting much of the evidence presented by the plaintiffs and following very closely the arguments presented in the United States' brief. Judge Johnson wrote for the court, meticulously recounting the history of state control and defiance presented by the plaintiffs and the United States. The court found that the State of Alabama had an official policy of maintaining, and was then operating, a dual school system based upon race. The evidence was "clear that over the years the State Board of Education and the State Superintendent of Education have established and enforced rules and policies regarding the manner in which the city and county school systems exercise their responsibilities under State law." This control, Johnson wrote, related to "accounting practices, textbooks, transportation, school constructions, and even Bible reading," but it was most "rigidly maintained through control of the finances."⁹

As for the Macon County school officials, it was clear to the court that they had "fully and completely attempted to discharge their obligations as public officials" throughout the "troublesome litigation," but it was "no answer" that they were "blameless" as to the situation created by the governor and state board; *Cooper v. Aaron* had settled this matter. The Macon County school board's

⁸ *Southern School News*, July, 1964; *Montgomery Advertiser*, Aug. 4, 8, 1964; *Armstrong v. Board of Education of Birmingham* (ND); *Bennett v. Madison County Board of Education* (ND); *Carr v. Montgomery County Board of Education*, 232 F.Supp. 705 (MD); *Davis v. Board of School Commissioners of Mobile County* (SD); *Harris v. Bullock County Board of Education*, 232 F.Supp 959 (MD); *Hereford v. Huntsville* (ND); dismissed was the complaint in *Lorder v. Huntsville Board of Education*, Civil Action 63-612; *Miller v. Board of Education of Gadsden*; see all of these orders also at *Race Relations Law Reporter* 9.3, Fall, 1964, pp. 1163-98.

⁹ *Lee v. Macon County Board of Education*, Opinion and Decree of July 13, 1964, 231 F.Supp. 743; see also at *Race Relations Law Reporter* 9.2, Summer, 1964, pp. 626-38. See also *New York Times*, July 14, 1964; *Birmingham News*, July 14, 1964; *Montgomery Advertiser*, July 14, 1964.

plan to desegregate only the 12th grade that fall was, furthermore, “completely unacceptable” and a step backward considering its present officially-desegregated status (students in multiple grades already desegregated) and the recent rulings of the Fifth Circuit. The Macon County authorities were ordered to submit a plan that embodied the new Fifth Circuit standards for “deliberate speed.”¹⁰

Turning to grants-in-aid, the court cited *Griffin* and held that such grants would be unconstitutionally provided where public schools had become “unavailable.” Thus, the grant-in-aid statute need not be found unconstitutional on its face, only in its application where “private schools” existed only for white students. On Macon Academy’s status, the court held that, “the evidence strongly indicates that there has been on the part of the Governor, the State Superintendent of Education, and other state officials, public interference and public support and services” given or offered to the academy. The court declined to rule on the segregated academy’s public or private status, however, until the school had an opportunity to be heard on the matter. Macon Academy was thus made a party defendant and directed to show cause why it should not be deemed a public institution and enjoined.¹¹

On the constitutionality of the Alabama Pupil Placement Law, the Court essentially echoed the *Shuttlesworth* decision. It was clear that the law had been designed to apply only to black students requesting transfer to white schools, and it was equally clear that state authorities intended that it be used in this fashion. This was, in fact, the only way in which the Macon County Board of Education had applied it. However, Johnson wrote, the law should not “be stricken down because of its application in Macon County . . . since its illegal use [there] was brought about through intense pressure” from the defendant state officials. A judgment on the law’s constitutionality must be reserved, Johnson argued, until local school boards across the state had a chance to apply it “in somewhat more normal

¹⁰ Lee v. Macon County Board of Education, Opinion and Decree of July 13, 1964, 231 F.Supp. 743; see also at *Race Relations Law Reporter* 9.2, Summer, 1964, pp. 626-38. See also *New York Times*, July 14, 1964; *Birmingham News*, July 14, 1964; *Montgomery Advertiser*, July 14, 1964.

¹¹ Lee v. Macon County Board of Education, Opinion and Decree of July 13, 1964, 231 F.Supp. 743; see also at *Race Relations Law Reporter* 9.2, Summer, 1964, pp. 626-38.

circumstances” – that is, with the state school board and governor enjoined. Despite its dubious origins, the law could still be constitutional in its application by local authorities, if state officials would cease interfering. So the court suggested.¹²

The court then addressed the more controversial claims in the case. Johnson wrote that “the purpose of the [defendant] state officials . . . was clearly to prevent or impede any desegregation through their unlawful interference with the city and county school boards attempting to comply with the law.” The court enjoined the state board, its individual members, the state superintendent, and Wallace as the board’s president, from any further such interference in court-ordered desegregation “anywhere in Alabama.” The defendants’ contention that the plaintiffs could not represent a statewide class was simply “without merit.” The plaintiffs’ right to represent a statewide class had been upheld in the *Bush v. Orleans* case and implicitly sanctioned in the Ft. Worth case, *Potts v. Flax*. Furthermore, considering that the United States’ interest in the case was to see to the “due administration of justice in the federal courts,” the defendants’ claim that relief ought to be limited to the individual plaintiffs “border[ed] on the frivolous.”¹³

Finally, Johnson came to the only question that had given the court “considerable concern”: whether or not it should order the statewide desegregation of schools based upon the state officials’ usurpation of local authority. There was “no question” that the state officials had demonstrated, through their interference in Macon County, that they had “considerable authority and power over the actual operation of local school systems.” This was true “irrespective of any supposed limitations on that power as set out in the Alabama law.” The state board and the governor had “actively participated in the perpetuation of a segregated school system in Macon County. That the defendants had admitted to having abused their authority, subsequently relied upon the advisory opinion of the Alabama

¹² Lee v. Macon County Board of Education, Opinion and Decree of July 13, 1964, 231 F.Supp. 743; see also at *Race Relations Law Reporter* 9.2, Summer, 1964, pp. 626-38.

¹³ *Ibid.*; *Bush v. Orleans Parish*, 190 F.Supp 861 (ED, LA, 1960); *Potts v. Flax*, 313 F.2d 284 (5th CCA, 1963).

Supreme Court, and promised within the proceedings not to “do it again” placed them, Johnson wrote, “in a very weak position.” The court held that “a present recognition of . . . past illegal activity will not – in this case – justify this Court’s failure to take appropriate action now.” Nor could the state board of education deny that it, in fact, had the sort of “general control and supervision over the public schools” of the state which would make a statewide order feasible. However, “*at this particular time*,” Johnson wrote, the Court decided that it would “not order desegregation of in all the public schools of the State of Alabama.”¹⁴ Johnson continued:

For the present time, this Court will proceed upon the assumption that the Governor, the State Superintendent of Education, and the State Board of Education will comply in good faith with the injunction of this Court prohibiting such interference with the local city and county school boards, and, through the exercise of considerable judicial restraint, no statewide desegregation will be ordered at this time.¹⁵

The court specifically retained jurisdiction on this and all other questions, such that if “interference on the part of the [state officials] continues or occurs in the future – either directly or indirectly – through the use of subtle coercion or outright interference,” then the court could “reappraise this aspect of the case.”¹⁶

Johnson then proceeded to suggest how the court’s injunctive power might be used to effect desegregation if the state did continue to interfere. First of all, the state officials had an “affirmative duty,” via *Brown* and *Cooper v. Aaron*, to exercise their general control and supervision to bring about desegregation. Most especially, this meant utilizing their control over the distribution of state funds for school operation. The Court held that it not only “could” but “probably should” have immediately enjoined the state’s support of segregated education through the “illegal and unconstitutional practice of distributing public funds for the purpose of operating segregated schools.” Though the panel had

¹⁴ Emphasis in original.

¹⁵ *Lee v. Macon County Board of Education*, Opinion and Decree of July 13, 1964, 231 F.Supp. 743; see also at *Race Relations Law Reporter* 9.2, Summer, 1964, pp. 626-38.

¹⁶ *Ibid.*

elected not to enjoin such practice at that point, Johnson wrote that, “needless to say, it is only a matter of time until such illegal and unconstitutional support must cease.” Within a “reasonable time,” the court would “expect and require such support to cease.” The state board, superintendent, and governor were then ordered to “proceed to formulate and place into effect plans designed to make the distribution of public funds to the various schools throughout the State of Alabama only to those school systems that have proceeded with deliberate speed” to desegregate. After all of that – almost as an afterthought – the temporary restraining order was enlarged into a preliminary injunction.¹⁷

The court’s reluctance to order statewide desegregation can be attributed to several factors. First, Judge Johnson might have entered such relief had he been the only judge hearing the case. But he respected his fellow judges, especially the elder Judge Rives. Both Rives and Grooms were more cautious and more willing to allow time to prepare whites for unpalatable changes. All three judges understood that such an order would enrage segregationists. And all three believed, at that point, that local boards of education could effect desegregation once freed from state pressure and intimidation. Most importantly, the court understood that such an order would be unprecedented. Despite the court’s refusal to enter a statewide desegregation order or to overturn the state pupil placement law, Jack Greenberg at the time called the ruling “the most sweeping decree in the history of the Legal Defense Fund’s school integration campaign.” Not only could local school desegregation suits in Alabama proceed without interference, but the groundwork had been laid for an eventual statewide order.¹⁸

State Attorney General Richmond Flowers reacted similarly, though with foreboding rather than satisfaction. As the Macon County school board’s counsel and de facto counsel for the state, Flowers recognized the ruling as “momentous” and “the most far-reaching [decision] since” *Brown*. “Our backs

¹⁷ Ibid.

¹⁸ *Southern School News*, Aug., 1964; *New York Times*, July 14, 1964; see also correspondence between the judges of the three-judge court, Johnson Papers: Lee v. Macon Case File.

are really to the wall now," he said. "If we appeal it," he warned, "it might become the law of the land" and that would be "far worse than the original *Brown* decision." He added that he did not think his estranged colleagues in the state government realized how important the ruling really was. The court had adopted a "new concept in school desegregation cases" by suggesting that the state might be enjoined against disbursing funds to segregating school systems. "The order is coming," he continued, "I'm afraid we'll not even be able to get by this year Time requests don't work anymore. The court says time is of the essence [and] that it's been too long since the 1954 decision." Wallace's office declined comment. The governor was on the national campaign trail in – of all places – Little Rock.¹⁹

The *Montgomery Advertiser* concluded that the court had "for all practical purposes, . . . ordered virtual statewide school desegregation in Alabama with the threat of cutting off needed operating funds." The *Birmingham News* bent its front page coverage to the fact that Alabama was "off the hook in statewide mixing." The *News'* editorial page revealed more perception. "This is a massive opinion," it wrote, and a potentially "landmark implementation ruling" which was "a predicate for far more drastic action." Judges Johnson, Rives, and Grooms would "not be ignored in wisdom. They counsel a change of state policy. All of which the Governor and State Board of Education brought upon themselves." It was "a very disturbing opinion raising grave questions about the future," the *News* concluded, "but it [was] not at all surprising."²⁰ As the reality of the ruling continued to sink-in the following week, the *News* issued a rhetorical call to law, order, and compliance:

Obviously Alabamians do not want desegregation. There is no argument as to the vast majority feeling. But the fact of the law as it stands, and of court insistence on positive action as against continued resistance, must be understood. A time of grave decision is all but upon us. It is, we think, a matter of months. And it most comes to rest on officials. Will enough Alabamians see this and demand an awakening to reality?²¹

¹⁹ *Southern School News*, Aug., 1964; *New York Times*, July 14, 1964.

²⁰ *Montgomery Advertiser*, July 14, 15, 1964; *Birmingham News*, July 14, 15, 17, 1964.

²¹ *Birmingham News*, July 18, 1964.

The Civil Rights Act

The ominous decision in *Lee v. Macon* was not the only thing causing a furor among segregationists in Alabama that summer. Just two weeks prior to the ruling, President Lyndon Johnson put his signature on the Civil Rights Act of 1964, supposedly telling an aid afterward that the administration had thereby “delivered the South to the Republican Party for a long time to come.” Southern Senators had mounted the longest filibuster in the history of the United States Congress that spring in an attempt to block the legislation. The national outrage over the previous year’s events in Birmingham and the martyrdom of President Kennedy – whose administration had proposed the bill – allowed Johnson to push the legislation through. At first most whites in Alabama seemed more terrified over the act’s provisions for the desegregation of public accommodations than anything. Fearing a mass movement to desegregate parks, motels, and other public places, the *Birmingham News* called for the city’s blacks to avoid “deliberate, provocative exploitation in any tests that anyone may wish to make” The paper’s editors understood that the city’s whites would find the law “most disturbing,” but they urged segregationists to challenge the statute only through a “law and orderly process” in the courts. The Executive Committee of the Alabama Citizens’ Council was “convinced that many parts of the so-called “Civil Rights Act” [were] unconstitutional, especially the public accommodations section.” It urged whites to oppose the legislation by “refusing to eat or sleep under integrated conditions.” Birmingham restaurateur Ollie McClung – owner of the popular Ollie’s Barbeque – was soon equally convinced of the unconstitutionality of the public accommodations section and took up the call of the *News*. His case later resulted in one of two landmark Supreme Court decisions upholding the law – *Katzenbach v. McClung*.²²

²² See, for Johnson quotation, Bill Moyers, “Second Thoughts: Reflections on the Great Society,” *New Perspectives Quarterly* 4 (Winter, 1987); *Birmingham News*, July 5, 1964; *The Citizen*, July-Aug., 1964, p. 7. See, for the legal challenge to the public accommodations section of the act (Title II), *Katzenbach v. McClung*, 379 U.S. 294 (1964) and *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); see, for a thoughtful analysis of both cases, Richard C. Cortner, *Civil Rights and Public Accommodations: The Heart of Atlanta Motel and McClung Cases*

At the time, many in Alabama overlooked the act's provisions for school desegregation. Title IV finally gave the Attorney General the authority to bring suits against segregated school districts. This would allow the Civil Rights Division to initiate its own civil actions, rather than having to "piggy-back" on those brought by the LDF. This was of course a relief to the LDF, which along with its local associated counsel had carried the burden of school desegregation litigation largely by itself. Title VI was, in essence, the statutory embodiment of the enforcement mechanism suggested in the CRD's brief and Judge Johnson's opinion in *Lee v. Macon*. The court in *Lee v. Macon* had been persuaded by the suggestion that the state ought to use its control over funding to encourage school systems to desegregate. Such an approach also had origins at the federal level in Senator Adam Clayton Powell's efforts over the years to insert an anti-discrimination rider into any bill appropriating federal money to the states, and in the Justice Department's own efforts to force school desegregation in "impacted areas." The act was drafted by the head of CRD's Appeals and Research Section, Harold Greene, in close consultation with congressional leaders and with Burke Marshall and John Doar. Marshall had once testified before Congress in opposition to this punitive approach, but given the years of continuous defiance and frustration, all agreed that it was time to insert some such provision into the new legislation. Thus did Title VI prohibit discrimination in any program receiving federal funds, including public schools, and authorize the Office of Education of the Department of Health, Education, and Welfare (HEW) to undertake administrative proceedings to cut off such federal funds to segregating school districts.²³

(Lawrence: University of Kansas Press, 2001). On Johnson and Civil Rights, see Robert Dalleck, *Flawed Giant: Lyndon Johnson and His Times, 1961-1973* (New York: Oxford University Press, 1998), and David Carter, *The Music Has Gone Out of the Movement: Civil Rights and the Johnson Administration, 1965-1968* (Chapel Hill: University of North Carolina Press, 2009).

²³ Wilkinson, *From Brown to Bakke*, pp. 101-7; Brauer, *John F. Kennedy and the Civil Rights Revolution*, p. 250; Landsberg, "The Kennedy Justice Department's Enforcement of Civil Rights: A View from the Trenches," p. 15; Brian K. Landsberg, Correspondence with the Author, Dec. 20, 2012; Beryl A. Radin, *Implementation, Change, and the Federal Bureaucracy: School Desegregation Policy in HEW, 1964-1968*, Policy Analysis and Education Series, Dale Mann, Ed. (New York: Teachers' College Press, 1977), pp. 4-7.

Within a year, a massive increase in available federal funding for schools and the formulation by HEW of specific desegregation guidelines for local systems would vault the federal bureaucracy to the center of the segregationist consciousness. But with the news days later of the *Lee v. Macon* decision, the immediate threat to segregated education in Alabama continued to be confined in the judiciary. Even for those segregationists who did see the potential for doom in the act's school desegregation provisions, the focus was on Title IV. The editors at *The Citizen*, the organ of the Mississippi-based Citizens' Council of America, understood that only "a few . . . heretofore excellent public school systems" had been "infected by a potentially-lethal virus in the form of court-ordered race mixing." But "all Southern school systems," they continued, "received their death sentence when the misnamed 'Civil Rights Act of 1964' gave the U.S. Attorney General authority to obtain court orders on his own initiative to compel wide-spread integration."²⁴

Schools Open, Fall, 1964

It was too late for the Justice Department to initiate any suits which might yield results that fall, and HEW was not yet prepared to begin initiating a compliance campaign. But the summer's court orders produced a modest expansion of desegregation in Alabama when schools opened in September. In Madison County, schools desegregated for the first time, as four black students were accepted and admitted to Sparkman High School. Huntsville became the school system with the largest number of blacks admitted to white schools, with 31, the vast majority of these at Butler High. Birmingham admitted seven new black students to its white schools, including for the first time at Phillips, Jones Valley, and Ensley High Schools. Montgomery desegregated for the first time, admitting three black students each to its two white high schools, Sydney Lanier High and Robert E. Lee High. Ten years after the initial post-*Brown* challenge to segregated Alabama schools, two black children also entered

²⁴ *The Citizen*, Sept., 1964, p. 2.

Montgomery's Harrison Elementary School. In Mobile school authorities appealed to the U.S. Supreme Court for a stay of the accelerated desegregation order, but the stay was denied by Alabama's own native son, Justice Hugo Black. Days later the school system admitted seven black students to white schools, including three at Murphy High, from which both Henry Hobdy and Dorothy Davis had graduated that spring. Gadsden schools enrolled 20 black students in white schools for the first time, mostly at Gadsden High and Emma Sansom High. Bullock County admitted 3 black students to Bullock County High School at Union Springs, also for the first time; the Black Belt County was spared the four-grade initial desegregation formula suggested by the Fifth Circuit and applied elsewhere. As soon became his custom, Frank Johnson afforded the county board of education leeway in exchange for its full cooperation.²⁵

The Macon County school authorities were forced to reopen Tuskegee Public and admit 14 black students. Some whites came back to the Macon public school system – 59 that September and 133 by the end of the year. With no further high profile incidents or interference, some parents decided that a token black presence was preferable to paying for private school or transferring out of district. But enrollment remained too low to sustain all three of Macon County's white high schools, one of which was still partially burned down in any case. So, the board closed Shorter and Notasulga and arranged to, ironically, bus students *into* Tuskegee as necessary. Macon Academy continued to expand its operation, enrolling 322 students and adding to its fledgling facility. Its leaders petitioned the court to dismiss it as a party defendant, but the court refused. Meanwhile, the University of Alabama increased its black enrollment to 10, and Auburn University quietly admitted its first two undergraduate students, none other than *Lee v. Macon* plaintiffs Anthony Lee and Willie Wyatt.²⁶ Finally, the Mobile-Birmingham Catholic diocese ordered the beginning of token desegregation in its 80 elementary and 12 high schools

²⁵ *Southern School News*, Sept., Oct., 1964; *New York Times*, Sept. 9, 1964; *Birmingham News*, Sept. 3, 8, 1964; *Montgomery Advertiser*, Sept. 3, 1964.

²⁶ Harold Franklin – a graduate student – was the first to desegregate Auburn; see *Franklin v. Parker*, 223 F.Supp 724 (MD, AL, 1963), mod. 331 F.2d 84 (5th CCA, 1963); see also Gray, *Bus Ride to Justice*, pp. 195-6.

across the state, and four black students enrolled at John Carroll Catholic High School, just outside of Birmingham.²⁷

State Superintendent Meadows and others congratulated the people of Alabama on what was a peaceful and largely uneventful desegregated opening of schools. Edward Fields and J.B. Stoner of the National States Rights Party attempted to stage protests on the first day of classes in Birmingham and Montgomery. Stoner led a small group picketing Robert E. Lee High School in Montgomery, waving Confederate flags and placards. The group packed up and left as soon as the three admitted black students entered the school. Fields also organized a motorcade in support of school closure in Birmingham, but the Birmingham police broke the motorcade up shortly after it took to the streets. There were no major disturbances like there had been the year before. “The fact that schools over the state were integrated without incident and in compliance with the law,” Meadows announced, “speaks well for the people of our state and for their firm belief in law and order.” Meadows was “extremely well pleased that our people have demonstrated their belief in law and order, even though they, and I along with them, disagree with the principle involved.” Governor Wallace’s opponents undoubtedly understood that the lack of major disturbances was due in large part to the lack of high profile interference from Wallace. Attorney General Flowers maintained that the “law and order” stance was “the only sane and sensible attitude, and the only attitude, that we in the South can take and survive.” Defiance of court-ordered desegregation would “only bring violence and federal intervention,” Flowers said, “as it did last year and the year before.” Similarly, outgoing Alabama State Chamber of Commerce Chairman Winton Blount told a meeting of his organization that the state’s citizens, black and white, had “conducted themselves in a manner which can only reflect credit on Alabamians,” unhampered as they were by the “tense and unnatural environment” created by Wallace the previous fall. They had, Blount said, “repudiated the misrepresentation of our state as a body of unlawful people.” Surely, he

²⁷ *Southern School News*, Sept., Oct., 1964; *New York Times*, Sept. 9, 1964; *Birmingham News*, Sept. 3, 8, 1964; *Montgomery Advertiser*, Sept. 3, 1964; Norrell, *Reaping the Whirlwind*, p. 168.

continued, “other sections of the country” were “beginning to understand our position – that we believe in law and order, and that when legislation is enacted through the normal constitutional process we will abide by this legislation even though we believe the law to be unwise and even though it is abhorrent to us in every way.”²⁸

In each desegregating school district, the number of black students admitted to white schools was significantly lower than the number of those who applied for transfer. And in each case, the number of students applying for transfer was a very small percentage of the number of black students in the school system. For example, Montgomery school officials approved only 20 of an initial 40 applicants for transfer. Birmingham accepted 8 of 29, Gadsden 7 of 32. Plaintiffs in several cases expressed disappointment over what they saw as simply more foot-dragging. Plaintiffs in the *Carr* case petitioned Frank Johnson to order more acceptance in Montgomery, to no avail. Johnson cited the school board’s good faith and reaffirmed his approval of its plan. In Mobile John LeFlore argued that a number of applicants for transfer under the *Davis* injunction had been rejected on “obviously spurious grounds” and that the school board was still rigidly applying the “nearest school” policy to black students, meaning that a black applicant for transfer was rejected out of hand if there was a black school nearer his home than a white school. LeFlore argued further that admitting 7 students to desegregated schools, when there were 28,000 black students in the Mobile City-County system still attending segregated schools, was “a rather poor reflection of compliance with the federal court order that the pace of desegregation should be accelerated.” The LDF’s Derrick Bell followed-up LeFlore’s complaints by filing a motion for further relief in *Davis* asking the court to order desegregation of all grades the following fall; Judge Thomas denied it. Meanwhile, Alabama remained above only Mississippi and Louisiana in the number of desegregated school districts, with 8. And with .032 percent

²⁸ *Southern School News*, Sept., Oct., 1964, Jan., 1965; *New York Times*, Sept. 9, 1964; *Birmingham News*, Sept. 8, 1964; *Dallas Times-Herald*, Sep. 3, 1964; *Montgomery Advertiser*, Sept. 9, 1964.

of its black students in desegregated schools, it ranked only slightly above Mississippi and just below South Carolina.²⁹

George Wallace produced no third stand in the schoolhouse door that fall. He was, after all, enjoined from interference, and his behavior years before as a circuit judge proved that his grandstanding would stop short of inviting contempt of court. He did, however, react to the increase in token desegregation and the threat of further increases by calling the Alabama legislature into special session late in September. The state's lawmakers then unanimously passed a resolution calling for an amendment to the United States Constitution which would give control of public education completely over to the various states. Wallace insisted in an address to the legislators that, contrary to what some were saying, "total federal control" of education was not inevitable, nor was fighting it futile. "Home rule" and "states' rights" could prevail. Wallace called the resolution "the first shot in a battle" and "a Crusade" to "preserve the most democratic institutions on earth." Meadows offered support for the measure, which he insisted was "non-partisan and non-racial." Alabama and other states, the superintendent argued, were "under the thumb of federal control in public education," which would soon "necessarily be used to destroy the American system of representative democracy." Evidently comparing the U.S. government to that of Nazi Germany or Soviet Russia, Meadows said that "dictatorship nations" had historically used the education system to "capture the minds and souls of their youth . . . making slaves of them. This must not happen in America," he continued, "but it will happen unless federal control of our education system is resisted throughout the nation." The measure received token support at the annual meeting of southern governors that fall but never came close to being replicated in 37 states, the number which would have forced Congress to initiate the amendment process.³⁰

²⁹ *Southern School News*, Nov., Dec., 1964; *Montgomery Advertiser*, Aug. 27, Sept. 6, 9, 1964; *Birmingham News*, Sept. 1, 3, 6, 1964; see, for motion for further relief in Davis, *Southern School News*, March, April, 1965.

³⁰ *Southern School News*, Oct., 1964.

Meanwhile, Wallace's slate of unpledged presidential electors suffered a crushing defeat in the November general election, as the prediction Lyndon Johnson had made upon signing the Civil Rights Act began to look rather poignant. Republican presidential candidate Barry Goldwater won an astounding 70 percent of the Alabama vote, carrying 62 of 67 counties. Ironically, Wallace's own consistent bashing of the Kennedy/Johnson Administration had contributed significantly to this outcome. Democratic Alabama congressmen had tried to urge voters to split their tickets, voting Republican for president only, but even they were swept out on the rising Republican tide. Only one Democratic congressional candidate with Republican opposition retained his seat, and Alabama soon sent Republican congressmen to Washington for the first time since Reconstruction. The election left the state's congressional delegation in the House 5-3 Republican. Republicans took a number of local offices across the state as well. State Democratic chairman Roy Mahall attributed the losses directly to federal court decisions and to the fact that Goldwater voted against the Civil Rights Act. "Persons who call themselves Alabama Democrats try to put political views on the basis of liberal and conservative," Mayhall said, "but the basic issue in the state is segregation. The race issue is the cause of the whole march of people from the Democratic Party." It was time, he argued, "for Alabama to rejoin the Union," to "furl the Confederate flag and unfurl the American flag."³¹

HEW, Form 441, and the 1965 Guidelines

In response to the Civil Rights Act of 1964, the Civil Rights Division developed a two-pronged school desegregation litigation policy: it would use its new-found power to initiate suits on its own, and it would at the same time support HEW's own school desegregation program. In Tennessee early in 1965, the CRD filed its first unilateral school desegregation action since the seminal "impacted areas" suits. Around the same time, HEW issued its first regulations pursuant to compliance with Title VI. The

³¹ *Southern School News*, Dec., 1964, Feb., 1965.

HEW regulations called for all school districts requesting new or renewed funding from the U.S. Office of Education (USOE) to execute “assurances of compliance” indicating that they did not discriminate. In practice this meant submitting not only a signed assurance form – the innocuously named “Form 441” – but also a plan for desegregation which would then be subject to approval by the Commissioner of Education, Harold Howe. The regulations explicitly excluded those school districts under federal court order. The department thus deferred to the courts where the two entities’ jurisdiction overlapped. In time, the three-way relationship between HEW, the courts, and the CRD would produce its share of antagonism, but in 1965 the focus for all three was bringing as many school systems as possible into *some* sort of compliance with the law.³²

The punitive enforcement mechanism was simply the newest method for effecting this outcome. It has been described by one historian as a “clumsy” one which “undercut the principle of nondiscrimination.” The cutoff of federal funds to school districts which failed to comply with the federal nondiscrimination policy was, as another scholar described it, “like a hydrogen bomb,” that is, “better suited to threats to than to actual use.” Howe himself defended the mechanism by saying that HEW had to “make a philosophical judgment about what is most important – a system to create pressure to guarantee individual rights, a system free of discrimination, or a system involving payment of funds for a specific program. Most people,” he said, “place the first one first.” For segregationists the question was: would the federal government really punish students for the transgressions of their school boards. And many of them were willing to push HEW and the CRD to the limit to find out.³³

The threat of a funding cutoff captured Alabama school officials’ attention as soon as HEW set its program in motion. The department sent notice of its policy regarding Title VI to all of the state’s school districts on January 4, accompanied by Form 441. State Superintendent of Education Austin

³² Landsberg, *Enforcing Civil Rights*, pp. 108-9.

³³ Landsberg, *Enforcing Civil Rights*, pp. 108-9; Wilkinson, *From Brown to Bakke*, pp. 104-7, quoting from p. 106, Wilkinson also quoting legal scholar Owen Fiss; *Southern School News*, Jan., 1965; see, for Howe interview, *Birmingham News*, Aug. 18, 1966.

Meadows immediately called a meeting in Montgomery of the state's city and county school superintendents. He fumed to the press that the sanctions would have a "crippling effect on education in Alabama" – which was set to receive over \$30,000,000 in federal funds in the following fiscal year, not counting funds made available through assistance from the USOE. Federal funds only accounted for around ten percent of most local systems' total budgets (in impacted areas, the percentage was larger), but it was ten percent that most could not do without. "If this money is lost and made up on the state or local level," Meadows said, "it would result in us losing our vocational education program. The lunchroom program would be wiped out, and other services would suffer," he said. "We are damned if we do sign," Meadows concluded, "and twice damned if we don't. If a school board refuses to sign this assurance," he explained, "this will only advertise the fact that it does not plan to abide by the Civil Rights Act, and this in turn would provoke a desegregation suit under Title IV of the same act." In a similar address to the state's white teacher association, the state superintendent expressed his incredulity. "Every type of educational facility available to the majority group in Alabama has been made available to the minority group," he said. Was this not enough, he wondered. Would the nation not just "let Alabama continue its progress, nurture its fine culture, and further its goal of peaceful existence in the only way it knows to exist?" Or would all of this "be destroyed by outsiders who either do not understand or do not care enough for either race in Alabama?"³⁴

Local school officials expressed similar dismay. One told reporters, "The public needs to understand [that] we don't have any choice when you come down to it. They think we are selling them down the river for a little money if we sign," he argued, invoking the sale of slaves. "If I could assure us of keeping our schools white by not taking the money," he said, "I'd do it. But we'll come nearer having Negroes in our schools next year if we don't sign. We would be foolish to turn the money down and maybe next year take Negroes anyway." Others remarked that they "wouldn't have money to keep the

³⁴ *Southern School News*, Feb., March, 1965; Trial Brief of the United States, Jan. 5, 1967, Lee v. Macon County Board of Education, Frank Johnson Papers: Lee v. Macon Case File, Container 19, Folder 5, p. 14.

boilers hot” or “couldn’t operate [their] schools a month” without federal funds. Despite the shared apprehension, Meadows urged the superintendents at the meeting to avoid signing the assurance of compliance form. The local school officials dutifully followed suit, but many left feeling anxious about the ultimate wisdom of such a course. Meanwhile, defiance-minded segregationists supported the school officials’ refusal and urged continued resistance. The Citizens Council of Alabama called Form 441 a “destructive and diabolical agreement,” the signing of which would amount to “accepting a bribe in payment for violating the principles that have been proclaimed over and over by Alabamians.” It would “not only destroy the school system by integration but would insure immediate federal control of the affected school systems.”³⁵

The following month, local school systems began to give in on signing the assurance of compliance form, despite admonitions from the governor and from Meadows. One educator in Calhoun County, which received impacted areas funds in addition to normal federal allotments, said that the question was not one of “signing or not signing the compliance form. It is a question,” he said, “of whether or not we want to lose federal money.” Answering that question seemed easier in March, while the eyes of the state turned to events in Selma. Voting rights demonstrations in the black Belt city commanded the attention of observers around the world, in fact. On March 7 protestors organized a March from Selma to Montgomery to raise awareness of the murder of activist Jimmie Lee Jackson by a state trooper in nearby Marion. The would-be marchers were set upon, tear-gassed, and beaten by state troopers and Dallas County Sheriff Jim Clark’s mounted posse before crossing the Edmund Pettus Bridge. This event – captured by news cameras and broadcast across the nation in prime time – came to be known as “Bloody Sunday.” It was followed by more demonstrations and the murder of Unitarian minister James Reeb. A week later, Frank Johnson lifted an injunction against the still-planned Montgomery march and ordered the state to provide protection for the marchers. A white female

³⁵ *Southern School News*, Feb., March, 1965.

activist from Michigan was subsequently murdered when Klansmen discovered her ferrying marchers back from Montgomery in her car, accompanied by a young black man. In the immediate aftermath of the violence, a group of Alabama business moderates issued a renewed call to law and order. An advertisement was placed in all of the state's major newspapers, signed by the Alabama State Chamber of Commerce, a number of local chambers of commerce, the Alabama Bankers Association, Associated Industries of Alabama, and the Alabama Textile Manufacturers Association. The ad expressed the business groups' belief in "the full protection and opportunity under the law of all our citizens, both Negro and White," and in "basic human dignity. . . . We believe in obedience to law" it read, "even though some may question the wisdom of particular laws." The environment created by the sensational events in and around Selma that spring allowed local school systems to sign their compliance assurance forms without the kind of negative scrutiny that might otherwise have accompanied such decisions. By the end of the month, all but 11 local systems across the state had signed Form 441.³⁶

One system, Bessemer city, actually announced its intention to refuse to sign the document and to file a court test of the same. The Bessemer Board of Education argued that signing Form 441 "could mean virtual abdication over our schools [*sic*] to Washington bureaucracy." "From past experience in other phases of our lives," it announced, "we know we can expect ever-increasing control from Washington bureaus, and we consider this 'assurance of compliance' form to be pretty much a blank check to the HEW to go ahead with their controls." The Bessemer action gave the state board of education and Governor Wallace additional rationale for counseling similar defiance. On March 4 the state board voted unanimously to avoid signing the form pending the outcome of the legal test. Wallace had already been urging local school officials not to sign, calling the pledge "repugnant to the American

³⁶ *Southern School News*, March, April, 1965. On Selma, see David Garrow, *Protest at Selma: Martin Luther King, Jr. and the Voting Rights Act of 1965* (New Haven: Yale University Press, 1978); Taylor Branch, *Pillar of Fire: America in the King Years, 1963-1965* (New York: Simon and Schuster, 1999); Taylor Branch, *At Canaan's Edge: America in the King Years, 1965-1968* (New York: Simon and Schuster, 2007); Landsberg, *Free at Last to Vote*; and *Williams v. Wallace*, 240 F.Supp. 100 (MD, AL, 1965).

system” and applauding the Bessemer officials. Wallace accused HEW of “bureaucratic cannibalism,” because it had “[fed] upon the power creating it” and had then begun “a voracious quest for more power,” ultimately “asserting itself free from all limitations imposed by the executive, legislative, and judicial branches of government by the Constitution itself.” Wallace also sent a telegram to his fellow southern governors, urging them to arrange similar tests of the compliance form. The governor was playing a dangerous game again, as he and the state board were under injunction in *Lee v. Macon* to avoid interference in desegregation and to utilize state financial power to actually encourage it. He made sure to publically state that the Bessemer challenge did not mean that “the Bessemer board or any other board that joins with them in this suit intends to disobey the law. Congress has passed the law,” he added, “and we must obey it. But we don’t have to like it.” Meadows subsequently made a public show of “relieving the executive branch of [the] pressure” placed on it by the injunction in *Lee*. He purported to be taking the heat off of Wallace and the state board by signing the assurance of compliance form himself and by accepting the duty to use the state’s power over funds disbursement to encourage desegregation.³⁷

Commissioner of Education Francis Keppel was unimpressed by Meadows’ actions. He singled out the state of Alabama by writing a letter to the state superintendent expressing “grave concern as to whether this office can continue legally to provide funds to your department under the several programs which we administer.” Keppel was especially disturbed by the state board of education’s deferral to Meadows in signing its assurance of compliance form. This constituted a “serious misreading of the requirements of the act,” according to the commissioner. Keppel noted that most of the state’s school systems had submitted their assurances, but he added the obvious: that all of them continued to operate schools on a segregated basis. Merely submitting the assurance forms was “not only insufficient,” Keppel wrote, but “inappropriate” where systems maintained dual systems with no plans

³⁷ *Southern School News*, March, 1965; *City of Bessemer Board of Education v. Gardner*, C.A. 65-180 (ND, AL).

in place to disestablish them. “Since almost all of these districts remain fully segregated,” Keppel added, “and as far as we know have not undertaken the steps necessary to change the situation, we can only conclude that they did not realize that they were committing themselves to full and immediate compliance or they did not understand what full compliance means.” The commissioner urged the state’s local systems to accept this reality immediately, so that they would “have the opportunity to prepare and submit plans for review and approval.” These plans were to be submitted no later than early May and geared towards beginning desegregation that fall. Meadows sent word to local superintendents that the assurance forms were not enough and that they must show HEW they intended to take some action towards desegregation. Rather than suggest that they draft and submit desegregation plans, though, he advised them to continue using the pupil placement law and to retain counsel.³⁸

The stakes for school systems became much higher in April. On April 11 President Johnson signed into the law the Elementary and Secondary Education Act (ESEA). In authorizing 1.3 billion dollars in federal funds for state and local school systems, it represented by far the largest single commitment by the federal government to education in U.S. history. The act provided for millions of dollars to be disbursed to systems for library and textbook upgrades, for the establishment of creative research centers, for the dissemination of federal educational research, and for the strengthening of state departments of education. Title I was the most significant provision for the majority of local school systems, though. In HEW’s own words, it recognized “the long-standing relationship between educational achievement and the cycle of poverty,” and it provided for millions in aid to school districts with a “high concentrations of low-income families.” In Alabama this meant that nearly every school system in the state was eligible for a significant increase in federal funding. Each state would receive tens of millions for Title I grants alone. Local systems could apply to the state for grants based on the

³⁸ *Southern School News*, April, 1965.

number of children in their district from low-income families, and they could then use that money for supplementary and remedial instruction programs, guidance and counseling services, health and welfare services, equipment, and facilities.³⁹

With this carrot, however, came a much more well-defined stick. Days later HEW issued a “General Statement of Policies under Title VI of the Civil Rights Act of 1964 Respecting Desegregation of Elementary and Secondary Schools,” soon to be known simply as “The Guidelines.” The department clarified exactly what compliance would mean for school systems which wanted to remain eligible for federal funds. Since Title VI prohibited “the extension of Federal financial assistance to any dual or segregated system of schools,” school officials had to “eliminate all practices characteristic of such dual or segregated school systems” to be eligible. The Guidelines clarified that any school district which had failed to eliminate all practices characteristic of a dual or segregated system could not execute Form 441, meaning that merely signing Form 441 was moot for nearly every system in the state of Alabama. Segregating systems not already under court order were instructed, then, to formulate and submit desegregation plans, along with “initial compliance reports.” The core of the Guidelines was in the specifics HEW provided as to what types of plans would be accepted. Here the department leaned heavily on the latest federal school desegregation jurisprudence. It indicated that it would accept either geographic attendance zone plans, so-called freedom of choice plans, or some combination of the two.⁴⁰

Geographic attendance zone plans were specified to be those in which “racially separate attendance zones” were “abandoned entirely” and in which all attendance zones were “part of a single, non-racial zone,” the boundaries of which were drawn “to follow the natural boundaries or perimeters

³⁹ *Profile of ESEA*, PL 89-10, U.S. Department of Health, Education, and Welfare, Office of Education (Washington D.C.: Government Printing Office, 1966), pp. 5-7, 26.

⁴⁰ *General Statement of Policies under Title VI of the Civil Rights Act of 1964 Respecting Desegregation of Elementary and Secondary Schools*, U.S. Department of Health, Education, and Welfare, Office of Education (Washington D.C.: Government Printing Office, 1965); *The First Year of School Desegregation Under Title VI in Alabama: A Review with Observations and Conclusions*, Special Report of the Alabama Council on Human Relations (Huntsville, Alabama: Alabama Council on Human Relations, September, 1965).

of compact areas surrounding schools.” Regarding freedom of choice plans, the Guidelines specified that all pupils were to be given adequate notice of their eligibility to choose which school within a given system that they wanted to attend. The Guidelines explicitly placed the burden for desegregation on the school board, not the pupils and their families, and ruled out the use of pupil placement laws if they were used to “limit desegregation through restriction of any pupil’s right to choose.”⁴¹

In reality HEW officials knew that the opposite would be true, at least at first. School board’s would undoubtedly see adopting freedom of choice plans as a “clever way” to “appear to comply,” as one official with the Office of Education put it. Local boards knew that the number of black students choosing white schools would remain relatively small as long as the threat of violence, economic reprisal, or general pressure from the white community remained, along with pressure from those in the black community who favored strengthening black schools. School officials also surmised that they could limit the number of blacks they accepted into white schools, despite the admonition against placement law abuse in the Guidelines. Boards could rest assured, too, that no whites would elect to attend black schools. Putting whites into formerly black schools would undoubtedly have to be part of most geographical zone plans, and this would be an intolerable circumstance, they reasoned. HEW understood that a great many school districts would opt for freedom of choice plans. In explaining its decision to accept such plans, the department argued that it was simply following the lead of the federal courts. They were in agreement, it seemed, that while time may have run out on delay, pushing too quickly might encourage more systems to simply forego federal funds rather than comply.⁴²

⁴¹ *General Statement of Policies under Title VI of the Civil Rights Act of 1964 Respecting Desegregation of Elementary and Secondary Schools*, U.S. Department of Health, Education, and Welfare, Office of Education (Washington D.C.: Government Printing Office, 1965); *The First Year of School Desegregation Under Title VI in Alabama: A Review with Observations and Conclusions*, Special Report of the Alabama Council on Human Relations (Huntsville, Alabama: Alabama Council on Human Relations, September, 1965).

⁴² HEW, *General Statement of Policies under Title VI of the Civil Rights Act of 1964 ; The First Year of School Desegregation Under Title VI in Alabama*, Special Report of the Alabama Council on Human Relations.

In addition to provisions for pupil desegregation, the Guidelines further required that any plan include provisions for faculty desegregation; the elimination of segregated transportation; the elimination of discrimination and segregation in all services, facilities, activities, and programs; and the preparation of faculty, staff, and community for desegregation, including adequate publication of the plan in the local press. The Commissioner of Education reserved the right to “from time to time redetermine the adequacy of any desegregation plan to accomplish the purposes of the Civil Rights Act.” HEW required any school system which did not fully desegregate that fall to supply some justification for this, and it set the fall of 1967 as the target date for all systems to extend desegregation to all grades. In light of the target date, all systems were required to “provide for a substantial good faith start on desegregation” beginning with the coming fall of 1965. A “good faith start” was defined in line with the current standards of the federal courts: the desegregation of at least four grades, the elimination of new initial assignments on the basis of race, and the provision for some sort of faculty desegregation.⁴³

In the wake of the passage of the ESEA and the issuance of the HEW Guidelines, many school systems scrambled to secure compliant status, despite the efforts of the governor and his cadre to intensify their defiance campaign. Wallace attacked the Guidelines with a standard mix of states’ rights and Cold War rhetoric. “Even if Congress had the power,” he said, “this business of punishing school children to compel elected officials to act in a certain way is a viscous procedure heretofore unknown in a society of free people but universally employed in totalitarian nations.” The policy was the product of “left-wing liberals” who justified “the federal government withholding aid to children in our nation” while at the same time “loudly [opposing] cutting off federal aid to communists and communist satellite nations. . . . We don’t believe the people will put up with this,” he concluded, and “we will resist as long as we can within the law.” The governor supported the state legislature’s passage of a resolution which urged local school systems not to take any further action to comply with the HEW policy until the

⁴³ HEW, *General Statement of Policies under Title VI of the Civil Rights Act of 1964*.

Bessemer suit was adjudicated. Seven of the state's eight U.S. representatives signed a resolution of their own in support of the state resolution.⁴⁴

For the first time in Wallace's tenure as governor, he encountered significant domestic resistance to defiance. A group of state legislators mounted a sustained attack on what they determined was yet another in a long line of "so-called 'nigger resolutions.'" Several legislators expressed concern that, in light of the injunction in *Lee v. Macon*, the resolution would "rise up and haunt us" and invite a statewide desegregation order "in one fell swoop." One north Alabama senator told his colleagues that the resolution's 11 opponents in the Senate sat "with tears in their eyes" while the rest were "flirting with disaster" and refusing to "listen to the voice of reasons" [*sic*]. Another asked Wallace, specifically, to "quit appealing to the worst in people and appeal to the best," or to "quit rubbing these sores." Another senator borrowed a favorite line of Martin Luther King, charging the governor with effecting more desegregation in Alabama than had any other governor anywhere at any time. "The strategy employed by the governor," he added, with all of its "bluff and blunder," had "set our state back 100 years." In a lengthy but doomed filibuster, the group used several rhetorical barbs which particularly stung the administration: Alabama needed a "real stand, not a grandstand"; instead of "stand up for Alabama," the governor's slogan should have been, "stand up and run"; and finally, Wallace had "laid the gauntlet before the feet of tyranny" in his inaugural address, but King had "picked up that gauntlet and beat our people over the head with it."⁴⁵

Others state politicians made their disapproval know, some more vocally than others. Senators Hill and Sparkman, along with north Alabama representative Bob Jones, refrained from signing the resolution put forth by the rest of the state U.S. congressional delegation. Richmond Flowers continued to oppose the governor, lamenting that the state was "dominated by race hatred and defiance." Flowers said, "I have been at tremendous odds with Governor Wallace, and I have always taken a strong

⁴⁴ *Southern School News*, April, May, June, 1965.

⁴⁵ *Southern School News*, April, May, June, 1965.

stand for law and order.” The state’s attorney general was thankful that others were finally “becoming more aware that defiance is futile.” Lest anyone misunderstand him, Flowers clarified that just because he had chosen “to speak factually and with reason and moderation” and to “strongly disagree with the methods used by the governor of Alabama in his resistance to school integration,” did not mean that he was not a “strong segregationist.” The “defiant attitude” of Alabama’s leadership was simply “painting [the state] in a corner.” Flowers argued that as unfortunate as it was, it was time to accept that “segregation as we know it is gone.”⁴⁶

Few local school officials were prepared to accept that segregation was truly doomed. But neither were they all willing to follow Wallace this time. By June, 53 of the state’s 118 local systems had submitted voluntary desegregation plans, all of them freedom-of-choice plans. Some of the plans called for the application of freedom of choice to all grades in the fall. This was particularly true of north Alabama districts with small percentages of black students. These systems were rewarded with a telegram from the governor advising them that it was his administration’s “considered judgment that any plans for so-called non-discrimination [*sic*] in all grades is beyond even the minimum requirements set by the U.S. Commissioner of Education.” Wallace wrote, “We think it would be advisable for your school board to reconsider your action in the submission of your compliance plan.” Fifty-five other districts had at least submitted Form 441, and the seven under injunction had submitted their court orders. In all 111 of the state’s 118 boards of education had made some sort of compliance effort by the beginning of summer. At first review, HEW accepted only 13 of the 53 full desegregation plans. By mid-summer, after negotiations, that number had increased to 28, and by the end of the year it would increase significantly. The department continued to ignore the empty assurance of compliance forms. School systems were slowly accepting that they had to submit plans to be in full compliance. HEW’s director of compliance noted that the Alabama State Board of Education still refused to sign its

⁴⁶ *Southern School News*, April, May, June, 1965.

compliance instrument. He described the state as thus “playing Russian roulette” with 30 million dollars in federal aid.⁴⁷

The widespread signing of compliance forms and formulation of desegregation plans frightened parents across the state into forming new private school organizations. Such organizations already existed in Birmingham, Montgomery, Tuskegee, Anniston, and the Birmingham suburban community of Indian Springs. But newly formed organizations soon cropped up in Selma, Demopolis, Greensboro, Lowndesboro, and Marion – all in the Black Belt. Each effort was encouraged by the local Citizens’ Council. The Councils’ Mississippi-based news organ had recently issued a manual on “How to Start a Private School,” and Councils in Alabama were poised to put that information into practice. Innovation and adaptation to local circumstances were key. Typical of these initial efforts were the establishment of the school in Lowndesboro – where an eight-room recreation center was quickly converted into a schoolhouse – and the establishment of the school in Selma, which was set up in the former mansion of Confederate General John T. Morgan.⁴⁸

The Alabama state legislature responded to these private school efforts by passing another tuition grant-in-aid bill in August. It provided \$185 per-pupil grants to any family which opted to send its child to a private school when attendance at public schools had become “detrimental” to the physical or emotional health of the student. A companion bill set aside nearly \$2 million each of the following two years to fund the grants. There was little doubt that the measure was a Council-inspired maneuver.

Wallace was an active fundraiser for the organization. Callers to a Citizens’ Council hotline in Mobile

⁴⁷ The Office of Education eventually accepted Meadow’s signature on behalf of the state department of education, after State Attorney General Flowers indicated that the state superintendent was, indeed, authorized to speak for the board. *Southern School News*, June, 1965; *Alabama Council Bulletin*, Alabama Council on Human Relations, May 18, 1965; *Washington Post*, June 30, 1965; *Birmingham News*, June 26, 27, 1965; Trial Brief of the United States, Jan. 5, 1967, *Lee v. Macon County Board of Education*, Frank Johnson Papers: Lee v. Macon Case File, Container 19, Folder 5, pp. 16-17.

⁴⁸ *The First Year of School Desegregation Under Title VI in Alabama: A Review with Observations and Conclusions*, ACHR; *School Desegregation in the Southern and Border States*, Sept., 1965, Southern Education Reporting Service; *The Citizen*, June, 1965, Citizens’ Council of America; *Montgomery Advertiser*, June 11, 1965; *Birmingham News*, June 11, 1965.

heard the governor argue that “organized, intelligent resistance” was the only way to meet the challenge posed by “outside agitators with Communist backing” and “Federal bureaucrats and Federal judges . . .trampling on our rights as free men and women.” The Citizens’ Council, Wallace said, had “an action program” which was “our best example of intelligent resistance.” The bill was sponsored by long-time Selma Councilor Walter Givhan and supported by the governor’s State Sovereignty Commission, the agency established by Wallace to undergird segregation. The Sovereignty Commission’s Eli Howell told legislators that the bill was “perhaps the most important piece of legislation you have ever considered,” and that it would give parents “freedom of choice between public and private schools.” Neither Howell, Givhan, nor the bill itself made any mention of race, but the purpose was clear. It passed with near unanimity. Outside the legislature, many wondered if this was not just more powder for the cartridge that would ultimately propel a statewide desegregation order in *Lee v. Macon*.⁴⁹

Meanwhile, the litigious assault persisted, as the LDF continued to bring suits against Alabama school districts. Jack Greenberg, his colleague Norman Amaker, and Birmingham’s Oscar Adams filed complaints against the Bessemer Board of Education, the Jefferson County Board of Education, and the Fairfield Board of Education in May and June. The CRD intervened the United States in all three cases. Bessemer – Birmingham’s large, industrial, southwestern neighbor – was a logical choice. City officials there had challenged the HEW compliance effort. Jefferson was a logical choice for another reason. The county included Birmingham, Bessemer, and the city of Fairfield, sandwiched between the two. Working class blacks and whites had long since populated the city’s western suburbs like Fairfield and

⁴⁹ *The First Year of School Desegregation Under Title VI in Alabama: A Review with Observations and Conclusions*, ACHR; *School Desegregation in the Southern and Border States*, Sept., 1965, Southern Education Reporting Service; *The Citizen*, June, 1965, Citizens’ Council of America; *Montgomery Advertiser*, June 11, 1965; *Birmingham News*, June 11, 1965.

Bessemer. Suburban migration was not limited to the western part of the county, however, and it was rapidly increasing with the looming threat of integrated schooling.⁵⁰

Small Jefferson County cities, some newly incorporated and some simply newly invigorated, sat along the northern and eastern edge of Birmingham as well. But it was the southern edge which was becoming more popular with whites looking to escape. As early as the 1920s, a few whites had begun to migrate across Red Mountain, on the Birmingham's southern border, to a few exclusively white and wealthy suburban neighborhoods. White migration "over the mountain" had increased during World War II, when the affluent city of Mountain Brook was first incorporated. After the war, black encroachment into white neighborhoods had helped increase the flow of whites into Mountain Brook and the fledging cities of Homewood and Vestavia Hills. By 1965, with Birmingham under a desegregation order, the trickle of whites from the city to the southern suburbs started to become a deluge. For this reason, along with the fact that Blevia Stout and his daughter were willing to act as plaintiffs, Jefferson County was an attractive place for the LDF to support a suit.⁵¹

It was another LDF suit, though, that made headlines in June, as it directly concerned the HEW Guidelines. The Jackson, Mississippi case, *Singleton v. Jackson*, came before the Fifth Circuit Court of Appeals when Jack Greenberg and Derrick Bell, along with their associated Jackson counsel, Jack Young, filed a motion to compel the Jackson school board to accelerate their desegregation plan. Judge John Minor Wisdom wrote for the three-judge panel and declared that "the time has come for footdragging school boards to move with celerity towards desegregation." Wisdom explicitly noted the issuance of the Guidelines and held that the court attached "great weight to the standards established by the Office

⁵⁰ *Birmingham News*, May 25, June 5, 1865; *Southern School News*, June, 1965; see Brown and U.S. v. Board of Education of the City of Bessemer, Stout and U.S. v. Jefferson County Board of Education, Boykins and U.S. v. Fairfield in "Status Report of School Cases," March 9, 1967, in DOJ Civil Rights Division Records, Entry 306 F, Records of John Doar, Assistant Attorney General, Civil Rights Division, 1960–1967 (Boxes 1–2) [hereinafter cited as Records of John Doar].

⁵¹ *Birmingham News*, May 25, June 5, 1865; *Southern School News*, June, 1965; Blake Ball, "White Flight Pioneers: Race, Class, and Image in Mountain Brook, 1940-55," Paper Delivered at the University of Alabama Graduate Student History Conference on Power and Struggle, Tuscaloosa, Alabama, March 2, 2012.

of Education.” Wisdom argued that “in carrying out a national policy, the three departments of government are united by a common objective.” Therefore, there ought to be “a close correlation between the judiciary's standards in enforcing the national policy requiring desegregation of public schools and the executive department's standards in administering this policy.” The USOE was “better qualified than the courts,” and was “the more appropriate federal body,” to “weigh administrative difficulties inherent in school desegregation plans.” But courts would continue to have to sometimes do it themselves, and in these cases, the standards needed to be uniform, Wisdom reasoned. At the very least, the courts’ standards need not be lower than those of HEW. Otherwise school boards could invite litigation, use the courts as “a means of circumventing the H.E.W. requirements,” and in effect receive a “premium for recalcitrance.” It was a powerful endorsement and adoption of the HEW Guidelines. It would have significant reverberations in Alabama very soon, when the Jefferson County case came before the appellate court the following year.⁵²

Schools Open, Fall, 1965

As the opening of schools in the fall of 1965 approached, systems across the state were preparing to desegregate for the first time. Many of these, particularly in north Alabama, had gone just beyond the bare minimum required by HEW and had opened up freedom-of-choice within their systems for all 12 grades. Like the courts, HEW required that only four grades be opened that fall to desegregation, and most systems chose to go with the minimum. Neither avenue brought systems to more than token desegregation. Fifty-three of Alabama’s 118 school systems had submitted voluntary freedom-of-choice desegregation plans. Forty-two of these called for 12-grade desegregation that fall. In seven of those, freedom-of-choice resulted in no transfers at all. In others, the numbers were minimal: 3 black students in Morgan County, 9 black students in Butler County, 3 black students in Clay

⁵² Singleton v. Jackson, 348 F.2d 729, 731; Wilkinson, *From Brown to Bakke*, pp. 111-12.

County, 2 black students in Cleburne County, 2 black students in Coffee County, 4 in Covington, 2 in Geneva, 3 in Lamar, 1 in Monroe, etc. The numbers were higher in some systems opting for only four-grade desegregation: 34 in Walker County, 31 in Selma, 58 in Anniston City/Calhoun County, 42 in Cullman County. Other four-grade plans, however, resulted in minimal desegregation: 2 black students in Opelika and zero in Dallas County. Court-ordered desegregation plans produced similar results: 53 black students in Birmingham, 14 in Bessemer, 8 in Jefferson County, 39 in Mobile, 31 in Huntsville, 22 in Madison County, 32 in Montgomery. No white students anywhere applied for transfer to black schools.⁵³

In total Alabama had around 1,000 black pupils in formerly all-white schools that fall, in close to half of the state's 118 school districts. HEW ultimately approved 84 systems' plans, rejecting only 16 and calling those systems to participate in "extensive negotiations" to attempt to proceed to approval. This could only be seen as progress, considering the numbers the previous fall: 101 black students in white schools in only nine districts. But, as the Alabama Council on Human Relations concluded, this was still only a "token of tokenism." Over 99 percent of the state's approximately 300,000 black students still went to school in substandard and underfunded "Negro" schools. All of the state's formerly all-white schools were still racially identifiable as white, whether token desegregated or not. No teacher desegregation whatsoever had occurred. And, most damningly, the burden for desegregation still rested on the black pupils and their families, instead of on the state and local school officials, where both the courts and HEW had insisted it belonged. Considering that the HEW-promulgated goal for total disestablishment of dual school systems was two school years away, this was not significant progress.⁵⁴

⁵³ *The First Year of School Desegregation Under Title VI in Alabama: A Review with Observations and Conclusions*, ACHR; *School Desegregation in the Southern and Border States*, Sept., 1965, SERS; Bagley, *A Meaningful Reality*, p. 26.

⁵⁴ *The First Year of School Desegregation Under Title VI in Alabama: A Review with Observations and Conclusions*, ACHR; *School Desegregation in the Southern and Border States*, Sept., 1965, SERS.

Despite the seemingly negligible results, Governor Wallace and his allies in the state government reinvigorated their defiance campaign, rebilling it as one of absolute minimal compliance. The state board of education passed a resolution charging HEW and its subordinate the USOE with issuing “conflicting pronouncements.” It again urged local boards of education to take no action until the Bessemer suit challenging the Guidelines had been decided. It also instructed superintendent Meadows to ask the systems to ignore any compliance plans “not required by the law or court order.” The state board members specifically lamented that some local school systems had jeopardized the “good will and support of the people of Alabama” by “taking action in excess of the requirements of laws and court orders.” State officials went so far as to harass local superintendents whose school systems had submitted 12-grade desegregation plans. For example, Wallace joined Lieutenant Governor James Allen and state Speaker of the House Albert Brewer in sending a telegram to the superintendent of Lauderdale County Schools, lamenting the county officials’ adoption of a 12-grade plan, which HEW had publically deemed a model plan. The Lauderdale superintendent had attempted to justify the school system’s choice in a statement to the governor. The telegram he received in reply read:

Your statement to the governor’s office . . . that you are satisfied with the public school situation in Lauderdale County, where more Negro pupils are enrolled in previously all-white schools [73] than there are in either of the large cities of Birmingham and Montgomery, and your further statement that you plan to eliminate eventually all Negro schools in the county and transfer the pupils to white schools, could do more to destroy the public education system in Alabama than any action since the infamous 1954 decision of the United States Supreme Court. Those who have worked diligently to raise support of public education to a high level in our state resent and reject this attitude. We call upon you to align your policies with the minimum requirements of the law and of court orders.⁵⁵

⁵⁵ Telegram from Governor George Wallace, Lieutenant Governor James B. Allen, Speaker of the House of Representative Albert Brewer to R.A. Thornton, Superintendent of Education of Lauderdale County, Sept. 3, 1965, NAACP Papers: Legal Department Case Files, Alabama, Lee v. Macon County Bd. Of Educ., General Case Material, Folder: Undated (3 of 5) (see microfilm at *Papers of the NAACP: Supplement to Part 23*, Legal Department Case Files, 1965-1972, Series A: The South, Section I: Alabama, Reel 8, Frame 0247); *The First Year of School Desegregation Under Title VI in Alabama: A Review with Observations and Conclusions*, ACHR; Trial Brief of the

To increase pressure on the Lauderdale officials, the telegram was sent to the local county newspaper in Florence and to the Associated Press in Montgomery. A “follow-up” telegram sent later the same day to not only Lauderdale, but to all systems which opted for 12-grade desegregation plans, made specific reference to the state board’s resolution and its expression of “grave concern about the future of public education in Alabama in view of the fact that some school boards have gone beyond the maximum requirements of court precedents in existing compliance plans.” The adoption of such plans, the telegram read, was “not in the interest of public education in the State of Alabama.” The three state officials “respectfully request[ed]” that the school boards remember the design of the Pupil Placement Act and “take whatever action necessary to see that the administration and execution of these plans do not go beyond the requirements of federal court orders of five grades.”⁵⁶

Wallace continued to apply pressure by summoning all of the state’s superintendents of education to a meeting in Montgomery on September 7 to discuss “matters of vital concern to the people of Alabama involving the future welfare of the public school system.” In the meeting, which was closed to the press, Wallace reiterated his desire that all local systems would refrain from “going any farther than the law required” and repeated his plea for them to await the outcome of the Bessemer suit before engaging in any more compliance efforts. “Our purpose here,” he said, “is to minimize the effect of integration.” The Lieutenant Governor was just as plain, saying, “We’re in favor of maintaining the dual system in Alabama by whatever means that is [*sic*] peaceable, legal, and honorable.” Some local superintendents expressed dismay that the meeting had been held so late in the year. It was

United States, Jan. 5, 1967, Lee v. Macon County Board of Education, Frank Johnson Papers: Lee v. Macon Case File, Container 19, Folder 5, pp. 17-18.

⁵⁶ *The First Year of School Desegregation Under Title VI in Alabama: A Review with Observations and Conclusions*, ACHR; Telegram (2) from Governor George Wallace, Lieutenant Governor James B. Allen, Speaker of the House of Representative Albert Brewer to R.A. Thornton, Superintendent of Education of Lauderdale County, Sept. 3, 1965, NAACP Papers: Legal Department Case Files, Alabama, Lee v. Macon County Bd. Of Educ., General Case Materiel, Folder: Undated (3 of 5) [see microfilm at *Papers of the NAACP: Supplement to Part 23*, Legal Department Case Files, 1965-1972, Series A: The South, Section I: Alabama, Reel 8, Frame 0247]; Trial Brief of the United States, Jan. 5, 1967, Lee v. Macon County Board of Education, Frank Johnson Papers: Lee v. Macon Case File, Container 19, Folder 5, pp. 17-18.

difficult to undo what had already been done that fall. Wallace seemed to blame Meadows for this, saying the meeting “should have been called by the Department of Education months ago.” For his part, the state superintendent reminded everyone that he and the state school board were under injunction in *Lee v. Macon*. Indeed, the governor and the state board seemed to be acting with reckless disregard for the terms of the court’s 1964 ruling.⁵⁷

Later that fall, as Wallace attempted to persuade the legislature to amend the state’s succession laws to allow him to run for a consecutive term as governor, the voices of opposition continued to clamor. One state senator accused the governor of trying to “pick up support” by attempting to “pit the white race against the minorities of this country – the same way Adolph Hitler pitted the Jews against the master race.” Tuscaloosa *News* editor Buford Boone similarly charged the governor with being the “chief architect” of an “atmosphere of violence.” Wallace had, he wrote, “encouraged the violent and the lawless” through his defiance of federal authorities and “his frequent reference to resistance and his general antagonism to necessary change.” It was becoming increasingly clear that the nascent challenges to Wallace’s wide popularity represented a surging uneasiness among the state’s law and order and compliance moderates, vis-à-vis Wallace’s law and order and defiance cadre. Boone concluded that Alabamians had not “had the [necessary] leadership to tell us that the honorable correct way is unpleasant and undesirable, but it is a way that we must walk.” Instead they had been “torn asunder by the same man who has condemned the concentration of power in Washington.” The president of Troy State College, Wallace-appointee Ralph Adams, responded in Wallace’s defense, arguing that the governor had “in all his statements asked the people to stay away from points of tension and to let the lawful authorities handle whatever situation may develop.” He juxtaposed the riots surrounding the enrollment of Autherine Lucy in 1956 with the governor’s “stand in the schoolhouse door” in 1963. It was Boone’s city of Tuscaloosa that was “in danger of being torn asunder”

⁵⁷ *The First Year of School Desegregation Under Title VI in Alabama: A Review with Observations and Conclusions*, ACHR; *School Desegregation in the Southern and Border States*, Sept., 1965, SERS.

in 1956. That contrasted, Adams said, “with the situation which existed in 1963 when Wallace attempted to raise constitutional issues regarding the ability of a state to govern its own school system.”⁵⁸

Both men abhorred violence, though Adams failed to connect the governor’s defiance with the tragedy in Birmingham. For Adams, the absence of violence and the “raising of constitutional questions” was enough to constitute adherence to “law and order.” For Boone, it meant accepting that which was “unpleasant and undesirable” as an inevitable consequence of settled law, instead of using that unpleasantness and undesirability for political purposes. Boone’s approach was gaining followers entering 1966, but the Wallace-Adams approach remained strong, not least because the governor was pushing it with all the political power he could muster. One thing remained clear about both sides: they would have to be dragged kicking and screaming towards the elimination of dual school systems.⁵⁹

Meanwhile, local officials’ resistance continued to match that of state officials. Sixteen of the state’s non-complying school systems were called before HEW in Washington for “extensive negotiations,” that fall. Only 13 appeared to plead their cases. Among them was the relatively newly independent Mountain Brook city system, which had no black pupils. There were also seven Black Belt county systems, which stood to lose the most in federal funding, most of it from increases associated with Title I of the ESEA. Barbour, Clarke, Greene, Hale, Lowndes, Perry, and Wilcox Counties were among the poorest in the entire state and were willingly facing the loss of between \$400,000 and \$600,000 each by refusing to comply with the HEW Guidelines. They at least made an effort to convince federal officials to cut them a break. Among the most recalcitrant systems were those that did not bother to show up to the Washington talks. This included the industrial, working-class Birmingham suburb of Tarrant, which decided to voluntarily forego federal funds rather than comply; the Bibb

⁵⁸ *School Desegregation in the Southern and Border States*, Oct., 1965, SERS.

⁵⁹ *Ibid.*

County system, which decided to join Bessemer in mounting a legal challenge to the Guidelines; and the Barbour County system, which chose not to embarrass the county's native son, George Wallace.⁶⁰

Resistance elsewhere included tried and true economic reprisal tactics. Seven teachers were dismissed in Wilcox County. Some of them had 20 years' tenure in the system. The city of Camden in Wilcox, like several Black Belt communities, had experienced voting rights and school desegregation demonstrations that summer and fall. When teachers were suspected of involvement in these civil rights demonstrations, dismissal was a preferred tactic, as the laws passed in late 1950s had long since suggested. School officials accused teachers of encouraging student truancy by supporting activism. In Wilcox, this was exacerbated by the fact that Rev. Frank L. Smith, a black community leader and teacher, had not only participated in voting rights demonstrations, but had had the audacity to request the transfer of his children to white schools. Wilcox had no desegregated schools that fall. The Wilcox school board denied firing Smith and the others on account of their activism, citing generally diminishing student numbers. The president of the state's black teachers' association, Joe Reid, argued in rebuttal that the Wilcox system was, in fact, growing, overcrowded, and in need of more, not fewer, teachers.⁶¹

The school authorities' resistance in Wilcox brought no respite from the pressures of desegregation. It brought, instead, a suit filed by the Justice Department. Blacks had sent complaints to the Civil Rights Division, allowing the CRD to bring the suit. CRD attorneys needed no complaints to know that Wilcox was one of the blackest, poorest, and most segregated counties in the entire country. Its school system included 1,005 white students in three white schools and 4,789 pupils in 15 black schools. Resistance was often stiffest in a Black Belt county like Wilcox, because whites faced being "overrun" by blacks in such an overwhelmingly black county. If voting rights were to be granted to the county's blacks, this meant black elected officials in, potentially, all elected posts. And if schools were desegregated, it meant the threat of white students ultimately attending majority black schools. Most

⁶⁰ *School Desegregation in the Southern and Border States*, Oct., Nov., Dec., 1965, SERS.

⁶¹ *School Desegregation in the Southern and Border States*, Oct., Nov., Dec., 1965, SERS.

whites found either scenario unthinkable and intolerable. The CRD understood this. And it understood, just as the LDF and its associated counsel did, that the Black Belt counties lie mostly within the Middle District. Accordingly, the Wilcox suit was only the first of several the Justice Department would file against Black Belt school systems in Frank Johnson's court.⁶²

The court in *Lee v. Macon* had been compelled to enjoin Alabama state officials from interference in school desegregation, but it had stopped short of ordering them to bring about school desegregation through the application of their considerable statewide control. Despite this "exercise of considerable judicial restraint," the litigious assault mounted by the LDF, the CRD, and local attorneys and plaintiffs against segregated education in Alabama continued in its slow march against dual school systems, one by one. Meanwhile, the Civil Rights Act resulted in not only increased pressure from the Justice Department, but in new pressures from HEW, which used the threat of losing newly increased federal funding to persuade local school officials to comply.

Law, order, and compliance gained adherents as local officials began to favor "unpalatable" acquiescence to the minimal standards of the courts or of HEW versus the loss of tens of thousands in federal funds. But Wallace-style defiance remained a palpable force, even among some school officials. It continued to rule the day at the state level. As an HEW official had remarked months before, the state was "playing Russian roulette" by defying federal authority. Such action might force the court to fire the "single-shot" which state officials had feared even before *Lee v. Macon* was filed. The use of such violent metaphors was hardly surprising considering the history of resistance to school desegregation to

⁶² *School Desegregation in the Southern and Border States*, Nov., 1965, SERS.

that point in Alabama. Entering 1966, it underscored a deep uneasiness across the state, as the forces of desegregation, law, order, compliance, and defiance worked with and against one another in a struggle over the fate of Alabama's children.

CHAPTER 10: “BETWEEN THE DEVIL AND THE DEEP”: DEFYING THE REVISED HEW GUIDELINES, 1965-66

In the fall of 1965, a group of 500 white residents of the city of Anniston, Alabama joined in signing a pledge, which they publicized in the local newspaper, the Anniston *Star*. They were people “known in every corner of [the] city” from “every walk of life and station,” and they represented “persons of completely opposite attitudes and convictions on racial matters – from the most militantly opposed on down the scale.” They were united in a belief that Anniston was “a law abiding community,” that “laws must be obeyed,” and that violence had “no place” in their city. They reasoned that the Civil Rights Act had brought about “changes” which were “largely economic in nature” and which threatened the “peace and progress of [the] community. . . . Regardless of our personal feelings over the merit or lack of merit of this legislation,” they urged, “we feel that the Anniston Community must react to this new situation confronting us in a responsible, realistic, and thoughtful manner,” in other words, “within the framework of law and order.” Above all, “order and respect for the law” had to be maintained. These white community leaders, along with the local board of education and superintendent, fostered an atmosphere of reluctant but committed compliance with Department of Health, Education, and Welfare (HEW) desegregation Guidelines that school year. The result was HEW-approved token desegregation, and a great deal of uncertainty entering the 1966-67 school year. This was typical of the compliance efforts in a number of Alabama cities and counties.¹

Earlier that summer, whites in Lowndes County got wind of a number of local blacks’ intentions to request transfer to all-white Hayneville High. One afternoon, two white men named Buddy Woodruff and Brady Ryan drove to the home of Jordan Gully, a local black farmer. When Gully answered the door,

¹ “School Desegregation in Anniston Alabama,” Robert Amidon and Jacques E. Wilmore, October, 1965, U.S. Commission on Civil Rights, in *The Civil Rights Movement and The Federal Government: Records of the U.S. Commission on Civil Rights, School Desegregation in the South, 1965-66* (microfilm collection) (Bethesda, MD: LexisNexis, 2009) [hereinafter cited as “USCCR Alabama State Advisory Committee Files”], Anniston, Alabama Report, Reel 1, Frame 208 [hereinafter cited as “School Desegregation in Anniston, Alabama,” USCCR].

Woodruff barked, “what kind of shit are you trying to run over me?” Startled, Gully said, “I don’t know what you’re talking about.” Woodruff asked, “Ain’t you got a girl named Pearlie Pate?” Realizing where this was going, Gully replied that he did indeed, but he wondered why Woodruff wanted to know.

“When was the last time she’s been here,” Woodruff asked. She’d moved to Geneva recently, Gully told them. Woodruff persisted, didn’t Gully have another daughter named Wilma Jean Pate? He did.

“Where is she,” Woodruff demanded. She was in the house. “You’re the head of this house, ain’t you,” Woodruff replied. “Yes,” Gully said. Didn’t he know that Wilma Jean had applied for transfer to attend Hayneville? “I did,” Gully said simply, trying to walk the tightrope between the maintenance of dignity and the outright provocation of violence. Woodruff growled, “Don’t come to me for any help no more.”

Ryan added, “don’t come to me for no help either.” Such threats were common in areas like the Black Belt, where poor black farmers – nearly all of them landless – lived like sharecroppers. They were often obliged to ask a small oligarchy of white landlords or local white bankers for credit or short-term loans. When blacks attempted to secure their constitutional rights, paternalistic whites reacted with an angry incredulity unmatched since slaves began freeing themselves in the latter years of the Civil War. The withdrawal of past forms of petty assistance was an easy way to channel that anger and, at the same time, provide some motive for a change in black behavior.²

Woodruff said Gully had been “paying attention to them folks running up and down the roads,” referring to civil rights volunteers. “We didn’t bother about y’all registering [to vote],” Woodruff grumbled, “We didn’t bother y’all about going to mass meetings.” While this may have been true of Woodruff and Ryan, it was patently false in relation to many other whites in the county. There were no registered black voters in Lowndes, and reprisals for attending mass meetings were common.

Nonetheless, Woodruff concluded in a tirade, “I’ll be goddamn if this shit is going over this time. . . . This

² Affidavit of Mr. Jordan Gully, Hayneville, Alabama, taken by Student Nonviolent Coordinating Committee (SNCC), and filed with the Alabama State Advisory Committee, U.S. Commission on Civil Rights (USCCR), in USCCR Alabama State Advisory Committee Files: Alabama, Complaints, 1965 (1), Reel 2, Frame 113 [hereinafter cited as Gully Affidavit, USCCR Alabama State Advisory Committee Files].

shit ain't going to pass this time. We going to stop it. Don't you ask me for no goddamn help for nothing." Such were the responses to attempts at token desegregation in the Alabama Black Belt.³

When local school officials across the state in 1965 and 1966 tried to comply in good faith with HEW desegregation Guidelines, they found themselves caught between the requirements of the law and the demands of the white community. The vast majority of whites still hoped to avoid anything more than token desegregation, and many were certain that they could avoid even that. Federal court orders and HEW enforcement efforts convinced many school boards, as in Anniston, that they had no choice but to accept token desegregation. But Governor George Wallace and his allies in the state legislature and state department of education continued to encourage defiance. Wallace and others initiated an intense campaign against the HEW Guidelines as well as a renewed effort to provide tuition grants to white students attending segregationist academies. They pressured, harassed, and intimidated local school officials into defying the federal authorities, while at the same time encouraging whites in their respective communities, like Buddy Woodruff, to believe that the disestablishment of their dual school systems was neither inevitable, necessary, nor even legal. As the pincers tightened around local school boards, the reckless political maneuvering of state officials brought the prospect of a statewide desegregation order closer and closer to becoming a reality.

Desegregation Snapshot, 1965-66

At the time, Anniston was a city of roughly 34,000 situated 60 miles east of Birmingham, along the east-west corridor to Atlanta. It was just outside the city's limits that Klansmen had stopped a Freedom Riders' bus, beaten the riders, and burned the bus just 4 years prior. Many of Anniston's approximately 12,000 black residents worked in the city's several textile mills and cast iron pipe foundries. The city was also home to federal military installations: the Army's Fort McClellan and

³ Gully Affidavit, USCCR Alabama State Advisory Committee Files.

Anniston Army Depot, which also employed a number of blacks. The school system educated 7,414 students, 3,213 of whom were black (43 percent). It included 7 black schools and 13 white schools, with one high school for each. A major highway and railroad tracks split the city and separated the white and black communities, east-west. In 1964 the activist Calhoun County Improvement Association, an SCLC-affiliate, petitioned the school board for the presentation of a desegregation plan and threatened to bring suit in federal court if none were presented. The superintendent and the school board quickly desegregated the system's summer school program and formulated a geographical zoning plan for the city's two high schools which would have effected limited desegregation by incorporating a few small pockets of blacks on the white side of town into the white high school zone and one small pocket of whites nearest the black side of town into the black high school zone. The plan was accompanied by a freedom-of-choice provision, however, which would have allowed all the whites to request transfer back to white high school. Elementary school students were to attend the nearest school to their home, which also would have sustained the status quo. HEW soon convinced the school system to adopt a freedom of choice plan along the lines of the "model" Lauderdale County plan: free choice for all in the system, grades 1-12, with adequate notice and explanation of the plan to the community and with provisions for future faculty desegregation. The plan was faithfully executed by the Anniston authorities, with the assistance of the Improvement Association and the compliant law-and-order moderates.⁴

Fifty-eight of sixty-nine black students who requested transfer attended white schools that fall. The numbers might have been higher, of course. Many of Anniston's black families were ill-informed, or simply uninformed, about the possibilities inherent in desegregation, despite the school system's public notice to parents. Some were undoubtedly apathetic about school desegregation. For those black students who did transfer, motivations were diverse. It was simply easier and cheaper for many of the

⁴ "School Desegregation in Anniston, Alabama," USCCR.

black families living on the white side of town to send their children to the white high school. Rather than pay bus fare to be ferried across town to all-black Cobb High, they could walk the few blocks to Anniston High. Others felt that with better resources came a better education and resolved to take advantage of the opportunity which desegregation provided. Some had been encouraged by the efforts of the city's mayoral biracial committee, which had secured Birmingham-style concessions from white downtown store owners in the wake of a black boycott. The relatively peaceful progression of local desegregation in general was also encouraging – the Freedom Riders' assault notwithstanding. The students who transferred reported mostly positive experiences. Some white students were outwardly friendly. Some displayed open hostility, usually in the form of calling them "nigger." This was especially true at what blacks called the "lower class whites" elementary school. As students in Huntsville, Birmingham, Tuskegee, and Mobile had already discovered, most white students were simply indifferent. And the hostility seemed to subside as the year went by. As one student remarked, "it's getting better all the time."⁵

This seemingly encouraging picture was clouded by continuing resistance within, and especially outside, the city of Anniston. One of the most visible and enduring symbol of resistance was one local white man, described by his neighbors as possibly insane, who picketed desegregated schools on a daily basis, usually alone. But more ominous signs of resistance were evident from the beginning. During the integrated Anniston summer school session, a black student attending the program was beaten by a local white adult. Both the Ku Klux Klan and the National States Rights Party were active in the city that summer and during the school year. In the weeks preceding the opening of schools, the KKK sponsored a major rally and march through town, and the NSRP brought in what the U.S. Civil Rights Commission described as "some of the most widely known racists in the country" for a rally of its own. The local NSRP leader was a member of a notorious local white family, whose rabble-rousing male members were

⁵ Ibid.

known simply as “the Adams boys.” Kenneth Adams was arrested for trying to acquire a large amount of explosives not long after the rally. Also in the wake of the rally, a local black man named Willie Brewster was shot to death by a white man. Brewster’s killer was supposedly enraged that Brewster had been hired over him. All of this contributed to a general atmosphere of fear. Many black parents did not want to send their children to be “guinea pigs” in such an environment. Some wondered if “somebody might bomb the house” on any given night. Others feared economic reprisal. “I don’t think my boss would like it,” one black parent told representatives of the Student Nonviolent Coordinating Committee (SNCC), “he doesn’t like colored people too much anyway.” As elsewhere in Alabama, the numbers told the story well enough by themselves: 98 percent of the school system’s black students still attended “Negro” schools, and five of its schools remained all-white.⁶

As complaints made to the Alabama State Advisory Committee to the U.S. Civil Rights Commission attest, resistance could be found all across the state at the local level: intimidation, economic reprisal, and violence, in addition to footdragging, disingenuousness, and minimal compliance on the part of local authorities. This was especially true, if unsurprisingly so, in the Black Belt in the fall of 1965. One incident in Greene County was especially illuminating. A number of black families had applied for their children to transfer to the county’s white schools that summer. Local officials and landowners used intimidation and deception to get many of them to recant their requests – just as whites in Lowndes County had done. When a few of the families refused to be intimidated, the Greene County school board simply rejected all but one of the applications. The one girl who was accepted, Mattye Lee Hutton, showed up at her bus stop on the first day of school to find that the bus was empty but for the white driver. Hutton’s mother subsequently drove her to the white high school in Eutaw, where the two were met by local sheriff’s deputies and state troopers. Mrs. Lee was told it was too late to enter the school and that her daughter should have taken the bus. When she replied that the bus

⁶ Ibid.

was empty, the sheriff said, “Hell no, what you think? No one was on the bus, and no one will be riding with her; no one will sit with her; no one will have a damned thing to do with her!” He threatened to have her car towed and advised her to come by his office before returning to the school the following morning, because “them damned son-of-a-bitches up on the hill is Ku-Kluxes,” and “if you go up there [alone], they will get you.” Hutton’s daughter did return the next day, but she later withdrew from the white school.⁷

There were numerous other reported instances of intimidation. In Pickens County, the sheriff visited black parents who applied for their children’s transfer to white schools and “advised them to change their choices.” One man who did change his choice continued to be intimidated and “liv[ed] in fear of his life.” In Marengo County, Klansmen burned a black church between the towns of Demopolis and Eutaw, likely in retaliation for black applications for transfer to white schools. Sympathetic local whites observed state troopers at a Demopolis restaurant, joking with a white waitress as they had coffee in lieu of responding to the fire. The waitress loudly opined that she “hoped the church was full when they started the fire,” while the troopers wished that the rain would abate and let the fire burn. The waitress told the troopers upon their departure not to “go putting out that fire,” or she would “tell Al Lingo on [them].” In another retaliatory incident, the desegregated white high school in Elba, in South Alabama’s Coffee County, was dynamited the following winter. In addition to these acts of intimidation, there was intransigence from local school officials. Like many others, the Hale County Board of Education not only failed to publicized its desegregation plan in the county newspaper, it failed to send any sort of notification to black parents or to reach out in any way to the black community. The Hale County superintendent also harassed black students who requested transfer, asking about mass

⁷ T.Y. Rogers, President (Alabama State Advisory Committee to the USCCR) to USCCR, Washington, D.C., Sept. 17, 1965; Alabama State Advisory Committee to the USCCR, Complaint Submitted to Mid-South Regional Office, Memphis, August 20, 1965; Affidavit of Elizabeth Hutton, Aug. 28, 1965, “School Integration Attempt (Unsuccessful),” Submitted to Mid-South Regional Office, Memphis, Sept. 11, 1965; all in USCCR Alabama State Advisory Committee Files: Special Subjects, Alabama, Complaints (1), 1965.

meetings and “so-called preachers” who counseled activism. He summarily denied all requests for transfer from those who told him that they had attended the meetings or participated in a local boycott of all-black schools.⁸

Then there was Lowndes. The Black Belt County was home to around 4,000 black students and only about 600 white students. A small group of white families owned the vast majority of the land in the largely rural county, and whites in general held an increasingly tenuous death grip on politics and the economy. Episodes like those at Jordan Gully’s house were commonplace, especially in the summer of 1965. Many of the nearly 50 black families who applied for their children to attend one of the three white schools in the county were similarly harassed. A white teacher came to the home of Robert Harris in Hayneville and told him that the whites at Hayneville High did not want black children at the school. He asked Harris with whom did he do business. When Harris advised that he did business with Bob Dixon, the man replied that Harris should have run this by “Mr. Bob,” who would undoubtedly have been displeased. “Mr. Bob” was not going to advance him another year if he did not remove his child’s name from the transfer application list. Another man, Eli Logan, was also visited by a teacher from Hayneville High. The man told Logan that if he did not take his child’s name off the list that “the Ku Klux Klan would be through here next Tuesday” and that he should not tell the SNCC operatives in the area that he had talked to him. Logan displayed a growing measure of black defiance when he told the teacher that he would not take his child’s name off and that he should tell the Klan “to come during the day and not by night . . . because it won’t be good for them if they come at night.” Willie Joe White, a tenant farmer who drove a cotton picker for a landed white man, was similarly harassed. His employer

⁸ T.Y. Rogers, President (Alabama State Advisory Committee to the USCCR) to USCCR, Washington, D.C., Sept. 17, 1965; Alabama State Advisory Committee, USCCR, Complaint Submitted to Mid-South Regional Office, Memphis, August 20, 1965; T.Y. Rogers to USCCR., Washington, D.C., August 20, 1965; Rev. Henry McCaskill, Hale County Improvement Association, to Alabama State Advisory Committee, USCCR, August 18, 1965; Affidavit of Elizabeth Hutton, Aug. 28, 1965, “School Integration Attempt (Unsuccessful),” Submitted to Mid-South Regional Office, Memphis, Sept. 11, 1965; Affidavit of Ginger Dunnican, Aug. 27, 1965; Affidavits of Annie Bryant and Dorothy Mae Bryant, Aug. 27, 1965; Affidavit of Dolores Ann Williams, Aug. 27, 1965; all in USCCR Alabama State Advisory Committee Files: Special Subjects, Alabama, Complaints (1), 1965; *School Desegregation in the Southern and Border States*, Feb., 1966.

advised him to “get that girl [his wife] to take the children’s names off of that thing,” meaning the transfer list for Hayneville High. He told White that he could “let that woman and them kids go if they didn’t go over there and take their names off.” Cato Lee received a somewhat gentler but no less direct threat from the man who had loaned him money on his house. The man told Lee that applying for transfer was not illegal, but that “there might be some trouble in September” if his children transferred. Lee might also “lose some friendship” in his hometown of Lowndesboro if he did not withdraw the children’s names. Another man was told that the Klan was going to “get the leaders of those mass meetings.”⁹

Resistance continued in Lowndes, despite the pressure. One of the leaders of “those mass meetings” in Lowndes was John Hulett. In the way that many had mimicked the Montgomery MIA by forming their own “improvement associations,” Hulett had founded the Lowndes County Christian Movement for Human Rights, evoking the more militant Shuttlesworth outfit of Birmingham fame. Hulett had been rebuffed, in fact, by the conservative SCLC and had sought out the assistance of the increasingly militant SNCC, especially in organizing voter registration. The voter registration drive, the passage of the Selma-to-Montgomery march through the county, and the efforts of these families to apply to white schools provoked a visceral reaction from whites in Lowndes in 1965 and 1966. It included the murder of white civil rights volunteers and the eviction of black tenant farmers like Willie Joe White. Only one of the 47 families who applied for transfer to white schools dropped their children’s names from the transfer list, however. With the assistance of SNCC’s Stokely Carmichael, Hulett formed the Lowndes County Freedom Party – whose black panther emblem later lent its name to the more visible Oakland-based defense group – and blacks in Lowndes continued to press for the fulfillment of the Civil Rights Act of 1964 and the Voting Rights Act of 1965. That fall the Lowndes

⁹ Mr. Robert Harris, Mr. Eli Logan, Mr. Willie Joe White, Mr. Cato Lee, and Illegible, Sworn Affidavits to SNCC, filed with Alabama State Advisory Committee to the USCCR, USCCR Alabama State Advisory Committee Files: Alabama, Complaints (1), 1965.

County Board of Education rejected all but five of the applicants for transfer, prompting the local black leadership to petition the Justice Department to file a desegregation suit against the school district. They advised DOJ, “We cannot afford to bring a law suit,” and that, “We believe that if we do institute litigation, it would jeopardize the personal safety, employment, and standing of ourselves and our families.” Many of them had, after all, already “been threatened or harassed after [submitting] applications to the Lowndes County Board of Education.”¹⁰

The Civil Rights Division answered the call from the Lowndes activist-parents and filed suit against the Lowndes County school board in January of 1966. Before the start of the 1966-67 school year, the CRD also filed suit against four other recalcitrant Black Belt systems: Wilcox County, Hale County, Perry County, and Choctaw County. Additionally, it filed *amicus* briefs in private suits brought against the Black Belt counties of Crenshaw and Greene. The new litigation brought the number of school systems in Alabama under federal court scrutiny to 17. Many of the complaints from Black Belt counties to DOJ came from teachers who had been dismissed in retaliation for their role in encouraging student transfers. The CRD noted as much in its complaints in these cases, along with descriptions of the inadequate and even hazardous conditions in the often dilapidated black schools. The CRD also noted that the vast majority of freedom-of-choice transfer requests had been rejected. In response to the CRD’s filing suit in Lowndes, the county schools superintendent argued that if the school board had accepted all of the applications for transfer, they “wouldn’t have had a Hayneville High School” to attend because all of the whites would have withdrawn to attend Lowndes Academy, the newly established segregationist academy in Lowndesboro. “These people,” she clarified, “are not fighting the admission of some Negroes to white schools, but they’re not going to let their children stay in school if

¹⁰ Bernice Johnson to Attorney General Nicholas Katzenbach, August 2, 1965, USCCR Alabama State Advisory Committee Files: Alabama, Complaints (1), 1965; see, in general, Hasan K. Jeffries, *Bloody Lowndes: Civil Rights and Black Power in Alabama's Black Belt* (New York: New York University Press, 2009), *passim*.

the schools are overrun with Negro students.” The same could have been said for whites in the other Black Belt Counties.¹¹

In February of 1966, Judge Frank Johnson entered an order in the Lowndes case directing the desegregation of 6 grades that fall on freedom-of-choice and full desegregation as such the following year. He ordered the county to provide remedial educational opportunities to the system’s 4,000 black students in order to “eliminate the past effects of racial discrimination,” and to close 24 substandard black schools. The unprecedented closure order followed upon undisputed evidence presented in the CRD’s complaint which depicted the vast majority of Lowndes’ black schools as pathetic reminders of separate and unequal. Twenty-three of the twenty-seven had fewer teachers than grades; the majority lacked plumbing; many were decades-old, un-insulated wooden structures; and a few even lacked a source of drinking water. The school board was forced to concede that black students had been provided with educational opportunities “unequal to or inferior to” those of whites. It probably welcomed the court order, which put it out of the line of fire of angry whites, who began to look more closely at Lowndes Academy as their ultimate escape hatch. The segregationist academy was not yet up and running, but local whites were making fevered efforts to open its doors. Judge Johnson followed the Lowndes order up with almost identical orders in the Montgomery case and Bullock County case. He entered another for the three judge panel in *Lee v. Macon*. Macon was ordered to desegregate all grades the coming fall, while Montgomery and Bullock were given until the fall of 1967-68. The court also ordered a total of 41 schools closed in the three systems by the start of the 1967-68 school year.

¹¹ “Status Report of School Cases,” March 9, 1967, in DOJ Civil Rights Division Records, Reel 8, Frame 0615, Entry 306 F, Records of John Doar; *School Desegregation in the Southern and Border States*, Jan., 1966, SERS; Hutton and U.S. v. Lee (Greene County), C.A. No. 65-580 (ND, filed Jan 31, 1966); United States v. Lowndes County Board of Education, C.A. No. 2328-N (MD, filed Jan. 11, 1966); Harris and U.S. v. Crenshaw County Board of Education, C.A. No. 2455-N (MD, filed Sept. 12, 1966); United States v. Wilcox County Board of Education, C.A. No. 3934-65 (SD, filed Nov. 2, 1965); United States v. Hale County Board of Education, C.A. No. 3980-66 (SD, filed Jan. 7, 1966); United States v. Perry County Board of Education, C.A. No. 4222-66, filed Aug. 16, 1966); United States v. Choctaw Board of Education, C.A. No. 4246-66, filed Aug. 31, 1966).

Each school board was also required to take steps towards faculty desegregation, the desegregation of extra-curricular activities, and the establishment of remedial education programs.¹²

The 1966 Guidelines and Form 441-B

As the litigious assault slowly spread across the state in 1966, HEW intensified its efforts to enforce compliance with the U.S. Office of Education (USOE) Guidelines for desegregation. On March 7, the USOE issued a revised set of Guidelines. The revised Guidelines placed more demands on already reluctant school boards, which were themselves besieged by enraged, anxious, and fearful white parents. Across the country, more than 1,700 of around 2,000 school districts had already agreed to desegregate all 12 grades by the fall of 1966. Only 79 districts had registered no compliance whatsoever. But the courts had steadily been moving more quickly, and court orders were becoming more stringent than the original HEW Guidelines. HEW determined that by early 1966, it had “become clear that school districts not operating under court orders could and should make more progress . . . towards desegregation than was [previously] required.” Accordingly, the department issued a “Revised Statement of Policies for School Desegregation Plans under Title VI of the Civil Rights Act of 1964.” The revised Guidelines called for a number of accelerated actions which threw local school officials into a frenzy, including the requirement that school systems make a real beginning on faculty desegregation. Originally, HEW had only asked that desegregated faculty meetings be held. The revised Guidelines, “following the decisions of the courts,” required the elimination of “the pattern of assignment of teachers and other professional staff among the various schools of a system . . . such that schools are identifiable as intended for students of a particular race, color, or national origin,” or such that teachers

¹² *School Desegregation in the Southern and Border States*, Feb., March, 1966; *United States v. Lowndes County Board of Education*, Order of Feb. 10, 1966, *Race Relations Law Reporter (RRLR)* 11.2, Summer, 1966, pp. 692-3; *Carr v. Montgomery County Board of Education*, 253 F.Supp. 306, see also at *RRLR* 11.2, pp. 682-7; *Harris v. Bullock County Board of Education*, 253 F.Supp. 726, see also at *RRLR* 11.2, pp. 687-90; *Lee v. Macon County Board of Education*, Order of March 11, 1966, 253 F.Supp. 727, see also at *RRLR* 11.2, pp. 690-92.

and staff of a particular race were “concentrated in those schools where all, or the majority of, the students are of that race.”¹³

Calls for faculty desegregation in the previous Guidelines had been widely ignored. School boards knew that resistance from white parents would be stiff. For many white parents, black teachers in positions of authority vis-à-vis their children was simply intolerable. Most considered black teachers unqualified and inadequate. All black teachers had, of course, been educated in the very segregated and inequitable school systems which were supposed to be under eradication. But many black teachers were wholly qualified and, in many cases, more adequate than some white teachers. Nonetheless, segregationists applied the assumption of inferiority in blanket fashion. Unfortunately for them, the Fifth Circuit had already spoken as to the validity of the faculty desegregation requirements of the original Guidelines.¹⁴

In a second review of the *Singleton v. Jackson*, Mississippi case in January, the appellate court held that, in Judge John Minor Wisdom’s words, “an adequate start toward elimination of race as a basis for the employment and allocation of teachers, administrators, and other personnel” was an “essential” component of any desegregation plan which hoped to pass muster before the court. In its previous ruling in *Singleton*, the court had already held that the HEW Guidelines as a whole provided adequate standards for the courts to follow in fashioning relief in school desegregation cases. In what became known as *Singleton II*, the court reaffirmed this holding but added an explicit acknowledgment that “attaching great weight to the standards” established in the Guidelines did not mean ‘abdicating the court’s judicial responsibility.’ The court maintained its prerogative to determine the constitutionality of desegregation plans before it. While this recognition of the Guidelines as simply “minimum standards”

¹³ “Revised Statement of Policies for School Desegregation Plans under Title VI of the Civil Rights Act of 1964,” O-206-939, U.S. Department of Health, Education, and Welfare (Washington, D.C.: U.S. Government Printing Office, 1966); Secretary John Gardner, HEW, to Members of Congress, April, 1966, in Civil Rights Division Records: Records of John Doar, Policy Correspondence, 1965-66, Reel 8, Frame 615; *School Desegregation in the Southern and Border States, March*, 1966.

¹⁴ *Singleton v. Jackson Municipal Separate School District*, 355 F.2d 865 (5th CCA, 1966).

would soon have implications of its own, the reaffirmation of the Guidelines' validity – particularly as to faculty desegregation – served to increase both fatalism among school officials and determined resistance among other segregationists. In fact, the Supreme Court and a number of lower courts had, by that time, held that meaningful desegregation must include some sort of provision for desegregating faculty. This was one way in which HEW was “following the courts.”¹⁵

In addition to calling for faculty desegregation to begin forthwith, the new Guidelines also called for the immediate desegregation of all transportation programs, athletics programs, and all other extra-curricular activities, as well as the closure of inadequate school facilities and the proactive courting of community support. For systems using geographic zone plans, the new Guidelines restricted transfers to majority-to-minority situations; this was an effort to eliminate the sort of transfers the Anniston authorities had in mind when zoning the small group of white students to the black high school. The most controversial aspect of the new Guidelines, though, involved the many freedom-of-choice plans. HEW acknowledged what everyone already understood: that “a free choice plan tends to place the burden of desegregation on Negro or other minority group students and their parents.” The Guidelines continued:

Even when school authorities undertake good faith efforts to assure its fair operation, the very nature of a free choice plan and the effect of longstanding community attitudes often tend to preclude or inhibit the exercise of a truly free choice by or for minority group students. For these reasons, the Commissioner will scrutinize with special care the operation of voluntary plans of desegregation in school systems which have adopted free choice plans.¹⁶

¹⁵ Singleton v. Jackson Municipal Separate School District, 355 F.2d 865 (5th CCA, 1966), 882. Other rulings emphasizing the necessity of faculty desegregation included Rogers v. Paul, 382 U.S. 198 (1965); Bradley v. School Board of the City of Richmond, 382, U.S. 183 (1965), and Thompson v. County School Board of Hanover County (ED, VA, January 27, 1966, C.A. No. 4274); Assistant Attorney General John Doar to U.S. Attorneys, April 21, 1966, in DOJ Civil Rights Division Records, Records of John Doar, Policy Correspondence, 1965-66.

¹⁶ “Revised Statement of Policies for School Desegregation Plans under Title VI of the Civil Rights Act of 1964,” O-206-939, U.S. Department of Health, Education, and Welfare.

In determining the fair and effective operation of free choice plans,' HEW claimed that it would take into account community support, the racial identifiability of schools, and faculty and staff desegregation. But the "single most substantial indication as to whether a free choice plan [was] actually working to eliminate the dual school structure" would be the "extent to which Negro or other minority group students [had] in fact transferred from segregated schools." As a "general matter," HEW was looking for "substantial increases" in black transfers that fall. If school systems had a token number of blacks in white schools, with no indication of a potentially substantial increase, then their plans would fall under strict scrutiny, and they would likely be required to "take additional actions as a prerequisite to continued use of a free choice plan." If they failed then to utilize some other effective measure to accelerate desegregation, then they would be subject to administrative proceedings and potential federal funds deferral.¹⁷

Most controversially of all, HEW provided numerical guidelines for adequate progress for the fall. "If a significant percentage of the students, such as 8 or 9 percent, transferred from segregated schools for the 1965-66 school year," the revised Guidelines read, "total transfers on the order of at least twice that percentage would normally be accepted." If the percentage for 1965-66 were closer to 4 or 5 percent, then a "substantial increase" would likely mean triple that percentage in 1966-67. And if the 65-66 percentage were lower than 4, the increase would need to be "proportionately greater." In cases like Greene County in Alabama, where no black students had transferred, "a very substantial start would normally be expected."¹⁸

¹⁷ "Revised Statement of Policies for School Desegregation Plans under Title VI of the Civil Rights Act of 1964," U.S. Department of Health, Education, and Welfare; Gardner to Members of Congress, April, 1966, Civil Rights Division Records: Records of John Doar; Doar to U.S. Attorneys, April 21, 1966, Civil Rights Division Records: Records of John Doar.

¹⁸ "Revised Statement of Policies for School Desegregation Plans under Title VI of the Civil Rights Act of 1964," U.S. Department of Health, Education, and Welfare; Gardner to Members of Congress, April, 1966, Civil Rights Division Records: Records of John Doar; Doar to U.S. Attorneys, April 21, 1966, Civil Rights Division Records: Records of John Doar.

The Civil Rights Division and the Legal Defense Fund understood that HEW was following the courts' lead in a sense. But they also surmised that the new standards provided an opportunity for plaintiffs to seek uniformity in desegregation cases – which resulted in sometimes disparate relief. The CRD immediately petitioned the Fifth Circuit Court of Appeals for the consolidation and expedition of all appeals in school desegregation cases in which the U.S. was an intervening party, including the Jefferson County, Bessemer, and Fairfield cases. The LDF quickly noted that Judges Johnson and Wisdom had already anticipated and “substantially embraced” the spirit of the new Guidelines: Johnson in the several Black Belt cases, Wisdom in the *Singleton II* ruling. So the LDF filed new motions for further relief at the trial level, as did the CRD, seeking new desegregation orders based on the Guidelines' standards. In Alabama, the CRD and LDF followed up local activists' complaints by filing motions for further relief in the Birmingham, Huntsville, Madison County, and Gadsden cases. As a new HEW compliance instrument – Form 441-B – went out to, not just these, but every school system in Alabama, segregationists quickly seized on what they understood to be numerical quotas for desegregation.¹⁹

“Beyond the Law”: Reaction to the New Guidelines

The new Guidelines caused a furor among segregationists. Secretary of HEW John Gardner and Commissioner of Education Harold Howe insisted that the revised Guidelines were not intended to prescribe “rigid means” for effecting desegregation compliance. They were intended to bring about a “reasonable beginning” and “reasonable progress” thereafter, all with “considerable flexibility.” Nonetheless, school authorities, politicians, and random segregationists everywhere began to clamor: Form 441-B was a “blank check” which would bind school boards to any future revisions that HEW might

¹⁹ Activists had been particularly critical in Huntsville, where a group led by Drs. John Cashin and Sonny Hereford had complained of the deteriorating all-black Council High School. Doar to U.S. Attorneys, April 21, 1966, Civil Rights Division Records: Records of John Doar; *School Desegregation in the Southern and Border States*, April, 1966; Memorandum from Huntsville Community Service Committee to Dr. Raymond Christian, Superintendent of Schools, Huntsville, and Members of the Board of Education, Aug. 3, 1965, in USCCR Alabama State Advisory Committee Files: Reel 2, Frame 180.

make to the Guidelines; the calls for faculty desegregation would mean wholesale reassignment on an unimaginable scale; freedom-of-choice was being slowly eliminated regardless of good faith efforts; the use of percentages was intended to engender “racial balance” within school systems and therefore went beyond the call of Title VI of the Civil Rights Act. Gardner himself wrote to members of Congress to assure them that such assumptions “misconceived the purpose” of the Guidelines. The percentages were flexible; faculty desegregation would not mean “the instantaneous desegregation of every faculty in every school building in every school district”; Form 441 was simply a “declaration of intent”; and school boards could take exception to any future changes as they wished.²⁰

Segregationists in Alabama were not assuaged. Governor Wallace called a meeting of all local superintendents at which he and state Superintendent Meadows condemned the Guidelines and called for a “friendly suit” to prevent faculty desegregation and for the adoption of a resolution seeking congressional intercession. Wallace announced, “We must obey the laws, just and unjust, but we should not have to obey edicts of bureaucratic officials which go beyond the law.” This was the mantra which segregationist officials across the state would adopt. The Civil Rights Act contained a clause which read, “Desegregation shall not mean the assignment of students to public schools in order to overcome racial imbalance.” It was a compromise measure which was intended to appease non-southern members of congress who feared the forced dismantling of so-called *de facto* segregation in the Northeast, Midwest, and parts of the West. According to the developing southern segregationist resistance, the numerical standards in the Guidelines were in violation of this principle. Similarly, school officials attacked the provisions for faculty desegregation. They argued that a clause in the Civil Rights Act prohibiting “action . . . with respect to any employment practice of any employer” precluded any requirement for large-scale faculty desegregation or the elimination of race as a consideration in hiring.

²⁰ Gardner to Members of Congress, April, 1966, Civil Rights Division Records: Records of John Doar; Commissioner Harold Howe, U.S. Office of Education, to School Superintendents and Chief State School Officers, April 9, 1966, in Civil Rights Division Records: Records of John Doar, Policy Correspondence, 1965-66.

The superintendents at the Wallace-Meadows meeting voted 76-4 to adopt an intercession resolution embodying these complaints, along with the general statement that the revised Guidelines were “too voluminous, too complicated, and too confusing to be put into effect . . . in any sensible, justifiable manner.” A spokesman for the group announced after the meeting that “if the local boards [would] go along with the superintendents,” then there would be no signing of Form 441-B. The local officials had “gone the last mile” and had “done everything that was requested,” and now, the spokesman said, “HEW comes along with another thing.” They had supposedly had enough.²¹

The U.S. Office of Education quickly announced the establishment of teams of investigators which would be deployed to determine compliance in the various states. The Alabama group consisted of five investigators and was headed by Alabamian Gene Crowder – the soon-to-be nemesis of many local school officials. While the creation of a permanent enforcement staff enraged state and local authorities, it disappointed many in the Alabama Advisory Committee to the U.S. Civil Rights Commission, which understood the futility of sending such a team to deal with nearly 100 reluctant and defiant school boards. Along with the Alabama Council on Human Relations, the Advisory Committee was one of only two state-level biracial bodies actively working towards school desegregation. Many of the committee members were familiar names in the statewide movement: John Cashin in Huntsville, Orzell Billingsley in Birmingham, John Leflore in Mobile. These were activists who had dealt with all manner of defiance, sabotage, reprisal, intimidation, and foot-dragging. They understood that even after the breakthroughs of the previous three years, there was a “an increasing polarization between the attitude of the moderate white who intends to comply with federal law, but such compliance moving only as rapidly as white society permits, and the attitude of the more militant in the civil rights movement,” seeking more than “simple compliance with law.” They thought that the federal government ought to be attempting to secure “far more than token compliance with existing laws,

²¹ *School Desegregation in the Southern and Border States*, March, 1966; *Birmingham News*, March 11, 12, 17, 1966.

especially Title VI” Accordingly, the committee moved to hold its own regional informational meetings to counterbalance the dissemination of misinformation from the governor’s office and the state board of education. It also issued a statement, saying “in view of the enormity of the problem of school desegregation, the general intransigence of school administrators at the state and local levels, and the history of inadequate enforcement of last year’s Guidelines, [we] consider [an HEW] enforcement staff of five persons, working out of Washington, to be totally inadequate” The committee expressed hope that the USOE would open an office in Alabama with more personnel. It also conveyed “hope and desire” that the Justice Department would continue bringing actions in federal courts as well.²²

The USOE enforcement team waded into this sea of apprehension and disappointment that summer when it held its own meeting with the state’s superintendents. Local school officials seized the opportunity to levy the same criticisms which they had incorporated into the intercession resolution. Crowder and his team responded by arguing that the Guidelines were, indeed, authorized by the Civil Rights Act. Faculty desegregation had nothing to do with employment, and everything to do with the disestablishment of dual systems based on race, namely the elimination of racially identifiable schools. And the use of percentage milestones in desegregation was limited to the proper working of freedom of choice plans, which they argued were probably going to be deemed ineffective when too few black students chose to transfer from segregated black schools. Meadows was in attendance and offered some familiar platitudes, such as, “It takes longer to work out things in a democracy than in a dictatorship.” Local school officials expressed incredulity. “What if I can’t find a Negro teacher qualified to teach in a white school,” one asked. HEW officials responded with exasperation of their own. “If she

²² U.S. Civil Rights Commission Memorandum, Minutes of Closed Meeting of Alabama State Advisory Committee, Birmingham, March 17, 1966, in USCCR Alabama State Advisory Committee Files: Special Subjects; Summary Report, Alabama State Advisory Committee to the U.S. Commission on Civil Rights, Report of Open Meeting at Montgomery, Feb. 26, 1965, in USCCR Alabama State Advisory Committee Files: Special Subjects; *Birmingham News*, March 22, April 14, 1966; *School Desegregation in the Southern and Border States*, March, April, 1966.

isn't qualified, what is she doing in your system," HEW consultant and Marquette professor Wallace McBain replied. "The separate but equal ruling was made in 1894," he said, "[but] you aren't even willing to go that far!" Meadows telegraphed Harold Howe after the meeting to protest the dispatch of a "staff permanently located in Alabama to snoop on the actions of legally constituted education officials in Alabama." He called on the commissioner to "trust local school officials rather than announcing distrust by sending a horde of snoopers into the schools of the state." Howe responded by saying he understood the state's officials' apprehension, but that there would be no change in the Guidelines simply because they had misinterpreted their legal basis and intention. Meadows argued in turn that the Guidelines were abhorred by "every board member and superintendent in Alabama" and would be "disastrous in this state if followed." And any action on Howe's part, Meadows asserted, would be "illegal," since Howe had "no right and no authority to require guidelines which destroy authority of local school boards in placing teachers." It seemed that communication and negotiation were going nowhere very quickly.²³

Wallace, meanwhile, renewed his verbal assault on the revised Guidelines, and he and Meadows set about pressuring local school boards to follow the lead of the superintendents in registering objection and defiance. The governor's attacks were fueled by his newly announced *de facto* gubernatorial campaign. By state law, Wallace could not succeed himself in the governor's chair, so he attempted to have the legislature and the electorate amend the state's constitution. Failing in that, he decided to run his wife as a stand-in candidate. If victorious, Lurleen Wallace would act as governor in name only, allowing George to continue running the state, or more accurately, to allow George to campaign for the presidency and leave the business of state administration to his subordinates. He called the revised Guidelines the "last straw." Alabamians, he claimed, had "gone just as far as [they were] going to go" and would not allow HEW to enforce "illegal" guidelines in its attempt to "take over

²³ *Birmingham News*, March 22, April 14, 1966; *School Desegregation in the Southern and Border States*, March, April, 1966.

and control every aspect of the school system of the state.” Wallace called the new rules “political sop” cooked up by the “liberal, socialistic, beatnik crowd . . . roaming the streets in this country” and “using school children as pawns.” Ignoring the arguments made by the HEW officials at the March meeting, Wallace said, “HEW guidelines now seek to integrate faculties and bring about racial balance even though the Civil Rights Act prohibits this. We’ve tried to obey the law,” he claimed, “and the Department of Health, Education, and Welfare is going to obey the law too.” He then all but dared HEW officials to defer federal funds, adding “they’re the law violators, not us.” Wallace predicted that “most of the local boards will put up a united front” in opposition. No such united front immediately developed, however. So the governor and Meadows began to try and create one.²⁴

Joining Wallace and Meadows was an unusually united cadre of state and federal-level Alabama officials. Lieutenant Governor James Allen, a longtime Wallace foe, called the Guidelines “arbitrary, illegal, burdensome, and . . . far beyond the law.” State House Speaker Albert Brewer argued publicly that HEW was “trying to destroy the public education system.” Republican U.S. Representative and gubernatorial aspirant Jim Martin accused the Office of Education of being “concerned only with social reforms” and Howe of “demanding swift obedience to his edicts.” Martin called upon the state’s two U.S. Senators to hold a meeting with the state’s entire congressional delegation, Wallace, and Meadows and find some way to “save the South from the utter confusion and chaos that will erupt should the guidelines be placed into effect as proposed.” The generally aloof Senators John Sparkman and Lister Hill did, indeed, join the fray. “In addition to being illegal,” Hill announced, “the guidelines are unreasonable and so impractical as to destroy the difficult and sincere efforts that have been made and are being made by local officials.” The new regulations threatened “to disrupt the orderly compliance with the law by these officials,” and Hill promised to “do all in [his] power to get them rescinded.” Sparkman echoed these comments and vowed to have the Guidelines “rescinded and withdrawn.” He

²⁴ *School Desegregation in the Southern and Border States*, April, 1966.

was “convinced that they [were] beyond the law” and “hopeful a law suit [could] be brought to test this thing out.” Both men cited the same two sections of the Civil Rights Act regarding “racial balance” and employment practices which had already been seized upon. The generally compliance-minded *Birmingham News* concluded that the revised Guidelines had elicited unusually condemnatory reactions across the state from “many people besides those from whom criticism of federal actions is almost a reflex action.” The “best asset” the USOE had up to that point had been “the cooperation, however reluctant, of local school boards and educators.” Now it was in danger of being “blown to bits by do-it-now-or-else mandates which do not take into account practical problems in hundreds of sensitive situations.”²⁵

When Wallace initially invited the state’s entire congressional delegation to Montgomery to discuss resistance, the congressmen seemed more swayed by Jim Martin’s suggestion that they all meet in Washington with HEW officials. Then Lurleen Wallace ran away with the Democratic nomination for governor in early May. Mrs. Wallace won 54 percent of the vote – the other 46 percent of which was divided among her nine competitors, including former Governor John Patterson. When George Wallace argued that he had no intention of ‘meeting with bureaucrats’ in Washington, the delegation agreed to come to Montgomery. It was a great political victory for the governor, and a great disappointment for Martin. The meeting produced a condemnatory resolution which called upon local school officials to defy the federal government. The group urged school boards to “continue to resist” because “no principle of law is more essential to the preservation of liberty than one which holds any regulation of any bureau, department, commission, or agency of government is null, void, and unenforceable if such regulation exceeds the statutory authority granted to that department.” The Guidelines were “without authority of law” and were “in violation of specific prohibitions” of the Civil Rights Act. The 12 found it “shocking that an agency of the federal government would undertake to disregard the law and flout the

²⁵ *School Desegregation in the Southern and Border States*, April, 1966; *Birmingham News*, April 11, 1966.

repeatedly reaffirmed public policy of this nation,” especially by employing “totalitarian methods in the form of threats to deny benefits of educational programs from innocent parties in order to accomplish an illegal purpose.” They urged local school authorities to “stand firmly upon their constitutional rights, power, and prerogatives and to firmly resist every effort to subjugate those rights, powers, and prerogatives to the dictations and threats of the federal bureaucracy.” Finally, they advised those school systems which had signed HEW compliance agreements to reconsider.²⁶

Some local school boards had made public efforts to comply, and many others had done so clandestinely, fearful of political reprisal. Meadows reported that, as of mid-May, 24 school systems had signed the new compliance forms, but the USOE was reporting that 54 systems had done so. Some had filed their Forms 441-B with the USOE but had withheld their carbon copies from the state department of education. Others had refused to sign 441-B but had given informal forms of assurance to HEW officials. For example, the Opelika City system declined to sign 441-B but submitted its own “Resolution of Compliance.” Similarly, others had agreed to comply with the new Guidelines but had included clauses stipulating that they would not bind themselves to any part of the Guidelines which might be held illegal in the future. Anniston Superintendent Revis Hall asked HEW to accept a certified copy of the school board’s meeting minutes in lieu of Form 441-B. Hall explained that there were “certain factors” that existed in the state which might “infringe our ability to carry forward an orderly program if adverse publicity to our school system develops during political campaigns.” More specifically, Hall wrote, “adverse publicity would prevent” the development of a proposed education park, because state officials had the authority “to not only determine who the architect will be, but also the extent to which local capital outlay millage . . . can be extended for certain purposes.” Filing the minutes in lieu of Form 441-B, Hall argued, would allow his school board to “meet [any] state or local

²⁶ *School Desegregation in the Southern and Border States*, May, 1966. Wallace proposed a line condemning such systems which had complied, but some in the delegation refused to sign if such a line were included.

criticism which may arise,” but it would not “interfere with the Board’s decision to meet its responsibility under the law.” A few systems were openly challenging the Guidelines or were simply eschewing federal funds, including Bessemer, Bibb County, Tarrant, and all-white Mountain Brook. Most continued to follow their plans formulated under the original Guidelines and said that they were playing wait-and-see. The constant discussion of the Guidelines’ “illegality” had convinced many that there was a good chance they could be rescinded. As one superintendent said, “[We] are struggling to determine exactly what is the law under the Civil Rights Act of 1964.”²⁷

Amid the uncertainty, more state officials set about trying to influence the public towards defiance. The state board of education issued its own resolution, in which it “highly commend[ed] the . . . Alabama Congressional delegation, the Governor, the Lieutenant Governor, the Speaker of the House, and the State Superintendent of Education” for their condemnation of the “so-called guidelines in violation of the Civil Rights Act.” The state board “recommend[ed] that local school superintendents and boards of education withdraw any 441-B signed agreements for the new guidelines because the guidelines erroneously attempt to desegregate teachers and set up quota or percentage ratios of pupils in schools, both of which are in violation of the Civil Rights Act.” The board was careful to include an acknowledgment of the “autonomy of local superintendents and boards of education,” but it immediately reiterated its “request” that they “withdraw signed guideline agreements which are illegal and which attempt to usurp the powers and duties of local” officials. Meadows himself sent a personal letter to all of the state’s local school boards, in which he called the landslide nomination of Lurleen Wallace represented “an absolute mandate . . . against the encroachment of the U.S. Office of Education on local superintendents of education.” He requested that no school officials sign 441-B and asked those who had done so to withdraw the agreements. He further asked that all boards report to his

²⁷ *School Desegregation in the Southern and Border States*, May, 1966. Trial Brief of the United States, Jan. 5, 1967, Lee v. Macon County Board of Education, Frank Johnson Papers: Lee v. Macon Case File, Container 19, Folder 5, pp. 23-4.

office any action taken on the matter. Despite the USOE's claim that it was prepared to withhold \$40 million in federal aid to Alabama, Meadows assured them that he was "completely certain that the U.S. Commissioner of Education will not take any action to withhold funds for failure to carry out" the controversial and supposedly illegal sections of the Guidelines. Finally, the Alabama state legislature resolved that, "in view of the illegal nature of the regulations and in view of the arbitrary methods employed to require agreements with local boards of education," it was of "the unanimous opinion that every reasonable official should continue to resist all illegal requirements imposed by the 1966 Guidelines." The legislators "urge[d] the responsible [local] officials to take appropriate action to effect this resistance." The actions of Wallace, the state board, Meadows, and the state legislature convinced not only some school boards, but many other white citizens, that the Guidelines were in fact "illegal." The Russell County school board, for example, heard from a citizens' group which told it that "frankly, the people of Russell County and all over Alabama are confused about these guidelines." They urged the board "not to sign them until they have been tested in court."²⁸

Not only did the state officials' resolutions and numerous public statements encourage community pressure on local authorities, at the same time, Meadows and Wallace undertook a behind-the-scenes campaign to harass and intimidate school boards into withholding or rescinding Form 441-B agreements. Investigative records of the HEW-USOE reveal that, in telegrams and phone calls to local officials, Meadows deliberately misrepresented the number of school systems which had withheld or rescinded their compliance forms, and that he and the governor applied political pressure on a number of school systems during the summer of 1966. In one case, the state superintendent announced publically that the Marion County superintendent had rescinded his board's pledge. The Marion

²⁸ Resolution of May 19, 1966, Meeting Agenda and Minutes of the State Board of Education, Department of Education Files, SG20904-5, ADAH; Resolution of the Alabama State Legislature, July 26, 1966, in Special Session, *Journal of the House of Representatives of the State of Alabama* (Montgomery: Brown Printing Co., 1966); John R. Durr, "Title VI, the Guidelines and Desegregation in the South," *Virginia Law Review* 53, no. 1 (Jan., 1967); *School Desegregation in the Southern and Border States*, May, 1966.

superintendent had, in fact, done no such thing and actually told USOE officials that he would appreciate their telling Meadows that they were dealing directly with him. Anniston Superintendent Revis Hall was surprised to hear from the USOE that nearly 2/3 of the state's systems had signed Form 441-B and that HEW was, indeed, preparing to initiate non-compliance proceedings against the remaining systems. Hall said he had been under "considerable pressure from the State Department of Education" and had been told by Meadows that only Anniston and one other system had failed to rescind their compliance forms. The assistant superintendent of the Calhoun County system complained to USOE officials about "the political pressure they were getting from Gov. Wallace and the lower, uneducated elements in their area." He assured the officials that he and the school board were attempting to comply by following "a middle path." The superintendent of the Escambia County system, Harry Weaver, told the USOE that he understood his district was risking funds deferral, but that they "just couldn't reassign teachers." With the "pressure from the people and the government," there was "absolutely no chance." The superintendent of the Limestone County system admitted that his board had been withholding Form 441-B in hopes that the passage of time would ease the political pressure it was under. The Talladega County superintendent said that his board feared signing 441-B since a copy was supposed to go to the State Office of Education. The St. Clair County superintendent told HEW investigators flatly that his board "won't sign until Governor Wallace says so." Several other systems had signed 441-B but had included amendments regarding percentages or faculty desegregation; they were surprised to be informed that their funds would be deferred anyway.²⁹

²⁹ HEW Memorandum, Richard Fairley to David Seeley, May 13, 1966; HEW Memorandum, Richard Fairley to Harold Williams, May 24, 1966; USOE Telephone and Conference Record, Alan Ellis to Calhoun County Board of Education, July 1, 1966; USOE Telephone and Conference Record, Richard Sable to Harry Weaver, July 1, 1966; USOE Telephone and Conference Record, Lawrence Crowder to Nelson Swinea, July 8, 1966; all the above in NAACP Papers: Legal Department Case Files, Lee v. Macon County Board of Education, Background Information (*Papers of the NAACP*: Supplement to Part 23, Legal Department Case Files, 1960-1972, Series A: The South, Section I: Alabama, Reels 3-9) [hereinafter cited as NAACP Lee v. Macon Files]; Trial Brief of the United States, Jan. 5, 1967, Lee v. Macon County Board of Education, Frank Johnson Papers: Lee v. Macon Case File, Container 19, Folder 5, pp. 26.

In an attempt to mollify local authorities' concerns, HEW officials eventually recommended that systems which refused to sign instead include an amendment which read, "This assurance does not commit this school system to comply with any requirement of [HEW] which is contrary to the Civil Rights Act of 1964." After more letters from Meadows and Wallace, another mandatory meeting in Montgomery, and numerous requests for desegregation figures and Form 441 statuses, many superintendents simply told USOE investigators that their school systems would not sign anything because the governor and state superintendent had said the Guidelines "went beyond the law" and were, therefore, "illegal." A number of systems which had signed unqualified assurance forms rescinded them on account of the pressure. A few resolved to continue complying in good faith despite "[incurring] the displeasure of professional and political leaders in the state." The majority ultimately signed amended forms with some sort of caveat. When HEW agents reported up the chain of command to Commissioner Howe about the state's intimidation tactics, Howe issued a public memorandum to Meadows in which he sought to "make it absolutely clear . . . that school districts which are not in compliance will have federal funds for new projects deferred" and that "districts which do not make progress in faculty and student desegregation in accordance with the guidelines will necessarily be held by the commissioner to be out of compliance."³⁰

In a clear expression of disregard, Wallace subsequently threatened to hold mass meetings in communities whose school boards had signed compliance forms, so that the local officials would have to explain their actions to angry local whites. As the superintendent of the Florence system explained to HEW officials, "about that time the top blew off again in Alabama over the fact that we had signed 441-B. Some local boards, including ours," he wrote, "were threatened with called mass meetings to oppose

³⁰ USOE Telephone and Conference Records, Alan Ellis to Supt. Garner, Brewton, July 7, 1966; Martin Cooper to David Brown, Colbert County, July 19, 1966; John Deason to Richard Fairley, Aug. 26, 1966; Harold Howe to Austin Meadows, June 3, 1966; all the above in NAACP Lee v. Macon Files: Background Information (*Papers of the NAACP*, Supplement to Part 23, Series A, Section I, Reel 3); Trial Brief of the United States, Jan. 5, 1967, Lee v. Macon County Board of Education, Frank Johnson Papers: Lee v. Macon Case File, Container 19, Folder 5, pp. 27-30, 32.

the singing of 441-B.” The Florence school board remained “unmovable,” but he added, “It seemed best not to go beyond our present position for fear that a certain party might cause an explosion in our otherwise peaceful and harmonious community.” Another superintendent said that he would like to ask Wallace, “what good will such mass meetings do except perhaps arouse somebody to do something foolish?” But he added, “I don’t want any fight with the governor; that’s a fight you can’t possibly win.”³¹

As before, state-level intimidation emboldened the more committed segregationists at the local level to undertake their own campaigns of harassment. Typical of such local intimidation were the efforts of the superintendent of the Marengo County school system, Fred D. Ramsey, to avoid faculty desegregation. Ramsey required all teachers in the Marengo system to respond to a questionnaire which asked, “Do you believe that Marengo County Schools will improve its quality through integration?” “To what extent should schools be integrated, fully or token?” “Would you be willing to teach children of the opposite race from you?” “Would you be willing to take the National Teachers Examination” or “other examinations” as “a basis for your candidacy in teaching school?” And, “Would you willingly resign, if it became necessary, to carry out full integrated [sic] faculties?” Teachers were fired and intimidated in Crenshaw, Wilcox, Greene, and Hale Counties, as well, for encouraging student activism and communicating with civil rights volunteers. The superintendent in Hale County continued openly discouraging students who considered applying for transfer, blaming “so-called preachers” who supposedly filled students’ heads with misinformation at mass meetings. The school board in Wilcox County refused bus transportation for black students attending white schools, while half-empty busses

³¹ USOE Telephone and Conference Records, Alan Ellis to Supt. Garner, Brewton, July 7, 1966; Martin Cooper to David Brown, Colbert County, July 19, 1966; John Deason to Richard Fairley, Aug. 26, 1966; Harold Howe to Austin Meadows, June 3, 1966; all the above in NAACP Lee v. Macon Files: Background Information (*Papers of the NAACP*, Supplement to Part 23, Series A, Section I, Reel 3); Trial Brief of the United States, Jan. 5, 1967, Lee v. Macon County Board of Education, Frank Johnson Papers: Lee v. Macon Case File, Container 19, Folder 5, pp. 27-30, 32; Jeffrey Frederick, *Command and Control: George Wallace, Governor of Alabama, 1963-72* (Ph.D. diss., Auburn University, 2003), p. 310.

carrying white students passed by the houses of those black students. When a father of one of the Wilcox children began providing transportation for his son and some others, he was fired by the school board and had his mailbox destroyed by a shotgun blast and his car pelted with rocks. Students in Dallas County were reportedly charged tuition to attend white schools, and the parents of transferring students in Marengo County were threatened with eviction from public housing. One family which sent their black child to a white school in Wetumpka had its house bombed with Molotov cocktails and burned to the ground. Another Wetumpka family with children in white schools was refused a burial plot in the local cemetery for their son, a soldier who died fighting in Vietnam.³²

The frustration of local activists was effectively conveyed in a letter from the Crenshaw County Improvement Association to John Doar at the Justice Department. "We colored people have . . . been harassed, arrested, [*sic*] jailed, beaten, segregated, discriminated against, [and] fined," it read. The association asked DOJ to bring an "immediate action against the educational system and law enforcement" in Crenshaw, as these two departments seemed to be "the very strong hold of corruption. . . . We listen to Governor Wallace say the federal government is bluffing and can't do anything with Alabama, because he is boss here, and what he say goes," they wrote. "It seem[s] to be working so well, we hardly know what to believe since nothing has been done in this place we live now and the rest of our lives."³³

³² Complaint Submitted to Mid-South Regional Office, Memphis, USCCR, March 30, 1966, Superintendent's "Questionnaire to All Teachers of Marengo County Schools," March 8, 1966, attached; Walter Lewis to Rev. Henry McCaskill and Mrs. Sarah Daniel, Oct. 1, 1965; Frank Smith to Jacques Wilmore, Dec. 3, 1966; Walter Lewis to Samson Crum, Nov. 14, 1966; Donald Jelinek to Charles Grant, cc Jacques Wilmore, Sept. 28, 1966; Complaint submitted to Secretary of Agriculture Orville Freeman regarding Mr. and Mrs. Roosevelt Bracey, May 2, 1966; all the above in USCCR, Alabama Advisory Committee Files: Special Subjects, Alabama, Complaints, 1965-1966; NAACP Legal Defense Fund Fundraising Literature "Wetumpka Has Everything," in *Facts on Film, 1966-1967 Supplement*, Miscellaneous Materials.

³³ Collins Harris to John Doar, May 30, 1966, USCCR, Alabama Advisory Committee Files: Special Subjects, Alabama, Complaints, 1965-1966.

“The Citizens of Alabama are No Longer Willing to Abide”: Anti-Guidelines Legislation

The summer of defiance and intimidation culminated in the passage of legislation which became known as the Alabama “Anti-guidelines Bill.” The legislature invoked its “authority and . . . duty to require or impose conditions or procedures deemed necessary to maintain a system of public schools throughout the State . . . and to preserve peace and order in [those] public schools” Wallace’s point men in the legislature introduced the bill in late August. It passed with overwhelming majorities in both houses on September 2, and Wallace immediately signed it into law. It was, supposedly, an act to “preserve the integrity of the local school systems against unlawful encroachment in the administration and control of local schools.” In reality, it was exactly what it purported to avoid: an encroachment upon those same local school systems, in this case by the state itself. The legislators surmised that “public confidence in local school systems [was] being destroyed by the recent attempt by [HEW] to control the internal operation of local schools in Alabama, by issuing certain so-called ‘guidelines.’” These guidelines would “either effectively destroy the public schools or destroy the quality of education offered in public schools” Furthermore, it was “immoral and repugnant” for HEW to use education funds and “threats, intimidation, and coercion” as means to these ends. And of course, none of HEW’s actions were “required or authorized by law.” The lawmen encapsulated the self-victimization of white Alabama and at the same time captured the nascent rationale for law-and-order style evasion of school desegregation: “The time has come when the citizens of Alabama are no longer willing to abide by such infringements of constitutionally guaranteed personal rights and freedoms.”³⁴

The legislators understood that the time had passed for violent resistance, and that the time for economic reprisal and harassment would, perhaps, pass sometime in the near future. The time for legislative resistance was reaching its climax. And when it passed, what would be left but the legal

³⁴ House Bill 446, Approved Sept. 2, 1966; see copy at NAACP Lee v. Macon Files: Background Information (*Papers of the NAACP*: Supplement to Part 23, Series A, Section I, Reel 3), and at Frank Johnson Papers: Lee v. Macon Case File, Container 28, Folder 8; see also *Birmingham News*, Aug. 18, 19, 21; *Montgomery Advertiser*, Sept. 3, 1966.

struggle to protect “constitutionally guaranteed personal rights and freedoms.” They took it upon themselves to preserve these by declaring the Guidelines “unreasonable, arbitrary, capricious, and unconstitutional,” and by declaring any signed Forms 441 or 441-B “null, void, and [of] no binding effect.”³⁵ In case this was unclear, the act established that:

No local county or city board of education shall have the authority to give any assurance of compliance with the guidelines or to enter into any other agreement with any agency of the government of the United States which would obligate [them] to adopt any plan for desegregation which requires the assignment of students to public schools in order to overcome racial imbalance or which would authorize any agent of the United States to take any action with respect to any employment practice of such board or to take any other action not required by law.³⁶

In addition to the nullification provision, the Anti-guidelines Bill established a 160-member “Governor’s Commission.” The commission was to act on behalf of local school boards vis-à-vis the federal government and to request the opinion of the justices of the Alabama Supreme Court as to the legality of signed Guidelines agreements. Of the 160 members of the commission, 141 “happened to be” in the legislature, and there was a 14-member executive committee chaired by Wallace and Lieutenant Governor Jim Allen. The commission would have the authority to invoke the state’s police power anytime “peace and order” in school systems were threatened. This was widely interpreted to mean that the commission could call in the state troopers to obstruct desegregation, as Wallace had done via executive order in 1963. The act also promised state funds to local school systems which had federal funds deferred as a result of their refusal to comply with the Guidelines. That fall HEW was already moving to cut-off funds to 23 systems in Alabama. Wallace announced that the federal government could take its money, and he said, “they know what they can do with it.” The state would

³⁵ House Bill 446, Approved Sept. 2, 1966; see copy at NAACP Lee v. Macon Files: Background Information (*Papers of the NAACP*: Supplement to Part 23, Series A, Section I, Reel 3), and at Frank Johnson Papers: Lee v. Macon Case File, Container 28, Folder 8; see also *Birmingham News*, Aug. 18, 19, 21; *Montgomery Advertiser*, Sept. 3, 1966.

³⁶ House Bill 446, Sept. 2, 1966.

not subject itself, he argued, to compliance with “outlaw guidelines” which were really just “a blueprint devised by socialists.”³⁷

In a press conference the day of the act’s passage, Wallace called it “freedom legislation.” It would “free the school boards to carry on as they ordinarily would do” and would simply “bring into the open what HEW has attempted to do in the dark.” He had introduced the bill as an instrument to “protect the autonomy of our local school boards” and to “relieve [them] of the threats, the intimidations, and the blackmail of quasi-secret agents of [HEW] who are attempting to buy or threaten away the rights of our people.” Then, after the bill’s passage, he subtly warned the same local school boards against traitorous behavior, saying “We in Alabama do not intend to sit idly by and let the children of the state be sold for 30 pieces of silver.” There would be no penalty for signing Guidelines agreements, but the governor said that he assumed local officials would “obey the [new state] law.” Within a week, he had ordered school boards to renege on signed agreements and to reassign teachers and students transferred as a result of Guidelines-based desegregation plans. “Any assignment of teachers or students based on the guidelines is a violation of public safety,” Wallace declared, and such assignments should be reversed “forthwith in those cases where other than ordinary assignments have been made.”³⁸

Wallace specifically mentioned Tuscaloosa, where 2,000 white parents had signed a petition seeking the removal of two black teachers assigned to white schools. The pressure exerted on the Tuscaloosa officials demonstrated just how far state officials would go to prevent faculty desegregation. Klansmen had picketed the affected Tuscaloosa schools, and a group of whites had staged a march and accused the school board of “selling out” to federal officials. The marchers carried signs reading “Down with [local superintendent] Elliot” and “March with Wallace.” They told reporters that the school board

³⁷ House Bill 446; *School Desegregation in the Southern and Border States*, SERS, Sept., 1966; *Birmingham News*, Aug. 19, Sept. 15, 1966.

³⁸ *School Desegregation in the Southern and Border States*, SERS, Sept., 1966; *Birmingham News*, Aug. 19, Sept. 11, 15, 1966; *Montgomery Advertiser*, Sept. 18, 1966.

had not “shown the Governor of Alabama and Legislature the courtesy of a common hobo by waiting for a court decision.” Wallace and Meadows seized upon the local pressure and applied their own. Meadows called the school board three times “recommending” that it reassign the teachers back to black schools, because the assignment of black teachers to white schools was “against the law” and contrary to the “public policy” of the State of Alabama. He had recently sent a release to all of the state’s superintendents arguing that it was “obvious that for even a few school boards to agree to assign teachers and/or pupils not required by Sections 604 and 401(b) [of the Civil Rights Act] jeopardizes all other school systems because federal officials can say, ‘well, if a few do it, the others can do the same thing.’” Wallace’s legal advisor, Hugh Maddox, also called the Tuscaloosa officials and urged them to reassign the teachers, promising that the federal government could not really cut off federal funds to the system. Meadows subsequently offered to award local systems, including Tuscaloosa, additional teacher units so that they could provide alternative teachers for white students who were assigned black teachers. Of course, in his remarks at the press conference, Wallace did not mention the harassment of the Tuscaloosa officials by Meadows and Maddox, only that local whites demanded the teachers’ removal.³⁹

In the same press conference announcing the Anti-guidelines Act, Wallace also lambasted continuing court-ordered desegregation. He mentioned his own son, who was attending a desegregated school in Montgomery. “You might point out,” he told the press corps, “that the federal judge who ordered all this put his child in a private school.” By “the” federal judge, he meant Frank Johnson, and by “all this,” he meant the recent orders handed down in the Montgomery, Lowndes, and Macon County cases, which called for faculty desegregation and black school closure in addition to freedom-of-choice pupil desegregation. In a recent televised address, he had accused Johnson of acting with “swift

³⁹ *School Desegregation in the Southern and Border States*, SERS, Sept., 1966; *Birmingham News*, Aug. 19, Sept. 11, 15, 1966; *Montgomery Advertiser*, Sept. 18, 1966; Trial Brief of the United States, Jan. 5, 1967, Lee v. Macon County Board of Education, Frank Johnson Papers: Lee v. Macon Case File, Container 19, Folder 5, p. 44-5, 47.

vengeance” to destroy the Lowndes system, specifically. The governor had also asked for donations to the Lowndes County Private School Foundation. The foundation was still trying to have Lowndes Academy open for the fall, when blacks would be attending Hayneville High for the first time. Many understood Wallace’s actions to be recklessly inviting a statewide desegregation order via the *Lee v. Macon* case. Lurleen Wallace’s gubernatorial opponent Jim Martin often used this as a talking point in his campaign. When a reporter broached the subject, Wallace said “nothing could be worse that what they are doing now; HEW has desegregated all the schools as it is.” In reality HEW had done very little. And reckless defiance of its policy was making it increasingly likely that an unprecedented court order would supersede its efforts. Frank Johnson wrote to John Doar at the Justice Department in August and advised him to have DOJ people on the ground for the opening of schools in Lowndes, Montgomery, and Tuskegee. He told Doar he would not be surprised “if there were no white students attending ‘desegregated schools’ in Lowndes County that fall. In short,” he wrote, “I expect these three systems to be used as political footballs in the governor’s race that is now taking place in this state.” Wallace was calculating that the political yardage to be gained by continuing to encourage, facilitate, and now order defiance was greater than that to be lost by risking a statewide order.⁴⁰

In addition to passing the Anti-guidelines Bill that summer, the state legislature, Wallace, and Meadows had all been pushing for the application of the state’s latest tuition grant bill. The bill had been introduced the previous summer by longtime Citizens’ Councilor and state Senator Walter Givhan. It had become law in September of 1965, at which time the legislature had also approved nearly \$4 million in appropriations for the grants. The new law was intended to replace the 1957 tuition grant law, the application of which had been enjoined by the court in the 1964 ruling in *Lee v. Macon*. In this case, the racial purpose of the law had been removed from its face. Also, any connection to the closure of local public schools was removed in light of the recent ruling in the Prince Edward County, Virginia

⁴⁰ *School Desegregation in the Southern and Border States*, SERS, Sept., 1966; Frank Johnson to John Doar, Aug. 11, 1966, Frank Johnson Papers: U.S. v. Lowndes County Board of Education Case File, Container 41, Folder 5.

case. By virtue of the new legislation, students were eligible for tuition grants anywhere “the parent or guardian determines that the child’s attendance in the school to which he is assigned will be detrimental to the physical or emotional health of the child or subject the child to hazards of public safety.” Grants of \$185 per student were, in effect, made available to any white students who wished to avoid desegregating schools, particularly in majority or substantially black systems where private schools were already established or being hastily set up. Tuition at most of the schools was around \$20-\$30. In March of 1966, when the revised Guidelines were released, the state board of education adopted regulations for administering the tuition grants to any student who was refused a placement transfer by a local school board. The legislature later adjusted the law so that students could seek transfer to any school in the state, even out of district, and apply for grants upon the rejection of their request.⁴¹

In July Wallace opened a special session of the legislature and, in a televised address, beseeched whites to further support the private school movement. “I ask you tonight, there at home,” he said, “if you will, get out a pencil and paper and write down this address as it flashes on your television screen.” To this address, they could send donations to “help people in our state who are being forced to conduct private schools because of the destruction of their public schools. . . . These people – these parents – are fighting for their freedom too, a freedom that affects all of us, and I hope that you will join me in helping those whose schools have been taken away from them. . . . We stood at the University of Alabama,” he reminded them, “opposing the enemies of freedom” And they were using that stand to “warn the people of this nation that if men in high places in Washington break the law of our nation,

⁴¹ Senate Bills 394 and 395, or Act 687 and Act 688 of the Alabama Legislature, Regular Session, 1965, Approved Sept. 1, 1966; see in United States Brief in Support of the Motion for Preliminary Injunction, Oct. 19, 1966, Lee v. Macon County Board of Education, in Frank Johnson Papers: Lee v. Macon Case File, Container 21, Folder 6; Stipulation of Facts and Supplemental Stipulation of Facts, Sept. 30, 1966, Lee v. Macon County Board of Education, Frank Johnson Papers: Lee v. Macon Case File, Container 28, Folder 8; *School Desegregation in the Southern and Border States*, SERS, March, April, 1966; *Birmingham News*, July 27, Aug. 3, 10, 11, 18, 1966.

then every revolutionary, every thug who can assemble a mob, will feel that they, too, can break the law.”⁴²

Superintendent Meadows briefly expressed doubt as to the legality of approving grants for students to attend racially exclusive schools, but he nonetheless began approving them that summer. At the time, there were at least 11 post-*Brown* segregationist academies in the state, in addition to several older private schools which were also racially exclusive. Montgomery Academy had been established in 1959, when the Montgomery Improvement Association had threatened a suit to desegregate the city’s schools. It enrolled over 400 students in 1966. Three smaller elementary-level segregationist academies had since been opened in the city, enrolling nearly 400 more students among them. St. James School in Montgomery, established immediately after *Brown* in 1955, also enrolled several hundred students. Macon Academy in Tuskegee had been thriving since its opening in 1963, and it enrolled nearly 400 that fall. Hoover Academy in Birmingham remained small but continued to provide an escape for white students assigned to Graymont Elementary, which had been desegregated by the Armstrong boys three years prior. And whites in Tuscaloosa had established a small school when desegregation had been announced there the previous year.⁴³

When several Black Belt county school systems were forced to desegregate in the fall of 1965, whites in the affected counties had also set up private schools: including in Dallas (John T. Morgan Academy), Hale (Southern Academy of Greensboro), Perry (Perry Christian School), Greene (Warrior Academy), and Marengo (Marengo Academy). And in Lowndes, when efforts to intimidate blacks seeking transfer to white schools failed, arch-segregationist and local engineer Ray Bass and a small

⁴² Stipulation of Facts and Supplemental Stipulation of Facts, Sept. 30, 1966, Lee v. Macon County Board of Education, Frank Johnson Papers: Lee v. Macon Case File, Container 28, Folder 8; *School Desegregation in the Southern and Border States*, SERS, March, April, 1966; *Birmingham News*, July 27, Aug. 3, 10, 11, 18, 1966.

⁴³ Stipulation of Facts, Sept. 30, 1966, Lee v. Macon County Board of Education, Frank Johnson Papers: Lee v. Macon Case File, Container 28, Folder 8; United States Brief in Support of the Motion for Preliminary Injunction, Oct. 19, 1966, Frank Johnson Papers: Lee v. Macon Case File, Container 21, Folder 6; *School Desegregation in the Southern and Border States*, SERS, May, 1966; *Birmingham News*, May 18, 28, Aug. 14, 1966.

group of white parents finally opened Lowndes Academy in an old recreation center in Hayneville. The Tuskegee-style exodus Judge Johnson had predicted began shortly thereafter. Three of the five members of the county school board were on the private school foundation board of trustees. All but a dozen whites boycotted Hayneville High and enrolled in the new academy. The tremendously popular football team – which had not lost a game in three years – even followed the Tuskegee example and left with its coach for the new private school (the coach also donated a 10-acre site for the building of a new school facility). Like a few other academy foundations, the Lowndes leadership remained wary of accepting tuition grants, worried that it would nullify their “private” status. But by the opening of schools in 1966, grants had been approved and paid to students at all but the Greene, Hale, Lowndes, and Macon segregationist academies. Most segregationist academy founders were committed to avoiding desegregation, regardless of the cost. As Bass explained about the Lowndes group, “We hope [tuition grants] will be [available], but we’re not basing our plans on that. We’re not too optimistic about it.” Lowndes’s parents would “have to make a sacrifice,” but they all felt it was “of the utmost importance” to do so. “With desegregation like they’re taking about,” Bass said, “we don’t think we’ll have the high standards of education we’ve had in the past.” So, he said, “We’re prepared to carry the load ourselves.”⁴⁴

Scrambled Eggs and Paul Bunyan’s Litigious Stick

Meanwhile, the number of black students in white schools increased substantially in many systems across the state with the opening of schools in September of 1966. Under pressure from state officials, a number of systems refused to provide racial attendance statistics, but HEW estimated that as

⁴⁴ Stipulation of Facts, Sept. 30, 1966, Lee v. Macon County Board of Education, Frank Johnson Papers: Lee v. Macon Case File, Container 28, Folder 8; United States Brief in Support of the Motion for Preliminary Injunction, Oct. 19, 1966, Frank Johnson Papers: Lee v. Macon Case File, Container 21, Folder 6; *School Desegregation in the Southern and Border States*, SERS, May, 1966; *Washington Post*, June 2, 1966; *Birmingham News*, May 27, Aug. 14, 1966; *Montgomery Advertiser*, May 27, 29, 1966; see, for Bass quotation, *Chattanooga Times*, Aug 19, 1966.

many as 12,000 black students were in formerly all-white schools – a little over 4 percent of the state’s total black student population. Seventeen of the state’s 118 school systems were under court order. Of the rest, 52 were found not to be in compliance with HEW Guidelines. Two of those, Bibb County and Tarrant City, had federal funds completely cut off. Three systems had federal funds deferred, and the remaining 47 non-compliers were in the midst of the funds deferral process. All student desegregation had been achieved through freedom of choice, meaning the burden to desegregate was still on black families. Just over 1,000 teachers had been given desegregated assignments, although the vast majority of these were white teachers assigned to black schools. Most systems continued to delay faculty desegregation altogether, either encouraged by, or intimidated by, the Anti-guidelines legislation and Wallace’s pressure campaign.⁴⁵

Also working against faculty desegregation was Judge Johnson’s decision to allow Montgomery, Bullock, Lowndes, and Macon to delay faculty desegregation until the following year. Johnson felt that the desegregation of faculties ought to proceed immediately, especially since the Fifth Circuit’s *Singleton II* decision had ordered as much in Mississippi. But the Justice Department’s appeal in the combined Jefferson County cases (styled *U.S. v. Jefferson*) was pending before the appellate court, which was considering a circuit-wide model decree based on the Guidelines. So Johnson deferred to “orderly judicial procedure” and stayed his own orders pending the outcome of the *Jefferson* appeal. Other school boards felt they could not go over and above what the court-ordered systems had been required to do. Anything that appeared to be voluntary or over the absolute bare minimum risked incurring the wrath of the local white citizenry. One Birmingham *News* columnist observed that the governor and state legislature had “not acted alone” in their anti-guidelines fight, but had indeed had “substantial . . . popular backing [from] the people in their actions.” There were times, he continued, when people were

⁴⁵ *Statistical Summary of School Desegregation in the Southern and Border States, 1966-1967* (Nashville: Southern Education Reporting Service, 1966); *School Desegregation in the Southern and Border States*, Sept., 1966; *Birmingham News*, Aug. 28, 1966.

“ready to go to great expense and deprivation to make any manner of sacrifice for what they consider a just cause.” The fight to preserve segregation was such a cause, he imagined, and “the people of Alabama, for the most part, [were] that kind of people.” George Wallace knew this well.⁴⁶

Local school officials expressed a mixture of frustration, exasperation, and anger at the pressure from the courts and HEW on one side, and local whites and state officials on the other. Some happily embraced the interference from the governor and the legislature. The attorney for the Crenshaw County board, State Representative Alton Turner, wrote HEW’s general counsel and advised that any contact that the department wished to make with the school board should go through the governor’s legal advisor. Crenshaw was under federal court order but, like other such systems, was nonetheless required to sign a Form 441-B. “Should the board still be faced with the asinine demand to file with HEW an assurance [of compliance],” Turner wrote, “then I would advise them not to do so.” The Crenshaw school board was comprised of “law abiding citizens” and therefore had “no choice but to comply with this court order, but under no circumstances,” he continued, “would I advise them to submit to this unlawful and unreasonable demand.” Turner – who at trial had tried to introduce evidence that a number of the black students requesting transfer to white schools in Crenshaw were illegitimate – told HEW that the board was “fed to the teeth with [its] unlawful attempt at social reform . . . in the name of Education and under the guise of the Civil Rights Act.” Others were either relieved to have someone to blame for their non-compliance or simply too intimidated to defy the state authorities, particularly when most whites in their respective communities supported the state’s efforts. The

⁴⁶ *Statistical Summary of School Desegregation in the Southern and Border States, 1966-1967* (Nashville: Southern Education Reporting Service, 1966); *School Desegregation in the Southern and Border States*, Sept., 1966; *Birmingham News*, Aug. 28, 1966. See, for reports of student and faculty desegregation and, especially, anti-guidelines legislation influence and political pressure, HEW-USOE Equal Educational Opportunity Program (EEOP) Official Files, Telephone and Conference Records: Tuscaloosa City, Tuscaloosa County, Athens City, Sheffield City, Sept. 7, 1966; Autauga County, Sept. 8, 1966; Oneonta City, Sept. 12, 1966; Phenix City, Sep. 13, 1966; Autauga County, Sept. 16, 1966; Sylacauga City, Sept. 20, 1966; Brewton City, Sept. 26, 1966; Opp City, Sept. 8, 1966; Calhoun County, Oct. 5, 1966; Cherokee County, Oct. 11, 1966; “Alabama School Districts which Have Experienced Political Pressure and Influence”; all in NAACP Lee v. Macon Files: Background Information (*Papers of the NAACP: Supplement to Part 23, Series A, Section I, Reel 3*).

superintendent of the Talladega County system wrote HEW to insist that his school board was not “defying or resisting” the Guidelines, but that “the action of our legislature has made it very difficult for school boards in Alabama to proceed with desegregation plans.” The Calhoun County superintendent told the USOE that it stopped implementing its desegregation plan because it “felt that would be in violation of state law, which is not a good thing.” One superintendent said the “situation [was] too explosive.” Another said there was “too much opposition.”⁴⁷

Most commonly, local officials revealed a sense that theirs was a terrible dilemma. In a letter to HEW compliance officials following a meeting with investigator Gene Crowder, Butler County Superintendent H.L. Terrell said his school board had planned to place one black teacher in a white school that fall, but “due to these federal court orders and actions of our Governor and State Legislature, [the] Board decided that it would not be expedient for us to assign at this time Negro teachers to our all white schools.” He reminded the officials that “in Alabama, local boards of education and superintendents of education exists [*sic*] solely at the discretion [*sic*] of the Governor and State Legislature. As you can see,” he concluded, “our Board of Education is sort of caught between ‘the devil and the deep.’”⁴⁸

As local school boards settled into the business of administering the fall semester in such a dilemma, the Justice Department, the state NAACP, and the NAACP-LDF began their anticipated legal assault on the tuition grant and anti-guidelines legislation. The Civil Rights Division on August 31 moved for leave to intervene as a plaintiff in *Lee v. Macon* and filed, at the same time, a supplemental

⁴⁷ Alton A. Turner to James A. Devlin, Oct. 4, 1966; J.R. Pittard to David Seeley, Oct. 11, 1966; both in NAACP *Lee v. Macon* Files: Background Information (*Papers of the NAACP*: Supplement to Part 23, Series A, Section I, Reel 3); HEW-USOE Equal Educational Opportunity Program (EEOP) Official Files, Telephone and Conference Records: Tuscaloosa City, Tuscaloosa County, Athens City, Sheffield City, Sept. 7, 1966; Autauga County, Sept. 8, 1966; Oneonta City, Sept. 12, 1966; Phenix City, Sept. 13, 1966; Autauga County, Sept. 16, 1966; Sylacauga City, Sept. 20, 1966; Brewton City, Sept. 26, 1966; Opp City, Sept. 8, 1966; Calhoun County, Oct. 5, 1966; Cherokee County, Oct. 11, 1966; “Alabama School Districts which Have Experienced Political Pressure and Influence”; all in NAACP *Lee v. Macon* Files: Background Information (*Papers of the NAACP*: Supplement to Part 23, Series A, Section I, Reel 3); *Birmingham News*, Sept. 24, 1966.

⁴⁸ H.L. Terrell to David Seeley, Sept. 29, 1966, in NAACP *Lee v. Macon* Files: Background Information (*Papers of the NAACP*: Supplement to Part 23, Series A, Section I, Reel 3).

complaint against the governor and state board of education. The complaint alleged what everyone already knew to be the truth – that “the purpose and effect of the adoption and implementation of the tuition grant program . . . is to provide a means by which the State of Alabama can use public funds and official influence to perpetuate racially segregated education” The CRD asked the court to enjoin the state authorities from paying tuition grants to students at segregationist academies. Shortly thereafter, the Alabama NAACP State Conference of Branches initiated its own suit against the governor, the Governor’s Commission, the state board of education, Meadows, and various other state officials. Birmingham attorneys Orzell Billingsley and Oscar Adams filed the suit and requested the convening of a three-judge court to rule on the constitutionality of the anti-guidelines law and enjoin its implementation. The head of the state NAACP, Birmingham dentist John Nixon, announced the suit, styled *NAACP v. Wallace*, by telling reporters that Alabama was “so far out of step with national policy, the NAACP [felt] that real resistance to Governor Wallace’s anti-guidelines legislation [could] best be made through the courts.” To demonstrate the application of the legislation, Billingsley and Adams named as defendants the Tuscaloosa County school board, which Meadows had attempted to pressure into reassigning black teachers placed in white schools. Judge Elbert Tuttle of the Fifth Circuit Court of Appeals named Judges Johnson, Richard Rives, and Virgil Pittman of Gadsden to the panel hearing the case. The panel, in turn, ordered the United States into the case as a litigating *amicus curiae*.⁴⁹

Days later, Fred Gray filed a motion for the plaintiffs in *Lee v. Macon*, seeking either a contempt citation against Wallace or, in the alternative, an injunction against any enforcement of the Anti-guidelines Act. The governor, as *ex officio* president of the state school board, had “used his influence, control, and supervision over the public schools of the State of Alabama in a manner as to prevent and

⁴⁹ Motion for Leave to Intervene and to File a Supplemental Complaint, Aug. 30, 1966, and Supplemental Complaint, Aug. 31, 1966, *Lee v. Macon County Board of Education*, Frank Johnson Papers: *Lee v. Macon* Case File, Container 28, Folder 3; *Birmingham News*, Sept. 12, 15, 29, 1966; *Montgomery Advertiser*, Sept. 13, 18, 1966; Amendment to Complaint Adding a Party Plaintiff and Parties Defendant, *NAACP v. Wallace*, Civil Action No. 2457-N (ND, AL), in *NAACP Lee v. Macon* Files: General Case Material, Sept., 1966 (*Papers of the NAACP*: Supplement to Part 23, Series A, Section I, Reel 6).

discourage the elimination of racial discrimination therein.” He and the state board clearly had failed, then, to take affirmative action to dismantle the dual school system as the court had ordered in 1964. Gray asked the court to again consider requiring the state officials to use their power and influence over local school systems to “accomplish and effectuate total desegregation of all the public schools of the State of Alabama by any and all possible means, including the withdrawal of state funds from school districts which have not taken or are not now taking affirmative steps to effectively desegregate their schools.”⁵⁰

The editors at the Montgomery *Advertiser* expressed the feelings of many Wallace supporters who had begun to break with the governor over his reckless political engineering. “As the suit snowballs to federalize Alabama schools,” they wrote, “accommodating the death wish of Gov. Wallace and the Legislature in the Anti-guidelines Bill, grief has replaced anger that the state would be so foolish. An existing injunction [in *Lee v. Macon*] was primed and ready,” they continued, and the state had already been “put on clear notice that a statewide school desegregation [order] would follow if the Governor and state school officials did not stop interfering with local schools. It seems impossible to unscramble that egg now.” Alabamians could only hope, then, “that the three-judge federal panel tempers justice with more mercy than the state has asked for or has a reasonable right to expect.” The *Birmingham News* concluded that Wallace had “led Alabama up a blind alley” and had “set in motion the type of politico-legal circus in which he thrives.” He had given school systems “false hope.” Some systems already engaged in litigation were figuring this out. The Crenshaw County, Barbour County, and Choctaw County school boards, which had all limited their desegregation efforts after the passage of the Anti-guidelines Bill, were hit with court orders that month demanding acceleration. These “piecemeal court orders,” however, did not begin to “approximate a single [statewide] decree,” which the *News* argued would be “the direct result of the anti-guidelines law which Wallace is using to flirt with a jail

⁵⁰ Motion for an Order to Show Cause or, in the Alternative, for Further Relief, Sept. 22, 1966, Frank Johnson Papers: Lee v. Macon Case File, Container 28, Folder 8; *Birmingham News*, Sept. 12, 15, 23, 1966.

term to promote his own political future.” Remembering Wallace’s remark that the federal government could keep its money and ‘knew what it could do with it,’ the *Advertiser* observed that this “[did] not change, in any way, the liability of local districts to desegregation orders by the courts.” *Brown* was still “the law of the land, like it or not,” and the “court stick” to HEW’s ‘arrogantly-wielded’ carrot of federal funding was “Paul Bunyan size.”⁵¹

⁵¹ *Montgomery Advertiser*, Sept. 13, 1966; *Birmingham News*, Sept. 28, 1966.

CHAPTER 11: 'SEGREGATION IS STILL A PERFECTLY GOOD WORD': FREEDOM OF CHOICE IN PRACTICE,

LEE V. MACON ON TRIAL, 1966-67

“‘Segregation’ is a perfectly good word. It has been practiced through the ages for good results [and] used by people of the civilized world for man’s greatest advancement.” Thus began what might be called a memorandum to all local superintendents of education issued by State Superintendent of Education Austin Meadows in the summer of 1966. The state’s leading education official had teamed with the governor to force local school boards to disregard the revised desegregation Guidelines of the U.S. Department of Health, Education, and Welfare (HEW). By the time of the memo’s release, HEW enforcement staff, Department of Justice attorneys, the state NAACP, and the NAACP-LDF were carefully documenting every move that the governor and the state superintendent made. While Meadows thought he was simply penning an eloquent appeal to reason aimed at like-minded, white Alabama schoolmen, he was also hastening a renewed legal challenge to segregated education on a statewide basis. When *Lee v. Macon County Board of Education* came before the court for trial in the late fall of 1966, attorney Fred Gray was prepared to introduce the “segregation” missive into evidence and to make Meadows look quite foolish in the process.¹

On a balmy late November day, the second floor courtroom of the federal courthouse in Montgomery was packed with reporters, school officials, and attorneys. A light breeze blew in through the open windows and under the tall limestone arches which dominated the Depression-era chamber, with its ornate, stenciled ceiling beams and high wooden gallery in the back. A long, straight wooden

¹ Transcript of Proceedings in *Lee v. Macon County Board of Education and NAACP v. Wallace*, Nov. 30, 1966, in NAACP *Lee v. Macon Files: Transcripts*, Nov., 1966 (*Papers of the NAACP: Supplement to Part 23, Series A, Section I, Reel 9*) [hereinafter cited as *Lee v. Macon Trial Transcript*], pp. 78-82; see copy of the original release, Austin R. Meadows, State Department of Education Release, July 1, 1966, at NAACP *Lee v. Macon Files: Depositions (Papers of the NAACP: Supplement to Part 23, Series A, Section I, Reel Four)* [hereinafter cited as *Meadows Release, July 1, 1966, NAACP Lee v. Macon Files*]; the full text was read by Gray in open court and is, therefore, in the transcript of the proceedings as well.

bench stretched in front of a massive, arched-stone niche, at the back of which was a blue wall dotted with gold stars. Aloft on the bench sat the four judges hearing the combined *Lee v. Macon* and *NAACP v. Wallace* cases: Judges Frank Johnson, Richard Rives, Hobart Grooms, and Virgil Pittman. In front of them, facing the bench, sat attorneys for the defendant state and local officials, the plaintiffs, and the United States. And in the middle of it all sat state Superintendent Meadows, on a simple wooden witness stand below and in the center of the bench. Meadows was under injunction in *Lee v. Macon* and was supposed to have been using his office to promote desegregation in the state's public school systems. The "segregation" memo indicated quite clearly and forcefully that he had been doing exactly the opposite.²

Fred Gray chose his moment carefully. After questioning an equivocating Meadows for an hour, Gray began to ask him about the discharge of his affirmative duty under the 1964 injunction. "Have [you] recommended or encouraged any superintendent of education to abolish segregation in his particular school system," he asked. Meadows faltered and replied incoherently, "No, I don't remember it, because I approach it from discrimination; nondiscrimination if that is necessary; I have told Superintendents if this is necessary to not discriminate, to integrate pupils, and then you must follow that and abide by that in your opinion, you should do it." The state department of education had been forced to surrender documents to the plaintiffs' attorneys, so Gray asked, "Would any records in your office show any affirmative act which you have done in the last year?" Meadows tried again to be evasive. "Whatever they are, I have already furnished them to you," he said. Gray asked, more specifically, were there any releases to the state's local superintendents in which he had encouraged or promoted the elimination of dual school systems? "No," Meadows replied, "I approach it from

² National Register of Historic Places Registration Form, Continuation Sheet, and Accompanying Photos for United States Post Office and Courthouse (Frank M. Johnson Federal Building), <http://nrhp.focus.nps.gov/natreghome.do>, accessed June 1, 2013; *Farmer's Almanac* Historical Weather online, <http://www.farmersalmanac.com/weather-history>, accessed June 1, 2013; "Interpreter in the Front Line," *Time*, Vol. 89, No. 19 (May 12, 1967): pp. 84-93; *Lee v. Macon* Trial Transcript, pp. 78-80; Meadows Release, July 1, 1966, NAACP *Lee v. Macon* Files.

nondiscrimination.” Gray then offered the “segregation’ is a perfectly good word” release into evidence. He asked Meadows pointedly, “Is it your understanding that by circulating that release to the City and County Boards of Education, it would encourage them to segregate rather than to integrate?” Meadows said no; it was “an editorial statement on the word ‘segregation.’” Gray began to question the uncooperative Meadows about the document’s contents when presiding Judge Richard Rives interrupted him, saying, “You might read the statement to us . . . if you will, Mr. Gray.”³

As Gray obliged and began to read the essay, Meadows chuckled. By the end of the reading, however, the state superintendent was squirming uncomfortably in the witness stand, and it was the panel of usually stern and decorous federal judges who were smiling and struggling to contain laughter. Segregation was, Meadows had written, “the basic principle of culture,” whereby “the good join together to separate themselves from the bad.” It was biblically sanctioned, for “the Lord set aside or segregated fruit in the Garden of Eden from Adam and Eve.” Eve had destroyed this arrangement by convincing Adam to eat the fruit, and “honest men and women,” he wrote, “have been obliged to work for their living ever since.” From the witness stand, Meadows felt the need at this point to interject, “That’s right.” Gray looked up briefly and then resumed. Marriage was “the highest type of segregation,” without which “there would be no family unit.” It too was sanctioned by scripture. Segregation was also “one of the principles of survival throughout the animal kingdom.” Animals joined “their own kind to defend themselves by numbers against other animals that would destroy them without such segregated bond. Birds of a feather truly flock together.”⁴ Gray continued as the judges began to grin:

Wild geese fly across this continent in ‘V’ formation but they never join any other flock of birds. Wild duck fly together and not with other birds. The wild eagle mates with another eagle and not with any other bird. Red birds mate with red birds, the beautiful blue birds mate with other

³ Lee v. Macon Trial Transcript, pp. 78-80; Meadows Release, July 1, 1966, NAACP Lee v. Macon Files.

⁴ Lee v. Macon Trial Transcript, pp. 80-1; Meadows Release, July 1, 1966; NAACP Lee v. Macon Files; *Los Angeles Times*, Dec. 1, 1966.

blue birds and so on through bird life. There can be segregation without immoral discrimination against anyone. Integration of all human life and integration of all animal life would destroy humanity and would destroy the animal kingdom.⁵

Beneath the surface of what Meadows described as an innocuous “editorial statement” were the same age-old white hopes and fears. Desegregation was abhorrent to god. It would lead, without question, to miscegenation, the emasculation of all white men, and the degradation of Western civilization. If whites did not band together, especially in the cities and in the Black Belt, they would be overwhelmed by blacks. But they could unite and defend segregation. They could do this, too, without any moral qualms, provided they observed and maintained law and order. Who would not recognize as much when the stakes were so high as the destruction of humanity? Meadows discerned that a “time of reckoning” was coming in “this United States of America” on the “fundamental principles of segregation and non-discrimination,” which he apparently still believed could “be [maintained] without destroying segregation in its truest sense.” By that November he had to convince not only the state’s local superintendents of this, but four federal judges deciding the fate of segregated education in the state of Alabama. And they were laughing at him.⁶

When schools opened earlier that fall, the defiance and intimidation campaign undertaken by Meadows, Governor George Wallace, and the state legislature had resulted in motions for further relief in the *Lee v. Macon* case and in the initiation of the suit against the Wallace himself, *NAACP v. Wallace*. Since there were “common questions of law and fact” in each, the respective judicial panels assigned to both actions had combined them for the purposes of the November trial, resulting in the designation of a four-judge court of sorts (really just two three-judge courts sitting together for the purpose of a

⁵ Lee v. Macon Trial Transcript, p. 81; Meadows Release, July 1, 1966; NAACP Lee v. Macon Files.

⁶ Lee v. Macon Trial Transcript, p. 81-2; Meadows Release, July 1, 1966, NAACP Lee v. Macon Files.

hearing). Judges Johnson and Rives were already sitting on the three-judge panels in both cases, and Judges Grooms and Pittman were each sitting on one of the two.⁷

The court in *Lee v. Macon* had denied a request for a contempt citation against Wallace because he was a defendant in the case only in his capacity as *ex officio* president of the state school board, and the supplemental complaint against him alleged acts committed in his capacity as governor. Also, Johnson understood that a contempt citation would have played into the “politico-legal circus” which Wallace had already created. Johnson believed that enforcing or expanding the existing injunction would be a more sensible course of action, should the court side with the plaintiffs. But this matter still had to be adjudicated anew, and both cases involved state interference: in *Lee v. Macon*, interference with the 1964 order and defiance of the injunction; and in *NAACP v. Wallace*, interference with local school boards’ compliance with HEW Guidelines. The court decided to withhold judgment on these issues – and on the issuance of a potential statewide desegregation decree – until the combined hearing on November 30, 1966, at which Gray forced Meadows to sit and listen to his own racist parable being read before the court.⁸

As the fall semester drew to a close for students in schools across the state, all eyes were on this unfolding courtroom drama and the developing federal-state showdown. At the same time, the Fifth Circuit Court of Appeals was considering a consolidated set of school desegregation case appeals from black plaintiffs and the U.S. Justice Department. Among the decisions being appealed in light of the issuance of the revised HEW Guidelines were those in the Jefferson County, Fairfield, and Bessemer cases – all under the styling *U.S. v. Jefferson County Board of Education*. By the beginning of 1967, the panels hearing *Lee v. Macon* and *NAACP v. Wallace* would be awaiting an *en banc* rehearing of the *U.S.*

⁷ *Birmingham News*, Oct. 1, 1966; Order of Oct. 13, 1966, *Lee v. Macon County Board of Education and NAACP v. Wallace*, in NAACP *Lee v. Macon* Files: General Case Material, 1966 (*Papers of the NAACP*: Supplement to Part 23, Reel 7); *School Desegregation in the Southern and Border States*, SERS, Oct., Nov., 1966.

⁸ *Birmingham News*, Oct. 1, 1966; Order of Oct. 13, 1966, *Lee v. Macon County Board of Education and NAACP v. Wallace*, in NAACP *Lee v. Macon* Files: General Case Material, 1966 (*Papers of the NAACP*: Supplement to Part 23, Reel 7); *School Desegregation in the Southern and Border States*, SERS, Oct., Nov., 1966.

v. *Jefferson* appeals, as a statewide desegregation order and the freedom-of-choice method of desegregation itself hung in the balance.

The Freedom-of-Choice Experience in 1966-67

Meanwhile, in each community, white and black students, their families, teachers, and administrators dealt with the realities of desegregation in the classroom that fall. They had no part in formulating court orders, signing HEW compliance forms, drafting anti-guidelines legislation, or developing school board desegregation plans, but all of these documents informed their daily lives. Freedom-of-choice desegregation had become a reality in nearly every school system in the state by the fall of 1966. For the estimated 7,000 or so black students around the state of Alabama who had elected to transfer to white schools in 1966-67, it was a varied experience.⁹ Many of them were interviewed about their experiences for a 1967 study sponsored by the Council on Human Relations. The results showed that students found everything from cautious friendship to outright hostility, inspiration to disillusionment, hope to despair, reward to regret.¹⁰

Relationships with white teachers were often especially problematic. Some black students reported that their white teachers were “real nice” to them and often reprimanded white students for harassing them. But interracial student-teacher interactions were just as often fraught with misunderstanding and, in some cases, resentment and aggression. Many black students had been unaccustomed, for example, to replying to teachers using “yes, ma’am” and “no ma’am,” and some

⁹ The USOE reported that 6,570 black students were in what it described as desegregated schools; this did not include black schools which enrolled a few whites, or black students at formerly whites schools which had been abandoned by whites. Earlier estimates by the SERS had indicated perhaps as many as 10,000 – 12,000 black students in white schools that year. In addition to including the students from what the USOE did not consider desegregated schools, this estimate was clouded by the refusal of a number of systems to report figures; see *Birmingham News*, Dec. 18, 1966.

¹⁰ Mark A. Chesler, *In Their Own Words: A Student Appraisal of What Happened after School Desegregation* (Atlanta: Southern Regional Council, 1967), see copy in *Facts on Film, 1966-1967 Supplement*, Miscellaneous Materials; see also reproductions of much of the report in the *Washington Post*, April 23, 1967, and *Los Angeles Times*, April 30, 1967. Chesler represented the Institute for Social Research at the University of Michigan.

found that white teachers reacted to this oversight with incredulity. Said one student, "It seemed as if all [the teacher] did the whole time was to just wait for us to say 'yes' so she could make a big thing out of it. . . . She got fed up because I got tired of her trying to make me say 'yes, ma'am,' and I started saying, 'I think so'" Some teachers tolerated belligerent white student behavior towards black students and, occasionally, colluded with these students themselves. "Some of the teachers will try to be funny," one student said, "when they get to a word like 'Negro,' they call it Nigger or else try to make it fun." Another reported that their teacher divided up the classroom everyday into black and white sections and made a point to assign black students to older lab equipment. One teacher was reported to have interjected her opinion anytime civil rights came up, saying things like, "In a little time our freedom will be gone." One girl explained that "there were always conversations going on between the teacher and the students," and "the teacher was always saying some kind of wise crack [and] praising the governor." Other petty intimidations included calling on black students only when their hands were not raised and ignoring them when their hands were raised, and encouraging white students to call on black students with difficulty reading to read aloud.¹¹

Some black students insisted that their relationship with white students was "not entirely a hostile one." One black girl claimed that white girls would "call the white boys down" about bothering her, for example. But black students continued to report a wide array of persistent intimidation and harassment from their white classmates, not unlike that endured by the first students to desegregate white schools in 1963. Two black ninth graders in Wilcox County withdrew from Wilcox County High after being ambushed in the hallway and assaulted. It was not the first time. One of the students had already been "jumped" by a gang of four white boys in the bathroom. "I'm tired of getting' hit," he said, especially since "nothin' ever done about any of it." Elementary students in Wilcox endured similar physical attacks. White children in another county repeatedly threatened black students with BB guns.

¹¹ Chesler, *In Their Own Words*, pp. 2-5; *Los Angeles Times*, Dec. 16, 1966.

White students elsewhere encouraged their classmates to injure black students at recess and pelted black students with rocks and crayons in class. A black student at Washington County's Leroy High was beaten to the point of hospitalization. One black student in a Choctaw County white school received a typewritten message on the school bus, which read "YOU AND YOURS SISTER ARE GOING TO GET THE HELL BEAT OUT OF YOU AND YOURS SISTER UNLESS YOU AND YOUR SISTER STOP COMMING TO SCHOOL. Go to your on negere schools [sic]."¹²

Often white students made a show of avoiding any contact or close proximity to black students. In one school, a student-written play called for three characters to embrace their respective nieces; upon realizing that black girls would be playing the white nieces, the white boys playing the uncles refused follow through, and the scene was called off. "Sometimes we were going down the hall," one student recalled, "and if any white students was standing in the hall and they see us coming they say 'here come a black Nigger, you better stand back' or something. They would get back against the wall." Being called "Nigger" was far and away the most common harassment that the students had to endure. "You got used to things [like that] written on the bathroom wall," one girl remembered. One boy recalled not knowing how he would react to the insult. "I couldn't tell anybody I wouldn't hit anybody when they called me Nigger," he said, "but after I got over there and I had been called a Nigger about a thousand times during the first six-week period I'd [still] feel a burning inside. And after the third six-week period, I'd get over this burning inside." Often black students recognized that this sort of behavior was encouraged and instilled by white parents. "For the most part," one girl said, those children over there want to be friendly, some of them do, but their parents tell them what to do and what not to do and all." Others attributed much to peer pressure. "You can tell some of them want to say something [friendly] to you," a girl observed, "but they are scared that if they say something to you, then the other

¹² Chesler, *In Their Own Words*, pp. 5-9, 12; *Los Angeles Times*, Dec. 16, 1966 (Wilcox); *Southern School Desegregation, 1966-67*, A Report of the U.S. Commission on Civil Rights (Washington, D.C.: Government Printing Office, July, 1967), p. 57 (Choctaw); *Atlanta Daily World*, Nov. 18, 1967 (Washington).

one is going to call them 'Nigger lover' and all that kind of junk." Added another, "They all seem to be afraid of what someone else might think; they can't even think for themselves."¹³

Desegregation often shattered preconceived notions for black students. Expectations about white students, in particular, were disappointed. "Some people think that white people are higher class than Negroes," one girl reported, "but from the way the children behave, they are lower class people than the Negro." Another said "I was really surprised as I went to the white school. They say, 'oh, the Negroes are so dumb,' but I really found out that the Negroes are not really dumb at all. . . . I was kind of backward on some subjects," he remembered, "like math, because the only time I took that was in the seventh grade, and I had a hard time with math. But in all my other subjects, I caught up with most of the white children and passed them in the first six weeks." One student said that she'd grown up thinking that "the white person was just smarter than we are . . . born smarter just because they were white, but I found out that this isn't true. . . . I think that maybe the reason we think we aren't as smart as they are" she said, "is because they've made us feel like we don't know anything." Another said that whites had made blacks feel inferior "because they always keep us in jobs like in the kitchen or in the yard or on the farm. They never have made us feel like we should be anything," he added.¹⁴

All black students who transferred on freedom of choice had to endure certain sacrifices, among which were the inability to participate in most extracurricular activities and the loss of certain other opportunities. One student who transferred had friends who approached him and said that they would like to come to the white school, but they would prefer to also play basketball, and that was not possible for them there. A student named Jimmie Doctrie from the small east Alabama city of Opelika revealed the depths of sacrifice for many when he tried to change his choice of a white high school back to the city's black high school just before the start of fall classes. Doctrie was president of the student council, president of his class, and a member of number of different student organizations – none of which he

¹³ Chesler, *In Their Own Words*, pp. 5-9, 12; *Los Angeles Times*, Dec. 16, 1966.

¹⁴ Chesler, *In Their Own Words*, pp. 9-12.

had a chance of participating in at the white school. His mother eventually prevailed upon him to change his choice at the last moment, arguing that “he really did not realize what he was doing.” But it was too late. Another girl, Phyllis Mills, also tried to change her choice of formerly all-white Opelika High School back to the black high school, Darden. She had been top of her class and could have been valedictorian at Darden. She was also hopeful of receiving academic scholarships to college based on her stellar grade point average. Her parents felt that at Opelika she “might not get everything [she] could qualify for” at Darden and were thus “totally against it.” After discussing it with them at length, she professed to have “made a haphazard decision” without studying “all of the evidence.” Mills and Doctrie both appealed to the city school board and directly to Judge Frank Johnson. Neither was allowed to alter their choice and spent the year at Opelika High.¹⁵

While adjusting to everyday life in white schools – new teachers, friends, enemies, opportunities, sacrifices – black students who transferred on freedom of choice often had to go back to their respective black communities and justify their choices. One girl remembered, “We had to deal with a lot of criticism, because they just didn’t feel like this was something that needed to have been done. It was not easy,” she said, “especially being ten or eleven years old, and you’ve got to deal with that.” Another girl said she “noticed that some of the kids at the Negro school would say that we were stuck up. . . . They are the first to say that you won’t speak to them anymore,” she added, “but they won’t give you a chance. They turn away or make some snide remark,” like, ““You think you are so big or so important that you can’t be around your old friends anymore.”” Another girl heard, ““You think you are so good because you go to an integrated school.”” Another said a friend assumed that “just because I went to the white school . . . that we were ‘big Niggers’ . . . and had a lot of money.” With or without the criticism, there was always additional scrutiny, one girl added, because friends and neighbors “wanted to see if [we] could even compete academically” with white students. Another girl

¹⁵ Chesler, *In Their Own Words*, pp. 13-14; Bagley, *A Meaningful Reality*, see for quotation, pp. 58-9.

said she was intimidated by fellow blacks who said that “the white school wasn’t any better than the Negro school” and that she “was just trying to be popular.” Some blacks believed that desegregating the schools was unnecessary, telling transferring students they were not “ready to be with the white people yet.” Fear undoubtedly influenced some of these discouragements. “They said that our house was going to be burned and the Ku Klux Klan was going to get us and lots of people was going to get killed,” a girl said. Then “our house did get burned, and when it did people said, ‘That’s what I told you was going to happen.’” One student argued that many of these critical people actually supported desegregation in principle, but they were scared and “waiting for somebody else to do it.” These people, he said, “did not realize that those who first went down had to sacrifice.”¹⁶

Do You Know Alabama?

Transferring black students were often impressed by the quality and novelty of the textbooks that they were given in white schools. But their full exposure to some of these books’ content was a painful reminder of the endurance of institutionalized white supremacy. In the black schools, many students simply went without their own texts. As one student recalled, parents who could afford it could buy books for their children from local bookstores, but she said, “Other than that, there were only the always-outdated volumes provided by the school system. When we integrated, that problem left,” she explained, “We had workbooks per child, individual books, art supplies; everybody got what they needed.” In the case of at least one widely-used history textbook, however, pleasant surprise gave way to disgust. The *Know Alabama* fourth grade textbook was used in nearly every white elementary school in the state. Its chief writer was Auburn University graduate and influential Vanderbilt University and University of Alabama historian, Dr. Frank Owsley. Owsley once described freedmen as “half-savage blacks” who could “still remember the taste of human flesh” because “the bulk” of them were “hardly

¹⁶ Chesler, *In Their Own Words*, pp. 12-15.

three generations removed from cannibalism.” Published a year after Owsley’s death in 1957, *Know Alabama* represented a disturbing exposition of the Lost Cause mythology, an apology for white supremacy, and a not-so-subtle indictment of the civil rights movement and the federal government’s support thereof. From its idyllic and paternalistic representation of white family life on the antebellum plantation; to its presentation of slaves as docile, content, and ignorant; to its argument that Reconstruction was an abhorrent mistake; and finally its depiction of the Ku Klux Klan as the benevolent savior of southern society, *Know Alabama* explained the state’s history as whites wanted to imagine it.¹⁷

The textbook described plantation life as “one of the happiest ways of life in Alabama before the War Between the States.” The life that “plantation owners made for themselves” had “lived on in song and story to become part of the history of the Old South.” The planters, it read, raised cotton “with Negro slaves to help do the work.” The book invited white students to imagine living on such a plantation, where they might awaken to run down and eat breakfast served by “the Negro cook whom you call ‘Mammy,’” and whom “you have known . . . all your life and love . . . very much.” The day proceeds with the student-imaginer riding the fields with his father on horseback. “In those days of slavery,” it read, “the plantation owners had many slaves,” and “most of them were treated kindly. . . . There were a few masters who did not treat their slaves kindly,” of course, but “the first thing any good master thought about was the care of his slaves.” This was supposedly true of the mistresses, too. “Many nights you have gone with your mother to the “quarters” where [your mother] cared for some sick person,” the book suggested, “She is the best friend the Negroes have, and they know it.” As the child rides by the slaves working in the fields, they stop working to say hello, but only long enough to tip

¹⁷ J. Frank Owsley, et al., *Know Alabama: An Elementary History* (Birmingham: Colonial Press, 1957), see copy in Special Collections and Archives, Ralph Brown Draughon Library, Auburn University; Author’s Interview with Solomon Seay, February 1, 2012, Digital Recording and Transcript in Possession of the Author and to be Deposited [hereinafter cited as Seay Interview]; *New York Times*, Feb. 9, 1970; Bagley, *A Meaningful Reality*, pp. 56-59; see Owsley’s commentary on freedmen in “The Irrepressible Conflict,” his contribution to *I’ll Take My Stand: The South and the Agrarian Tradition* (New York: Harper, 1930; latest reprint, Baton Rouge: Louisiana State University Press, 2006); see also, on Owsley, Orville Vernon Burton, “Frank Lawrence Owsley,” *American National Biography Online*, (Oxford University Press, 2000), <http://www.anb.org>.

their hats. "You like the friendly way they speak and smile," it read, "They show bright rows of white teeth." One slave named Sam tells "'Marse Tom'" that the slaves have "'mes more cotton than [they] can pick,'" then "chuckles to himself" and goes back to work, "picking as fast as he can." The child later plays "Indian" with his siblings and is joined by a Negro boy named "Jig," who "got his name because he dances so well when the Negroes play their banjos." Jig asks to play a game, and the child agrees but insist that Jig be the Indian. Jig "goes off gladly to be the Indian, to hide and to get himself captured."¹⁸

Know Alabama's depictions of the "War Between the States" and its aftermath were equally romanticized and disturbing. Slavery was "only one of the causes of the War Between the States," and "the Southern states had a right under the law to leave the United States." The South lost the war only because "the North had more men, guns, and more food," and after four years "this 'more' of everything finally caused the South to lose." Northern troops marauded the Tennessee River Valley in northern Alabama "burning crops, taking things that did not belong to them, and killing Southern men," while "old men, women, and children had a hard time" doing anything about it. The history of Reconstruction in the textbook was particularly illuminating, as it was clearly intended to inform students' contemporary sensibilities. For example, the leader of the Freedmen's Bureau was "sent by the people in Washington who did not want things to be easy for the South." Most such "carpetbaggers" were "not honest men, and they came to steal and cheat people," aided by "scalawags" who had "turned against their own people in the South." Under "terrible carpetbagger rule," these people tried "to turn the Negroes against the white people" and used the Freedmen's Bureau to "make promises that were not true to Negroes," including the delivery of forty acres and mule. Most blacks who voted could not read "and did not know what they were voting for," so Alabama's subsequent government was "a poor kind" and really "no real government at all." The legislature "was made up of carpetbaggers, scalawags, and Negroes," with the latter being, by implication, as bad as the former two.

¹⁸ Owsley, et al., *Know Alabama*, pp. 93-98.

The blacks were “nearly all field workers” who were illiterate and, therefore, “did not know what it meant to run a government.” Most of the laws passed were “not for the good of the people” and were intended only for the carpetbaggers “to get something for themselves.” The legislature even “had a hard time finding a man who could write well enough to keep a record of the meetings.”¹⁹

The *coup de grace* of *Know Alabama*'s first half, and indeed of Southern whites' understanding of their early history, was the Redemption of the South. “The loyal white men of the South,” it read, “saw that they could not depend on the laws or the state government to protect their families,” so they recognized that they, themselves, “had to do something to bring back law and order” and to “get the government back into the hands of honest men who knew how to run it.” According to the textbook, “it happened that at this time a band of white-robed figures appeared” and “rode through the towns like ghosts and then disappeared.” The Ku Klux Klan “did not ride often, only when it had to.” Such it was that “whenever some bad thing was done by a person who thought the ‘carpetbag’ law would protect him, the white-robed Klan would appear on the streets” and “go to the person who had done the wrong and leave a warning. Sometimes,” it continued, “this warning was enough, but if the person kept doing the bad, lawless things the Klan came back again.” The Klan subsequently would hold a “court” in “the dark forest at night,” where they “passed sentence on the criminals and they carried out the sentence,” which “sometimes . . . would be to leave the state.” It did not say what the sentence was in the alternative. Eventually, the Klan “struck fear in the hearts of the ‘carpetbaggers’ and other lawless men who had taken control of the state,” and “many of the ‘carpetbaggers’ went back North,” upon which “the Negroes who had been fooled by the false promises of the ‘carpetbaggers’ decided to get themselves jobs and settle down to make an honest living.” The blacks had only “lately been freed from slavery” and “had no education,” but they “knew who their friends were. The Southern white men who had been good to them in the time of their slavery were still their friends.” When the Democrats were

¹⁹ Owsley, *Know Alabama*, pp. 111-115, 142-45.

able to run the last of the carpetbaggers out of the government, “law and order were restored,” and “there was no more need for the Ku Klux Klan.”²⁰

Thus were white children in schools across Alabama indoctrinated with the history of the Lost Cause and the value of “law and order.” Owsley himself had intended as much. He once described the “purpose of [his] life,” as undermining the great “Northern myth” of the Old South. He sought to do this by influencing fellow historians, who would then “teach history classes and write textbooks and . . . gradually and without their knowledge be forced into our position.” By the end of his career, he had evidently moved on to simply writing the textbooks himself. *Know Alabama* was the only fourth-grade history textbook approved by the Alabama Department of Education and was, therefore, required reading in white and black schools alike, technically. But black teachers could supplement or simply pass over the objectionable sections, if they bothered to teach the book at all. When black students began entering the classrooms of white teachers, though, they and their parents discovered the highly distorted image of southern history which was being taught in the white schools. It was hardly surprising; they understood that this was how many whites continued to construe the history of the state, and that this directly informed the way that they interpreted the present political situation. It was particularly disturbing, though, for black children to have to read these passages aloud in a classroom full of white children. Even in other grades with different texts – some of which were nearly as grotesque as *Know Alabama* – students were exposed to the same distortions and presentist political applications.²¹ As one high school student remembered, “in history classes it was very bad.” The teacher was constantly talking with the white students about “the Governor and integration and the President and the federal government and all such that. They were talking against the federal government because the government was for integration and the like,” she recalled, “they were talking against integration because they don’t see any sense to it.” Another student explained that “in history

²⁰ Owsley, *Know Alabama*, pp. 145-7.

²¹ See, for textbooks similar to *Know Alabama*, CH 17, *infra*.

[class], you see, we have about a week to study one subject, but the teacher sit up there and talk about integration for four days. Then on Friday she come up and give one big whole week lesson and have us get that and have a test on it that Monday.”²²

Across the South, there were plenty of textbooks like *Know Alabama*, whose salacious misrepresentations were being simultaneously uncovered by blacks in white schools. That fall the U.S. House Subcommittee on Education began looking into “the problem of racially distorted schoolbooks.” HEW, however, declined to take action, preferring to “encourage voluntary action.” In at least one case, the Alabama Council on Human Relations (ACHR) chapter in Muscle Shoals, in northwest Alabama, complained to the local school board in January, 1967 about the *Know Alabama* text, and certain sections were removed and supplemented. In most cases, however, voluntary school board action never came. State-level action was certainly not quickly forthcoming. The state textbook review committee counted among its members a Montgomery minister known as “The High Priest of Segregation” as well as a known associate of the Citizens Council and the John Birch Society. The committee was more concerned with rooting out “communist” literature, like *Catcher in the Rye* – which it recommended be removed from state college readings lists – and the history textbook *Under Freedom’s Banner* – which contained references to “known communists” like Langston Hughes and Jane Addams. Not until the mid-1970s did school systems begin phasing out *Know Alabama* and similar books, even as the state superintendent continued to defend them. At that point, some school boards simply stopped buying new editions of the book, while the older editions continued to circulate. Even

²² Chesler, *In Their Own Words*, p. 3; *New York Times*, Feb. 9, 1970; *Los Angeles Times*, March 25, 1970; *Atlanta Constitution*, March 10, 1970; Seay Interview; see, for Owsley quotation, Fred Arthur Bailey, “Frank Lawrence Owsley,” in *The Tennessee Encyclopedia of History and Culture* online (University of Tennessee Press, 2002-2013), <http://tennesseencyclopedia.net>, accessed Jan. 20, 2013.

this modest adjustment came about only after parents and representatives of the NAACP and ACHR complained repeatedly to state and local school authorities, to HEW, and to the courts.²³

Meanwhile, in the fall of 1966, Governor Wallace and other state officials were able to incorporate HEW statements regarding such textbooks into their anti-guidelines talking points. In early November, just before the *Lee v. Macon* trial, Wallace gave an exclusive interview to the organ of the national Citizens' Council, based in neighboring Mississippi. In typically hyperbolic form, he argued that under the "so-called 'guidelines,'" HEW could "change the instructional materials used in a school if they consider them inferior, which means that Commissioner of Education Harold Howe is going to be in complete charge of what is taught your children and my children. The other day [Howe] said in a speech," Wallace continued, "that we are using 'distorted' books in the South, which means the HEW bureaucrats are going to determine what books will be used in the school system." Wallace maintained that the Guidelines were part of an HEW conspiracy to "destroy the public school system as we have known it, and take over every right and vestige of the states, and to completely capture your child." It was HEW which was "trifling with the health and the safety and the security of the minds of our children." But the Guidelines, Wallace said, were "not the law," and he did "not believe any such 'guidelines' [would] ever stand any test. We passed this law in Alabama," he added, "it's now being attacked by the NAACP, but we felt that we could bring [the conspiracy] out into the open" to "prevent a complete takeover of the school system before the people knew about it." By the fall of 1966, Wallace actually *wanted* to take the Guidelines fight into the court, where his defiance would gain maximum him exposure.²⁴

²³ *New York Times*, Feb. 9, 1970; *Los Angeles Times*, March 25, 1970; *Atlanta Constitution*, March 10, 1970; Seay Interview; *Alabama Council Bulletin*, January 16, 1967 (Auburn, AL: Alabama Council on Human Relations), p. 3; *The Citizen*, October, 1966 (Jackson, MS: White Citizens' Councils of America), p. 5-6; see copies of the *Alabama Council Bulletin* and *The Citizen* in *Facts on Film, 1966-67 Supplement*, Miscellaneous Materials. See Frederick, *Command and Control*, p. 297-8, for "High Priest of Segregation," Dr. Henry Lyons, and Citizens' Council / Birch Society associate Jimmy Jones, a Birmingham pharmacist; both were Wallace appointees.

²⁴ *The Citizen*, November, 1966, pp. 7-8.

The *Lee v. Macon* and *NAACP v. Wallace* Trial

That November the general election for governor was held. As some of the state's newspapers described it, voters were "hypnotized" and whipped into a "general psychosis" by George Wallace. They overwhelmingly elected his wife, Lurleen, and thereby inaugurated what has been described as four years of "political ventriloquism." Mrs. Wallace defeated Republican Jim Martin, 538,000 votes to 250,000. Martin had campaigned on a strong but smart defense of segregation, characterizing George Wallace's own defense of the same as defeatist. He won only two of the state's 67 counties. Since Martin was as committed to segregation as his opponent, many blacks voted for Wallace by default. A straight Democratic ticket at least allowed them to vote for the several blacks in various cities and counties who had won their primaries. The Republican surge that had begun to show in the last election had temporarily receded. Alabama's white voters – particularly the lower class and the rural – had been mesmerized by Wallace's brazen defiance of the courts, DOJ, HEW, and the NAACP. The Democratic Party in Alabama, in general, was the beneficiary. Martin's accusations of recklessness in the Wallace Administration's anti-guidelines policy probably only enhanced Wallace's heroic image in the minds of these segregationists.²⁵

Later that month, many Wallace voters could applaud as the defendant state officials in *Lee v. Macon* and *NAACP v. Wallace* submitted their answers to the respective complaints in those cases. The defendants collectively and categorically denied all claims made by the plaintiffs and motioned for dismissal of the complaints. But this was not all. They filed a cross-claim against the United States – then an intervening plaintiff in both cases – alleging that under Title IV of the Civil Rights Act, the 1966 HEW Guidelines and Form 441-B were unconstitutional. If the court had accepted it, this would have had the effect of impleading the U.S. as a "third party defendant." But the cross-claim was "erroneously characterized," insofar as the U.S. was entitled to sovereign immunity and could not be sued as such.

²⁵ Carter, *Politics of Rage*, pp. 288-292, quoting state's newspaper coverage and describing Wallace's stand-in governorship as "political ventriloquism"; see also Frederick, *Command and Control*, pp. 348-9.

The validity of the Guidelines was clearly at issue, however. DOJ attorneys were prepared to litigate the issue, so they waived any formal objections to the claim's mischaracterization or to its "lack of timeliness" and consented to the naming of Commissioner of Education Harold Howe and HEW Secretary John Gardner as parties defendant for this purpose. At the same time, the plaintiffs in *Lee v. Macon* filed a motion to add Wallace as a party defendant in the case in his capacity as governor. Fred Gray filed the motion along with a motion for a preliminary injunction against the governor. Gray asked the court to prevent the governor from implementing the Anti-guidelines Bill. He also asked that the court force Wallace to use the power of his office to facilitate – rather than frustrate – school desegregation on a statewide basis. Wallace answered by denying that he had made any attempts to interfere with local school boards; by claiming that any actions he had taken or statements he had made had been solely in relation to the "unlawfully, arbitrarily, and capriciously applied" Guidelines; and by claiming that ordering injunctive relief against him as governor would constitute "judicial encroachment" and a violation of the separation of powers clauses of the state and U.S. constitutions.²⁶

When the hearing finally convened on November 30, the issues before the four judges included: the constitutionality of both the Alabama Anti-guidelines Act and the tuition grant law; the constitutionality of the revised HEW Guidelines, themselves; the question of whether the defendant state officials – including Wallace as governor – had demonstrated control over local school systems; and the question of whether those officials ought to be not simply enjoined from interference in school desegregation statewide, but ordered to actually effectuate school desegregation on a statewide basis. Finally, there was the question of how the defendant state officials might be ordered to achieve the latter. In addition to their standing obligation to "promote and encourage" statewide desegregation,

²⁶ Order of Nov. 23, 1966, *NAACP v. Wallace*; Joint and Several Answer and Cross-Claim of George C. Wallace, et al., Nov. 22, 1966, *NAACP v. Wallace*; both in *NAACP Lee v. Macon Files*, General Case Material, 1966 (*Papers of the NAACP*, Supplement to Part 23, Reel 7). Motion for Preliminary Injunction and Supplemental Complaint, *Lee v. Macon County Board of Education*, Nov. 21, 1966; Answer of George C. Wallace, Governor, *Lee v. Macon County Board of Education*, Nov. 29, 1966; both in *Frank Johnson Papers: Lee v. Macon Case File*, Container 28, Folder 7.

they could be ordered to withhold state funds from segregating districts. Or they could be ordered to utilize many of the other controls which they allegedly wielded, including the approval of transportation plans, construction plans, architects, textbooks, and curricula, the closure or consolidation of various schools, the allotment of teacher units for the hiring of faculty, and the assignment and reassignment of teachers.²⁷

Fred Gray represented the plaintiffs, along with Melvyn Zarr and Henry Aronson from the NAACP-LDF. The Civil Rights Division's St. John Barrett led the team representing the United States, along with the CRD's Brian Landsberg, HEW's Albert Hamlin, and as a formality, the U.S. Attorney for Alabama's Middle District, Ben Hardeman. Barrett's group represented the U.S. as plaintiffs and Commissioner Howe and Secretary Gardner as impleaded defendants. Birmingham's Orzell Billingsley and Oscar Adams represented the Alabama NAACP, joined by Joan Franklin from the NAACP's New York office and Howard University law professor Frank Reeves, a veteran of the NAACP's trial of the *Brown v. Board* cases. Assistant state Attorney General Gordon Madison appeared for the Macon County Board of Education, and his son-in-law, Tuscaloosa attorney Martin Ray, represented the Tuscaloosa City and County Boards of Education. The defendant state officials were represented by Montgomery attorney Maury Smith and the governor's personal legal advisor, Hugh Maddox. Also representing Wallace was Mississippi's John Satterfield, a former state legislator who had worked closely with the Mississippi Citizens Council and who had represented his state's Sovereignty Commission. Satterfield had also defended Governor Ross Barnett in the case evolving from the attempted enrollment of James Meredith at the University of Mississippi. *Time* magazine would later refer to him as "the most prominent segregationist lawyer in the country." It was a courtroom full of attorneys, and it was a microcosm of the decades-long legal struggle over segregation.²⁸

²⁷ Lee v. Macon Trial Transcript, Nov. 30-Dec. 2, 1966, passim, NAACP Lee v. Macon Files.

²⁸ Lee v. Macon Trial Transcript, Nov. 30, 1966, p. 1-5, NAACP Lee v. Macon Files; on Satterfield, see "Apologist," *Time*, Oct. 31, 1969, p. 70; see also "Biographical Note" in Finding Aid for the John C.

Entering the actual trial, the Department of Justice had already deposed dozens of local superintendents across the state, as well as several state officials, Commissioner Howe, and USOE investigator Gene Crowder. The DOJ attorneys spent weeks traveling the state and conducting the depositions. The U.S. was trying to establish that local school systems were still dual in nature and that the state school board had used its power over them to perpetuate the duality. State control allegedly included the allocation of state funding through construction bond issues, through the allocation of teacher units, the approval of building projects, and the mandatory consolidation of schools. The state had for decades conducted annual system-wide school surveys, which ironically proved invaluable for the plaintiffs in demonstrating both duality and state control. In addition to labeling all schools either “Negro” or “white,” the surveys designated each existing school plant as either satisfactory, in need of repair, or in need of closure. In some cases, the state surveyors recommended plans for consolidation when certain schools were slated to be shut down, and suggested in other cases which potential sites would be most suitable for building new facilities. Of course, no consolidation across racial lines was ever suggested, and no new school was ever proposed to consist of members of both races.²⁹

The DOJ attorneys also wanted to show that each of these superintendents and their respective school boards had initially cooperated with HEW officials until Wallace and Meadows began harassing and intimidating them through their various telephone calls, telegrams, letters, and mandatory meetings. They were particularly interested in the various meetings – at which Meadows had repeatedly urged the local officials to defy the federal authorities and Wallace had threatened to hold community mass meetings to intimidate them. This got particularly awkward when the U.S. attorneys prodded the schoolmen about state harassment involving Wallace’s legal advisor, Maddox, who was

Satterfield/American Bar Association Collection, University of Mississippi J.D. Williams Library, Special Collections and Archives, accessed online at http://www.olemiss.edu/depts/general_library/archives, Jan. 22, 2013.

²⁹ Transcripts of Depositions and Summaries of Depositions, Lee v. Macon County Board of Education, NAACP Lee v. Macon Files: Depositions (*Papers of the NAACP*, Supplement to Part 23, Series A, Section I, Reels 4-6), passim; see sample State Dept. of Ed. school system survey at NAACP Lee v. Macon Files: Background Information (*Papers of the NAACP*, Supplement to Part 23, Series A, Section I, Reel 3).

often present as defense counsel. Maddox and the state officials' other attorneys tried to paint every action by the state as merely suggestive and tried to establish that the local school officials were, themselves, ultimately the sovereign decision makers. The school surveys, for example, were made only upon the request of local school boards and, in the words of one angry superintendent, did not "have a thing in the world . . . to do with [the U.S.'s] case."³⁰

Typically these depositions proceeded with a careful and lengthy direct examination by the Civil Rights Division attorneys. Most superintendents were cooperative and forthcoming, revealing minimal efforts to comply with federal law, heavy pressure from state officials not to go "beyond the law," and similarly heavy pressure from their respective white communities. Most had their own counsel present, but this did not deter some from speaking frankly and openly. J.R. Snellgrove of the south Alabama Wiregrass's Enterprise city system certainly did not let the formality of the proceedings temper his candor. In describing the demographics of his city, Snellgrove indicated, "We have three sections of the nigger race in Enterprise." Asked to summarize the demographics of the schools in the system, Snellgrove continued, "Holly Hill doesn't have anything except white people. There is not a nigger that lives over in that section of the community. . . . I believe we have at this time ten niggers in the Hillcrest Elementary there." He listed further, "College Street Elementary, 565 whites and 26 niggers. That's an elementary school, one through six. Enterprise Junior High School, that's seventh and eighth grade, 535 whites and fifteen niggers. Enterprise High School is 912 whites and ten niggers. Coppinville High School, 389 niggers, that's seven through twelve." Like many others, Enterprise had only two full-time teachers in desegregated assignments. Snellgrove explained that at Enterprise High, there were "thirty-five white teachers, full time teachers, one nigger, full time teacher, and then one part time . . ." At all-black Coppinville, he said, "We have full time one white teacher, eighteen full time niggers and one part

³⁰ Transcripts of Depositions and Summaries of Depositions, Lee v. Macon County Board of Education, NAACP Lee v. Macon Files: Depositions (*Papers of the NAACP*, Supplement to Part 23, Series A, Section I, Reels 4-6), passim, and citing specifically Deposition of Charles H. Parrish, Superintendent of Fayette County Schools, Oct. 26, 1966, Russellville, AL (Reel 5, Frame 653), pp. 14-5.

time white teacher.” He almost forgot, “Plus we have a guidance counselor over there. Of course, she is nigger . . .” Many of the state’s local education leaders were more tactful, at least, but Snellgrove was not an anomaly.³¹

Having deposed the local superintendents prior to the trial, none of the plaintiffs’ counsel saw any need to call them to testify when the actual trial began. Fred Gray thus began the proceedings by calling Austin Meadows. From the beginning, it was a tense and unlikely exchange. Gray introduced a statement Meadows had made months earlier, in which the state superintendent had lauded Alabama’s equalization program. Meadows had pointed out that “through out-of-state aid, the minority group has been able to attend colleges that have been superior to colleges in the state of Alabama in the past.” Gray asked if the state still provided these grants, which it did. What was the purpose of the program, he asked? Meadows replied that it was designed to “give [Negroes] college advantages that they . . . are not able to get in the state of Alabama.” It had been in existence since 1945. Meadows added, “I approved a grant for out-of-state aid for you to study law.” It was true. Meadows had been state superintendent when Gray was a young graduate of Alabama State College for Negroes, bound for Case Western Reserve School of Law, since no law schools in Alabama would accept a black person. Now Meadows was seated before the already accomplished Gray, forced to recount his many interferences with the lawful operation of local school systems in Alabama.³²

Meadows was consistently evasive but was forced to admit to having urged non-compliance at the statewide superintendents’ meetings. He also had a hard time explaining away the many telegrams and letters he had sent to local school officials. The most egregious was the “segregation is a perfectly good word” memo to all local superintendents which Gray read in its entirety to the grinning federal panel. In addition to that, there was a letter urging the Lauderdale school board to reconsider its 12-

³¹ Deposition of J.R. Snellgrove, Superintendent of Enterprise City Schools, Oct. 21, 1966, Lee v. Macon County Board of Education, pp. 10-11, in NAACP Lee v. Macon Files: Depositions.

³² Lee v. Macon Trial Transcript, Nov. 30, 1966, passim, quoting from pp. 21-2.

grade desegregation plan. There was also a letter to Tuscaloosa County officials, in which Meadows offered to assign two new teacher units to the system so that the school board could offer white students a choice between white and black teachers. Meadows had also offered to have the department of education's building authority (consisting of himself, Wallace, and a Wallace crony) approve two additional classrooms for Tuscaloosa County as well. He acknowledged making a statewide offer to do the same for any school systems faced with having to assign black teachers to white schools. Perhaps most damaging of all was a reply which Meadows had sent to a woman from Holt, Alabama, a suburb of the city of Tuscaloosa. Gray forced the state superintendent to read from the letter: "A strong stand by people like you will help to prevent assignment of Negro teachers to white schools and percentage or quota assignments of pupils from a school of one race to a school of another race. Meadows continued, "I am sorry that your School Board has not followed the recommendation which I made . . . to all County and City Superintendents of Education in Alabama." The few school systems who had signed compliance agreements had "jeopardized the other school systems," because HEW had been emboldened into thinking that other systems could subsequently be "browbeaten into doing likewise." If only "all school boards had followed [my] recommendation," he lamented, "we would be better off."³³

The state superintendent was visibly annoyed by Gray's insistent and pointed questioning. He occasionally propped his feet up in the witness stand and scratched his nose with his tie, and he often stared up at the ornately deigned wooden ceiling as he replied simply "yep" and "yeah" to Gray's questioning. Finally, Gray got Meadows to at least reluctantly admit that his office had done nothing to promote or encourage the elimination of dual school systems, and that he, himself, had some discretionary power over state funding. He introduced telegrams which Meadows had sent to local school boards threatening to withhold state funds if the systems did not respond to an earlier request to report on their Form 441-B status. Meadows was requiring the reports, ostensibly, so that he could

³³ Lee v. Macon Trial Transcript, Nov. 30, 1966, passim, quoting from p. 73; *Los Angeles Times*, Dec. 1, 1966; *New York Times*, Dec. 1, 1966.

determine which school systems to shake down. In court he tried to defend the telegraphed threats by claiming, "School Board has to turn in a budget before we can allocate money." Gray asked him to clarify, "Now the report you are referring to there is what action they had taken with respect to HEW Guidelines . . . the execution of Form 441-B?" Meadows said, "Well, that's right."³⁴

The U.S.'s case was largely supported by the many depositions it had taken and by the state department of education documents it had obtained in discovery. There were few witnesses to call. St. John Barrett did call the department of education's finance and administration director, George Leslie Layton, who tried to avoid admitting that the state authorities encouraged the maintenance of dual school systems. Barrett was trying to establish that the many annual school surveys conducted by the department indicated as much. He was joined by Aronson for the NAACP, who was able to get Layton to admit, like Meadows, that the state had done nothing to encourage desegregation. Defense attorney Maury Smith continued to try and establish that the state never acted in more than an advisory capacity and that it had no real authority over funding. For all of the plaintiff parties, the damage had largely already been done and the case made by the Civil Rights Division staff. By midday on the second day, the NAACP, the LDF, and the U.S. rested.³⁵

The defense attorneys made the mistake of calling a number of local superintendents to the stand. This was an attempt to show that HEW had made "ridiculous demands" of the local school systems and that neither Meadows nor Wallace had done anything other than advise not going "beyond the law." According to this line of reasoning, systems had been in compliance with HEW's 1965 Guidelines, but Gene Crowder had come in and begun making demands to "go beyond the law." Upon

³⁴ Lee v. Macon Trial Transcript, Nov. 30, 1966, passim, quoting from p. 73; *Los Angeles Times*, Dec. 1, 1966; *New York Times*, Dec. 1, 1966.

³⁵ The state NAACP had initially been barred from participating in the proceedings because of a failure to fully answer certain interrogatories, but by the second day of the hearing they had complied and answered and could participate. Frank Reeves then called Montgomery NAACP leader E.D. Nixon to testify to the NAACP's statewide membership and organizational goals, namely desegregation of schools. Lee v. Macon Trial Transcript, Nov. 30, Dec. 1, 1966, passim, NAACP Lee v. Macon Files: Transcripts, Nov.-Dec., 1966 (*Papers of the NAACP*, Supplement to Part 23, Series A, Section I, Reel 9).

cross examination, particularly by Barrett, Aronson, and Gray, several of the superintendents were forced to admit to certain damaging realities which seemed to indicate that the harassment came, if anywhere, from the state. Reluctant testimony revealed that county school boards routinely accepted black students from within autonomous all-white city systems in order to preserve the latter's racial integrity. The superintendents also indicated that many systems which purported to have been in compliance with the original HEW Guidelines never actually were. Several of them confessed that it "would take a court order" for their school board to ever operate a singular, non-racial school system. The admitted necessity of a court order was so damning that Satterfield began objecting to Gray and Aronson's lines of questioning, and Rives was obliged to sustain.³⁶

Satterfield made a bold move himself in calling U.S. Senator Lister Hill. Over the objections of Barrett, Aronson, and Gray, Hill testified to debates within the Senate Appropriations Committee concerning the HEW Guidelines vis-à-vis the Civil Rights Act.³⁷ Senator Byrd from Virginia had argued that the Guidelines exceeded the statutory authority of the Civil Rights Act, and the committee as a whole had instructed HEW to heed the warning of Congress not to establish "onerous guidelines that contravene . . . legislative intent." On cross Gray established that Hill had not once voted for a civil rights bill in his many years in Congress. He also introduced commentary from the Congressional Record in which Senators Hubert Humphrey and Jacob Javits argued that the 1964 bill was not intended to correct racial imbalance. The trial could have dragged on for several days, but the parties agreed to stipulate much, and the court indicated its preference that the mountain of evidence be summarized in briefs rather than introduced in an extended hearing. After the defense rested its case, the court gave

³⁶ Lee v. Macon Trial Transcript, Nov. 30, Dec. 1, 1966, passim, NAACP Lee v. Macon Files: Transcripts, Nov.-Dec., 1966 (*Papers of the NAACP*, Supplement to Part 23, Series A, Section I, Reel 9).

³⁷ Upon the objections, the court disallowed Hill's testimony in NAACP v. Wallace, as to the constitutionality of the Guidelines. Fred Gray then suggested that the plaintiffs had no reason to object to the testimony in Lee v. Macon, however, and the court allowed it to be considered in that case.

all parties 30 days to file post-trial briefs and deposition summaries. Another hearing was then to be held in early February, after which the court would finally decide the cases.³⁸

The Fifth Circuit and *U.S. v. Jefferson*

Even as the *Lee v. Macon / NAACP Wallace* hearing was concluding, the Fifth Circuit Court of Appeals was considering the United States' consolidated appeals in the Jefferson County, Fairfield, Bessemer, and Caddo Parish, Louisiana cases. Along with these were appeals from private plaintiffs in the Jefferson County case (originally styled *Stout v. Jefferson* prior to the U.S.'s intervention), and two other Louisiana cases. The appeals were collectively styled *United States v. Jefferson County Board of Education*. Many of the same attorneys from the *Lee/NAACP* cases had worked on these cases, on both sides, including Barrett, Landsberg, Billingsley, Adams, and Satterfield. The Civil Rights Division had initially appealed the various decisions seeking expedition of each system's substandard desegregation plan. When HEW issued the revised Guidelines, the CRD asked the court to consolidate the appeals and to approve a model decree for the circuit, allowing for uniform-style elimination of dual systems, rather than the haphazard style which had theretofore prevailed. The panel considering the appeals included District Judge Harold Cox (sitting specially because of an overloaded docket), Circuit Judge Homer Thornberry, and crucially, Circuit Judge John Minor Wisdom. Cox was an out-and-out segregationist from Mississippi who had only recently come around to the unfortunate reality that at least token desegregation of schools was inevitable. Thornberry was a recent Lyndon Johnson appointee who had previously held the President's vacated seat in the Congress. He and Wisdom had already signaled their desire for the court to move much more forcefully in school desegregation cases. Wisdom, in particular, had reached the end of his patience with southern school systems. In *Singleton v. Jackson I*, Wisdom

³⁸ Lee v. Macon Trial Transcript, Dec. 1, Dec. 2, 1966, passim, NAACP Lee v. Macon Files: Transcripts, Nov.-Dec., 1966 (*Papers of the NAACP*, Supplement to Part 23, Series A, Section I, Reel 9); *Birmingham News*, Dec. 2, 1966; *Los Angeles Times*, Dec. 2, 1966; *New York Times*, Dec. 2, 1966.

had declared that the court attached “great weight” to the original HEW Guidelines and called for an end to “footdragging,” and in *Singleton II*, he had reaffirmed the court’s support of the Guidelines in light of the revised provisions on faculty desegregation. In August, Thornberry and Fifth Circuit Chief Elbert Tuttle had issued a ruling in the *Davis v. Mobile* case, in which they again reversed Judge Daniel Thomas’s trial court and ordered Mobile to accelerate its desegregation plan to conform with the Guidelines’ target date of fall 1967 for all-grade desegregation. In the *Davis* ruling, Tuttle had lamented trial court recalcitrance and had issued a stinging rebuke of those calling for the maintenance of “neighborhood schools” – the latest evasive trope being deployed by segregationists.³⁹

In December the court handed down what has been described by legal scholars as a “landmark” decision which “thrust law to the forefront of social change.” Wisdom wrote for the majority, with Cox dissenting. “*The only school desegregation plan that meets constitutional standards,*” Wisdom emphasized, “*is one that works.*”⁴⁰ The appellate court again held that lower courts in the circuit “should give ‘great weight’ to the HEW guidelines.” The Guidelines, Wisdom continued, “are based on decisions of this and other courts, are within the scope of the Civil Rights Act of 1964, are prepared in detail by experts in school administration, and are intended by Congress and the executive to be part of a national program.” In short, they presented “the best system available for uniform application, and the best aid to the courts in evaluating the validity of a school desegregation plan and the progress made under that plan.” Wisdom noted that school systems under court order automatically qualified for federal financial assistance under the Guidelines if they were in compliance with a final order of a federal court. Accordingly, “strong policy considerations” supported the court’s holding that “the standards of court-supervised desegregation should not be lower than the standards of HEW-supervised

³⁹ *United States v. Jefferson County Board of Education*, 372 F.2d 836 (1966); *Singleton v. Jackson I*, 348 F.2d 729 (1965); *Singleton v. Jackson II*, 355 F.2d 865 (1966); *Davis v. Board of School Commissioners of Mobile County*, 364 F.2d 896 (1966); Belknap, *Administrative History of the Civil Rights Division of the Department of Justice During the Johnson Administration*, pp. 68-70; “The Courts, HEW, and School Desegregation,” *Comment, Yale Law Journal* 77 (Dec., 1967): pp. 321-365, pp. 350-2.

⁴⁰ Italics in original, p. 847.

desegregation.” The court would not permit itself to “be used to destroy or dilute the effectiveness of . . . congressional policy . . .” He concluded, “There is no bonus for foot-dragging.” The Guidelines were – and ought to be – “substantially the same as” the Fifth Circuit court’s standards. District courts in the circuit were, therefore, instructed to “make few exceptions to the guidelines” in evaluating desegregation plans.⁴¹

The court considered itself obligated to cooperate with the Congress and the Executive in enforcing Title VI, and the Guidelines were “within the scope of the congressional and executive policies embodied in the Civil Rights Act of 1964.” The defendants had argued, of course, that the Guidelines “went beyond the law” as Congress had intended it. The court disagreed. Congress had bristled at any inclusion of cross-town or cross-district bussing, but the Guidelines had no provisions for such. The requirement that teachers be given desegregated assignments was not an infringement upon systems’ hiring practices, only on their placement practices, which sustained the systems’ duality. There were no provisions demanding pupil placement to achieve numerical benchmarks. The percentages were meant to be “general rules of thumb” or an “objective administrative guide.” Good faith had to be measured by something other than “promises,” Wisdom determined. Defendant state officials in Alabama had argued that the Guidelines required “integration” as opposed to simply “desegregation,” and that courts had supposedly not bound school boards to fully integrate. This argument rested almost solely on *Briggs v. Elliott*, the 1955 holding of District Judge John Parker of South Carolina in one of the remanded *Brown* cases. Segregationists had immediately pounced on – and had since clung to – Parker’s contention that “the constitution does not require integration; it merely forbids discrimination.” Wisdom had already suggested in *Singleton I* that this interpretation ought to have been “laid to rest.”

⁴¹ United States v. Jefferson County Board of Education, 372 F.2d 836, 845-8; *Birmingham News*, Jan. 12, 13, 14, 1967; *New York Times*, Dec. 29, 1966; Belknap, *Administrative History of the Civil Rights Division of the Department of Justice During the Johnson Administration*, pp. 68-70; Wilkinson, *From Brown to Bakke*, pp. 111-14, quoted as “legal scholar”; Owen Fiss, *Injunctions* (Foundation Press, 1972); pp. 649-50; Bass, *Unlikely Heroes*, pp. 297-310.

In *Jefferson* he dug the grave, writing that the “portion of the opinion most quoted” was “pure dictum.”

Briggs, he argued:

Did not paraphrase the law as the Supreme Court stated it in *Brown* or as the law must be stated today in the light of *Aaron v. Cooper*, *Rogers v. Paul* and *Bradley v. School Board*. These and other decisions compel states in this circuit to take affirmative action to reorganize their school systems by integrating the students, faculties, facilities, and activities.⁴²

Wisdom pointed out, for effect, that the school system under scrutiny in *Briggs* was still segregated ten years later.⁴³

The “Briggs Dictum” could be, according to the court, “explained as a facet of the Fourth Circuit's now abandoned view that Fourteenth Amendment rights are exclusively individual rights and in school cases are to be asserted individually after each plaintiff has exhausted state administrative remedies.” This “abandoned view” was the basis for Parker’s holding in the *Carson v. Warlick* case. By the early 1960s, the Fourth Circuit court had moved away from this interpretation and had begun to entertain class suits aimed at abolishing discriminatory practices. The Supreme Court had since held that administrative remedies need not be exhausted. It was, as one district court put it, “almost a cruel joke” to suggest that administrative remedies in these cases would actually bring about the abolition of dual systems. Wisdom concluded that “in the sense that an individual pupil's right under the equal protection clause is a 'personal and present' right not to be discriminated against by being segregated, the [*Briggs*] dictum is a cliché.” If the *Briggs* court had intended “integration” to mean “absolute command at all costs that each and every Negro child attend a racially balanced school,” then the dictum might have been defensible. But according to Wisdom, what was wrong about *Briggs* was “more important than what [was] right.” It drained *Brown* of its “significance as a class action to secure equal

⁴² *United States v. Jefferson County Board of Education*, 372 F.2d 836, 862.

⁴³ *United States v. Jefferson County Board of Education*, 372 F.2d 836, 848-62; *Singleton v. Jackson*, 348 F.2d 729, at 730 n. 5.

educational opportunities for Negroes by compelling the states to reorganize their public school systems.”⁴⁴

The court had thus tightly embraced the HEW revised Guidelines and had attempted to inter the *Briggs* Dictum once and for all. But what was most significant about *Jefferson* was the relief the court fashioned. Wisdom wrote that “*the only adequate redress for a previously overt system-wide policy of segregation directed against Negroes as a collective entity is a system-wide policy of integration.*”⁴⁵ Segregated education was “an integral element in the Southern State’s general program to restrict Negroes as a class from participation in the life of the community, the affairs of the State, and the mainstream of American life.” Concomitant with this was “the stigma of apartheid condemned in the Thirteenth Amendment.” This was why *Brown II* had prescribed class-based relief, affirming blacks’ collective right to “unitary, non-racial systems.” Indeed, there would have been no need for the delay justified by the phrase “all deliberate speed” if “the right at issue in *Brown* had been only the right of individual Negro plaintiffs to admission to a white school.” *Brown* and *Brown II* rested not only on the finding that segregated school systems were a psychologically harmful denial of equal opportunity, but also on the recognition that “state-imposed separation by race is an invidious classification and for that reason alone is unconstitutional.” If the assumptions of *Briggs* continued to rule the day, then that separation would “continue indefinitely.”⁴⁶

Briggs had been intended to limit relief to tokenism, and Wisdom was trying to remove what he and others felt was the main jurisprudential impediment to the realization of the promise of *Brown*. The mechanism behind the *Briggs* order was, of course, the freedom of choice plan. As construed by school boards at the time, free choice plans provided “little prospect of . . . ever undoing past discrimination or of coming close to the goal of equal educational opportunities,” according to Wisdom. In fact, they

⁴⁴ United States v. Jefferson County Board of Education, 372 F.2d 836, 862-5.

⁴⁵ Italics in original, p. 869.

⁴⁶ United States v. Jefferson County Board of Education, 372 F.2d 836, 865-71.

“necessarily promote[d] resegregation.” The “central vice” in dual systems remained in 1966 “apartheid by dual zoning.” Until this was eradicated, freedom of choice remained “better suited” than any other method of desegregation to “preserve the essentials of the dual school system while giving paper compliance with the duty to desegregate.” For these reasons, the court determined that “the only relief approaching adequacy” was the “conversion of the still-functioning dual system to a unitary, non-racial system – lock, stock, and barrel.” Because the court did not specifically hold that freedom of choice was unconstitutional, or even wholly undesirable, on its face, many contemporaries overlooked Wisdom’s writing on the proverbial wall. Freedom of choice ideally meant “the maximum amount of freedom and clearly understood choice in a *bona fide* unitary system where schools are not white schools or Negro schools – just schools.”⁴⁷

The court did not attempt to jettison freedom of choice altogether, but it included in *Jefferson* a set of uniform judicial standards for the circuit. This was embodied in a uniform remedial decree, which was intended to make freedom of choice “more than a mere word of promise to the ear.” Wisdom channeled Cicero through the state of Georgia, writing that “there should not be one law for Athens [GA] and another for Rome [GA].” The decree indicated that all desegregation plans include the following provisions: all-grade desegregation by 1967-68; mandatory annual choice of schools for all pupils; adequate notice given to all parents and students; desegregation of services, facilities, activities, and programs; school equalization; scheduled reporting to the court on the progress of desegregation; and the desegregation of faculty and staff, to begin immediately. Progress was to be measured by asking the question, “Has the operation of the promised plan actually eliminated segregated and token-desegregated schools and achieved substantial integration?” Wisdom acknowledged that the USOE would continue to monitor the bulk of the systems in the circuit, but he added that the court’s embrace

⁴⁷ United States v. Jefferson County Board of Education, 372 F.2d 836, 871-90.

of the Guidelines did not preclude pupils or school officials from bringing suits to challenge the implementation, or lack thereof, of specific school systems' desegregation plans.⁴⁸

Cox's dissent was vigorous. He warned, "If the majority opinion in these cases is permitted to stand, it will, in the name of protecting civil rights of some, destroy civil rights and constitutional liberties of all of our citizens, their children, and their children's children." Cox argued that "judicial haste and impatience" could not "justify . . . equating integration with desegregation." No court, he wrote, had yet "been heard to say that this court now has the power and the authority to force integration of both races upon these public schools without regard to equitable considerations or the will or wish of either race." Wisdom and Thornberry sought to "disparage [*Briggs*] as dictum," Cox wrote, but the Fifth Circuit had "in several reported decisions . . . embraced and adopted *Briggs* with extensive quotations from it as the decisional law of this circuit." He suggested that the *Jefferson* appeals be reheard *en banc*, concluding that, "Surely, only two of the judges of this court may not now single-handedly reverse those [previous] decisions and change such law of this circuit." The attorneys for the defendant Alabama school systems agreed and soon asked for such a rehearing. They indicated that they were also prepared to appeal the decision to the Supreme Court if necessary. In early 1967, the Fifth Circuit agreed to hear the cases *en banc*.⁴⁹

On January 16, 1967, Lurleen Wallace became Alabama's first female governor, and George Wallace became its first and only regent. In her inaugural address, Lurleen called her election a "notice to all the world that the strength and determination of a free people to defend the principles of self-government will not be suppressed by force – force from China, from Russia, from Cuba, or from

⁴⁸ United States v. Jefferson County Board of Education, 372 F.2d 836, 890-8; Wilkinson, *From Brown to Bakke*, pp. 112-114.

⁴⁹ United States v. Jefferson County Board of Education, 372 F.2d 836, 905-10; *Birmingham News*, Jan. 28, 1967; *School Desegregation in the Southern and Border States*, Jan., 1967; Wilkinson, *From Brown to Bakke*, p. 114.

Washington, D.C.” She lamented the “menace to the welfare of our children” that was school desegregation. “Even now,” she said, “a federal agency attempts to tell us the schools our children shall attend, to regulate the contents of their textbooks, who shall teach them, and with whom our children shall associate.” It was, she concluded, “an effort to gain control of [their] hearts and minds. I resent it,” she declared, and “as your governor and as a mother, I shall resist it.”⁵⁰

Austin Meadows had seen enough of the struggle. He retired and made way for a new state Superintendent of Education, Dr. Ernest Stone. Upon leaving office, Meadows remained obdurate. With no apparent concept of irony, he declared that the “greatest public school handicap” was the “federal destruction of local school board authority in the assignment of teachers and pupils,” which would soon “destroy the educational function of the public schools and finally the state public school systems.” He called “mass integration” a failure “at the national level in the District of Columbia as evidenced by the fact that 93 percent of the public school pupils are Negroes.” Similarly, “mass integration” was a failure in Lowndes, he contended, as 114 of the 118 students enrolled at Hayneville High were black. The nation was headed for a “tragic era” if the federal government did not realize that the South needed more than “the federal bayonets of Little Rock or the federally-supported marches against state and local constitutional authority.”⁵¹

Meadows’ successor in office tried to distance himself from the behavior of his predecessor. In doing so, however, Stone made clear that his would simply be a more thoughtful defense of the statewide dual school system. Like any successful white Alabama politician, he was an admitted segregationist. He indirectly lamented the recklessness of the previous administration, saying that Alabamians should have “prayed as much as [they had] cussed” since the “1954 ‘Black Monday’ decision.” This would have left the state in “much better shape.” He acknowledged that “laws and court orders have to be obeyed” but indicated that his state education department would not move on

⁵⁰ *School Desegregation in the Southern and Border States*, Jan., 1967.

⁵¹ *School Desegregation in the Southern and Border States*, Jan., 1967.

desegregation any more than it absolutely had to. In a pithy encapsulation of the law and order creed, Stone said, “We do not want to be belligerent . . . but we will volunteer no more.” Stone’s truest feelings were perhaps best expressed by a letter he wrote to the governor in August, 1965, when he was superintendent of the Jacksonville city system. Stone flaunted his segregationist credentials before the governor, reminding him that he was from northeast Alabama’s Sand Mountain, a long narrow plateau populated by mostly poor, white chicken farmers. “I was a big boy of several years before I even saw a negro,” Stone wrote, “In fact a negro was not allowed to travel over Sand Mountain when I was a boy.” Stone added that he and the Jacksonville Board of Education had done “only what we had to do in order to keep our schools open. . . . I will match my segregation philosophy and beliefs with any man in Alabama.” It impressed Wallace enough to put Stone atop the list of candidates to replace the retiring Meadows.⁵² The new Wallace Administration, then, would be not be substantially different than the old. The only question was, what legal obligations would state officials have, particularly Stone himself?⁵³

A statewide desegregation order via *Lee v. Macon* seemed possible, if not likely. At best the state’s anti-guidelines and tuition-grant legislation appeared destined for invalidation. Some segregationists held out a reasonable hope that the potentially crushing blow delivered in *U.S. v. Jefferson* would be softened by the *en banc* rehearing or challenged by the ruling in *NAACP v. Wallace*. If not, the HEW Guidelines were not only “*within the law*,” they were bare-minimum standards for the courts, which appeared poised to become the prime arbiters of school desegregation in the state, pending the *Lee v. Macon* outcome. Beyond these immediate concerns, some had ascertained that Wisdom’s lengthy critique of freedom-of-choice might possibly be embraced by the Supreme Court. Certainly, any perceptive and objective observers of the realities of token desegregation in Alabama’s

⁵² Underline in original.

⁵³ *School Desegregation in the Southern and Border States*, Jan., 1967; see, for Stone quotation, United States’ Supplemental Complaint and Proposed Decree, Feb. 26, 1967, *Lee v. Macon County Board of Education*, p. 8 fn. 4, in Frank Johnson Papers: *Lee v. Macon* Case File, Container 19, Folder 7.

schools understood the limitations of the present system. Not only were Alabama segregationists facing a statewide order, then, they were facing the reality that token desegregation was not the worst that could happen. Many of the state's whites had only lately come around to the reality that token desegregation was a lamentable necessity. In the Black Belt, many had refused to accept even this. Most continued to believe that *segregation* really was "a perfectly good word." Litigation was about to force them to come to terms with more than just HEW-recommended tokenism, however. Wisdom's contention that "*the only adequate redress for a previously overt system-wide policy of segregation*" was "*a system-wide policy of integration*" would soon impact the entire state, even the entire South, in a way that few could have imagined when Detroit Lee first approached Fred Gray in Tuskegee almost a decade earlier.

1967

Frank Johnson made the cover of *Time* magazine in May, 1967. It featured an oil portrait of the judge, with characteristically stern and intense gaze and closely cropped hair, underneath a banner reading "The Law and Dissent." In the article, entitled "Interpreter in the Front Line," Johnson remarked on the widespread defiance of the law by state and local officials in Alabama and described his legal philosophy relative to civil rights cases. "I'm not a segregationist," he said, "but I'm not a crusader either. I don't make the law. I don't create the facts. I interpret the law." Johnson added, "I don't see how a judge who approaches these cases with any other philosophy, particularly if he was born and reared in the South, can discharge his oath and the responsibility of his office." The piece also described the beginning of a typical proceeding in Johnson's courtroom: "Through a door in the starry wall strides the judge, lean and tanned in his unvarying crisp black suit, white shirt and black tie. He usually shuns robes: 'If a judge needs a robe and a gavel, he hasn't established control.'"¹

In the first six months of 1967, Johnson established that courtroom as the seat of control over school desegregation in Alabama. Nearly 15 years after the *Brown* decisions, local school systems were still segregated, and state officials were still doing everything in their power to keep it that way. By the end of that spring, however, the three-judge court hearing *Lee v. Macon County Board of Education* had entered a statewide desegregation order and brought 99 of the state's school systems under the umbrella of that single case. Through an agreement with the other two judges, Johnson himself took on the bulk of the work in administering what became the first statewide structural injunction in U.S. legal history. Many had assumed that desegregation in the state would continue to proceed according to the dictates of the Department of Health Education, and Welfare (HEW) and its Guidelines for compliance

¹ "Interpreter in the Front Line," *Time*, Vol. 89, No. 19 (May 12, 1967): pp. 84-93.

with Title VI of the Civil Rights Act of 1964. But with the 1967 orders in *Lee v. Macon*, the court – and in essence Johnson himself – took up the responsibility of enforcing compliance.

The mechanics of this arrangement were certainly more complex than such a statement suggests. The Department of Justice's Civil Rights Division (CRD) played an indispensable role for the court. Once he was enjoined, so did state Superintendent of Education Ernest Stone. HEW battled to maintain its enforcement authority, but the court was forced to enjoin the department from cutting off federal funds to school systems in the state in order to protect the integrity of the statewide decree. Ultimately, it was local school authorities themselves who carried out desegregation plans. The *Lee v. Macon* order freed them from state interference and, just as importantly, freed them to blame the federal court and alleviate white community pressure. But the primary authority ensuring compliance, from March, 1967 onward, manifested itself in the Montgomery courtroom of Frank Johnson. Simply put, there was widespread defiance of the law in Alabama, and Johnson understood that, at that point, the quickest and easiest way to put an end to it was through the court. In a sense this meant his court alone.

Lee v. Macon and NAACP v. Wallace Back in Court

Entering 1967 there was some hesitation and disagreement among the four judges considering *Lee v. Macon* and *NAACP v. Wallace*. The four judges agreed on much. They all agreed that Alabama state officials had clearly interfered with local school systems' ability to fulfill their constitutional obligations to eliminate dual school systems. Incoming Superintendent Stone had filed a motion to dismiss, claiming that he ought not be held accountable for the sins of his predecessor. But, the court was in agreement that the 1964 *Lee v. Macon* injunction bound Meadows' successors in office, and that in any case, Stone had stated no grounds as to why the case was moot as to him. There was also no question that the Alabama tuition grant and anti-guidelines measures were unconstitutional. They had

not agreed on everything, however. After the *U.S. v. Jefferson* decision in late December, 1966, the judges struggled over whether or not to wait for the Fifth Circuit Court of Appeals to decide that appeal *en banc* before issuing their own rulings. The decisions of the three-judge court were directly reviewable to the Supreme Court; was the trial court bound, then, to follow circuit court precedent? Johnson believed it was. He felt this was especially so, in fact, considering that the three-judge court was, itself, an institutional safeguard against haphazard invalidation of state statutes or irresponsible use of injunctive relief against state officials. A decision of the appellate court sitting *en banc*, furthermore, required special deference. Johnson felt strongly that they should wait, but there was some dissension on this point.²

The judges could also not agree on the constitutionality of the HEW revised Guidelines and, as a consequence, the nature of the relief the court would grant in *Lee v. Macon*. The question of whether the Guidelines exceeded the Congressional mandate was a serious one, and to make matters worse, President Johnson had apparently failed to formally approve them. At a hearing on February 3, presiding Judge Richard Rives hammered the attorneys for the NAACP and the CRD with questions and generally expressed concern that the Guidelines “might transcend the legislative authority granted by Congress in the 1964 Civil Rights Act.” At one point, Rives said, “It worries me whether there is any requirement of integration beyond true freedom of choice. I think there are some Negro children,” he continued, “who prefer to go to purely Negro schools and some white children who prefer to go to purely white schools.” Rives was holding to the *Briggs* Dictum interpretation – that the thrust of post-*Brown* litigation had been, rightly, towards “the elimination of discrimination not the mixing of races.” The Guidelines’ percentage provisions, he felt, were sure to ultimately result in “forced mixing.” At one point he asked the CRD’s St. John Barrett, “If you classify students by race for the purpose of forced

² Frank Johnson to Richard Rives, Hobart Grooms, and Virgil Pittman, Feb. 15, 1967 (P.S. Feb. 16, 1967); Frank Johnson to Richard Rives and Hobart Grooms, March 15, 1967; Richard Rives to Frank Johnson, March 14, 1967; all in Frank Johnson Papers: Lee v. Macon Case File, Container 28, Folder 6.

integration, aren't you coming close to depriving people of their rights under the equal protection provision of the Constitution?" Later when the LDF's Henry Aronson suggested that freedom of choice was not working, Rives referenced the distinction again, saying, "If the goal is to mix, I will concede that freedom of choice will not work, but if the goal is to abolish discrimination, then . . . it might work."³

Barrett maintained that the often-quoted sections of the Civil Rights Act which seemed to run contrary to the revised Guidelines were "at most . . . a limitation of the Commissioner [of Education]'s power to take corrective action with respect to *de facto* desegregation." He argued that Congress had intended only to limit enforcement in metropolitan areas outside the South where "racial imbalance" (a synonym for *de facto* segregation) was supposedly not the result of an official school board policy of dual racial zoning. The CRD also argued that the Guidelines were not an exercise of the rule-making authority of the USOE but were simply a "statement of enforcement policies" and, therefore, were not subject to presidential approval. Finally, Barrett suggested that the court enter an order that would require every school system in the state to implement a desegregation plan similar to those already ordered in other cases in the state. The CRD had at one point suggested bringing only HEW-non-complying school systems under a *Lee v. Macon* order. To Barrett's revised suggestion, Johnson joked, "Your proposition for the court to go into the guidelines business is very interesting." He was ready to validate the Guidelines and enter some sort of statewide order. Rives was clearly not. Judges Virgil Pittman and Hobart Grooms looked to provide the swing votes on these aspects of the case. Grooms thought *Briggs* should remain settled law, but he was not on the panel considering the Guidelines. Pittman was. He had just been appointed to the federal bench the previous summer, having been a state circuit judge in Gadsden. The World War II Navy veteran from a poor Wiregrass farming family was likely to side with Judge Johnson and validate the Guidelines, but Rives' trepidation commanded

³ Frank Johnson to Richard Rives, Hobart Grooms, and Virgil Pittman, Feb. 15, 1967 (P.S. Feb. 16, 1967); Frank Johnson to Richard Rives and Hobart Grooms, March 15, 1967; both in Frank Johnson Papers: Container 28, Folder 6; *School Desegregation in the Southern and Border States*, Feb., 1967, SERS; *Birmingham News*, Jan. 28, 1967.

respect. At the end of the day-long hearing, the court asked for briefs on the difference between *de jure* and *de facto* desegregation and on the necessity of presidential approval.⁴

To an extent, the questions debated at the February hearing were not controlling. The sticking point in *NAACP v. Wallace* was clearly the validity of the Guidelines themselves. But the judges did not feel it was necessary to even consider the Guidelines in determining the need for some sort of injunctive relief in *Lee v. Macon*. Nor did the court need to consider their validity in determining the *invalidity* of the state's anti-guidelines measure at issue in *NAACP v. Wallace*. The defendant state officials had obviously flouted the Constitution, the *Brown* decisions, and the 1964 *Lee v. Macon* decision in perpetuating an official, statewide, segregated system and in frustrating local systems' limited efforts to comply with the law. The remaining question in *Lee* was: would the resulting decree run only to the defendant state officials, as had the 1964 decree; would it run to local school systems as well, but only to the systems which were not in compliance with the HEW guidelines; or would it run to all school systems in the state not already under court order? The first choice would have been a weak response to brazen and continuous defiance of the law. The second presented a different problem. In this scenario, the three-judge court in *NAACP v. Wallace* might go against Wisdom's recent *U.S. v. Jefferson* ruling and declare the Guidelines invalid, and the three-judge court in *Lee v. Macon* might, at the same time, excuse school systems from its decree based on their compliance with the very same Guidelines. This would be, in Johnson's words, "quite inconsistent." So, he counseled patience.⁵

Rives polled the active judges of the circuit on the matter of timing: when should the three-judge panels in *Lee v. Macon* and *NAACP v. Wallace* release their opinions, relative to the pending *en*

⁴ Supplemental Brief of the United States, Feb. 22, 1967, *NAACP v. Wallace*, pp. 2-10, in *NAACP Lee v. Macon Files: General Case Material (Papers of the NAACP: Supplement to Part 23, Series A, Section I, Reel 7)*; *School Desegregation in the Southern and Border States*, Feb., 1967, SERS; Read and McGough, *Let Them Be Judged*, p. 407; *Mobile Press-Register*, Jan. 22, 2012 (Pittman Obituary).

⁵ Frank Johnson to Richard Rives, Hobart Grooms, and Virgil Pittman, Feb. 15, 1967 (P.S. Feb. 16, 1967); Frank Johnson to Richard Rives and Hobart Grooms, March 15, 1967; both in *Frank Johnson Papers: Lee v. Macon Case File, Container 28, Folder 6*; Supplemental Brief of the United States, Feb. 22, 1967, *NAACP v. Wallace*, pp. 2-10, in *NAACP Lee v. Macon Files: General Case Material (Papers of the NAACP: Supplement to Part 23, Series A, Section I, Reel 7)*.

banc rehearing of *U.S. v. Jefferson*? Judge Johnson remained adamant that the court should await the *Jefferson* decision regardless of the outcome of the poll. He insisted that a divided court, such as theirs, would be of no assistance to the full circuit court in deciding *Jefferson* and reiterated that their panel would be bound by the *en banc* decision when it was rendered. The conundrum was partially solved when Judge Johnson convinced Judges Rives and Grooms to join in entering a statewide decree in *Lee v. Macon* that ran to all school systems not already under court order, regardless of their HEW compliance status. Johnson drafted the opinion and decree. He argued that a failure to include all the systems would leave those systems which were in paper compliance with HEW standards (about half of the state's 118) free to do nothing until the Guidelines cases – *NAACP v. Wallace* and *U.S. v. Jefferson* – were resolved. “Uniformity of operation” was important, he felt. Further, the court was holding the systems accountable for fulfilling their constitutional requirements, not their obligations under the Guidelines. Paper compliance, in the absence of meaningful *actual* compliance, ought not to excuse them. This solution allowed the court to release its decision in *Lee v. Macon* in March, while the panel in *NAACP v. Wallace* continued to await *Jefferson*. The timing was important. Systems would need time to adopt the model freedom-of-choice plan in the decree, send out choice forms and notifications, and hold a choice period of 30 days, all before they broke for the summer. Also, the state superintendent would need time to compile reports on local action and submit them to the court in time for further action before it was too late for fall implementation.⁶

The *Lee v. Macon* Statewide Decree

The court issued on March 22, 1967 its long awaited *Lee v. Macon* decision, the primary consequence of which was a statewide, remedial desegregation order. The central question was simple:

⁶ Frank Johnson to Richard Rives, Hobart Grooms, and Virgil Pittman, Feb. 15, 1967 (P.S. Feb. 16, 1967); Frank Johnson to Richard Rives and Hobart Grooms, March 15, 1967; all in Frank Johnson Papers: *Lee v. Macon* Case File, Container 28, Folder 6.

had the defendant state officials (then Lurleen Wallace, Ernest Stone, and the members of the state board of education) continued to “use their authority to operate throughout the State of Alabama a dual school system based on race.” Judge Johnson wrote:

Not only have these defendants, through their control and influence over the local school boards, flouted every effort to make the Fourteenth Amendment a meaningful reality to Negro school children in Alabama; they have apparently dedicated themselves and, certainly from the evidence in this case, have committed the powers and resources of their offices to the continuation of a dual public school system such as that condemned by *Brown v. Board of Education* As a result of such efforts on the part of those charged with the duty and responsibility under the law as announced in 1954 by the Supreme Court in *Brown*, by the Congress of the United States in the Civil Rights Act of 1964, and, more specifically, by this Court in its July 1964 order, today only a very small percentage of students in Alabama are enrolled in desegregated school systems. Based upon this fact and a continuation of such conduct on the part of these state officials as hereafter outlined, it is now evident that the reasons for this Court's reluctance to grant the relief to which these plaintiffs were clearly entitled over two years ago are no longer valid.⁷

More than anything, Johnson concluded, the defendant state officials had consistently lied to local officials about their constitutional duty, especially by telling them that “local school districts should go no farther than ordered by the court.” Johnson called it “one of the most illegal methods adopted by these defendants.” Per the 1964 order, the state officials had an obligation to inform local school systems of their “federal constitutional duty to desegregate their school systems totally, notwithstanding whether a particular system is under a court order or whether that school system agrees to comply with the requirements of the Department of Health, Education and Welfare” There was “no more clear an indication” of their having failed in this than Meadows’ own admission that he had done nothing to eliminate segregation in the state’s schools.⁸

The court found that state officials had used their power over local systems in two ways: most obviously, to levy extraordinary intimidation and punishment, and more importantly, to perform their

⁷ Lee v. Macon County Board of Education, Opinion, Order, and Decree of March 22, 1967, 267 F.Supp 458, 465.

⁸ Lee v. Macon County Board of Education, Opinion, Order, and Decree of March 22, 1967, 267 F.Supp 458, 460, 474.

ordinary functions in such a way as to perpetuate the segregated system statewide. The court cited extensive evidence of the state's "dramatic interference": Meadows' public assertions of the equalization of facilities for "the minority race"; his circulation of the ridiculous segregation "parable"; his and Governor Wallace's many efforts at coercion and intimidation, including their joint effort to have the black teachers in Tuscaloosa reassigned or effectively replaced. Johnson noted the effect these actions had, namely school boards' refusal to comply with the HEW revised Guidelines. But "the most significant action by these defendant state officials, designed to maintain the dual public school system based upon race," according to the court, "[was] found in the day-to-day performance of their duties in the general supervision and operation of the system." For example, the court found the evidence "absolutely overwhelming" that the state had exercised extensive control over school construction and consolidation, especially through its annual school surveys. Also, the state officials had "endeavored to thwart and, with considerable success, [had] thwarted efforts toward implementation of the constitutional requirement to eliminate faculty and staff segregation," such that only 76 out of 28,000 teachers in the state were assigned to schools where the opposite race was in the majority. Furthermore, the state had annually conducted or supported segregated teacher institutes and in-service training programs and had issued teaching certificates so as to perpetuate segregated faculty assignments. The state had shown similarly significant control over transportation, since it approved bus routes and transportation equipment standards for all systems, and since "nearly 100% of the cost of local school transportation programs [was] paid from the state Minimum Program Fund." The court also held that the state had exercised immediate authority of the state's vocational schools, trade schools, and junior colleges, in such a way as to maintain segregation therein.⁹

The court determined that the state's tuition grant statute was "but another attempt of the State of Alabama to circumvent the principles of *Brown* by helping to promote and finance a private

⁹ Lee v. Macon County Board of Education, Opinion, Order, and Decree of March 22, 1967, 267 F.Supp 458, 465-75.

school system for white students not wishing to attend public schools also attended by Negroes.” This was “unmistakably clear” when analyzing the law “in the historical context which gave rise to its enactment,” that is, when acknowledging that it was “born of an effort to resist and frustrate implementation of the *Brown* decision” and to “fill the vacuum left by this Court’s injunction against the 1957 tuition statute.” In short, the state had failed to provide any sort of rational basis for the law other than the obvious: that it was “attempting to make a concerted effort to establish and support a separate and private school system for white students.” The court warned that if the state persisted in such efforts that it would be forced to declare the “‘private’ system” a state actor under the Fourteenth Amendment and bring it under the statewide desegregation order.¹⁰

Johnson felt that the relief had to be designed to “reach the limits of the defendants’ activities” in the various areas of their control and to “require [them] to do what they have been unwilling to do on their own.” Accordingly, the state officials and the state itself were ordered to “take whatever corrective action . . . necessary to disestablish” the statewide dual school system. The court could “conceive of no other effective way” to effect this than to enter “a uniform state-wide plan for school desegregation, made applicable to each local county and city system not already under court order to desegregate, and to require these defendants to implement it.” The many individual school systems were not, themselves, parties to the suit, of course. The court held that they need not be, but it warned that they might be added as such in the future to insure that the decree was being implemented properly. The court opted for statewide freedom of choice, since this was the method that had “invariably” been used by courts in the Fifth and neighboring judicial circuits. Johnson emphasized, though, that this was the plan which the court would require “for the time being” and with the understanding that “administrative problems [might] make some other method advisable in the future.” In a final word of warning, Johnson added that “if choice influencing factors are not eliminated, freedom

¹⁰ Lee v. Macon County Board of Education, Opinion, Order, and Decree of March 22, 1967, 267 F.Supp. 458, 475-8.

of choice is a fantasy.” Echoing Judge John Minor Wisdom’s assertion in *U.S. v. Jefferson* that the only freedom-of-choice plan that was constitutionally permissible was one that “works,” Johnson wrote that freedom of choice was “not an end in itself,” but merely “a means to an end.”¹¹

In the accompanying decree, the court ordered the state superintendent to use the authority of the state school board and the state department of education over school construction, transportation, and teachers to bring about the immediate disestablishment of segregated systems statewide. As state superintendent of education, Ernest Stone was ordered to notify the 99 city and county school systems not already under court order that they were to adopt a model freedom-of-choice desegregation plan.¹² The plan included specific provisions for the desegregation of student bodies, faculty, staff, activities, facilities, and transportation. There were specific instructions indicating who could exercise a choice, when choice periods should run, what constituted adequate notice of plans to the community, what choice forms should look like, what the text of letters to parents ought to include, what to do when a student’s first choice was impossible to grant, and other minutia. School systems were given 20 days to adopt the plan and report back to Stone, who was to then report to the court. Stone was also to develop and submit to the court a statewide equalization plan designed to bring the “physical facilities,

¹¹ Lee v. Macon County Board of Education, Opinion, Order, and Decree of March 22, 1967, 267 F.Supp. 458, 478-83.

¹² The 99 were Alexander City, Andalusia, Anniston, Athens, Attalla, Auburn, Autauga County, Baldwin County, Bibb County, Blount County, Brewton, Butler County, Calhoun County, Carbon Hill, Chambers County, Cherokee County, Chilton County, Clarke County, Clay County, Cleburne County, Coffee County, Colbert County, Conecuh County, Coosa County, Covington County, Cullman, Cullman County, Dale County, Daleville, Dallas County, Decatur, DeKalb County, Demopolis, Dothan, Elba, Elmore County, Enterprise, Escambia County, Etowah County, Eufaula, Fayette County, Florala, Florence, Fort Payne, Franklin County, Geneva County, Greene County, Henry County, Houston County, Jackson County, Jacksonville, Jasper, Lamar County, Lanett, Lauderdale County, Lee County, Limestone County, Linden, Marengo County, Marion, Marion County, Marshall County, Monroe County, Morgan County, Mountain Brook, Muscle Shoals, Oneonta, Opelika, Opp, Ozark, Phenix City, Pickens County, Piedmont, Pike County, Randolph County, Roanoke, Russell County, Russellville, St. Clair County, Scottsboro, Selma, Sheffield, Shelby County, Sumter County, Sylacauga, Talladega, Talladega County, Tallapoosa County, Tallassee, Tarrant, Thomasville, Troy, Tuscaloosa, Tuscaloosa County, Tuscumbia, Walker County, Washington County, Winfield, and Winston County: Lee v. Macon County Board of Education, Opinion, Order, and Decree of March 22, 1967, 267 F.Supp 458, 482-3. Those already under court order in this and other litigation were Macon County, Bessemer, Jefferson County, Fairfield, Birmingham, Gadsden, Huntsville, Lawrence County, Madison County, Mobile City-County, Montgomery, Montgomery County, Bullock County, Lowndes County, Crenshaw County, Wilcox County, Hale County, Perry County, and Choctaw County; see “Status Report of School Cases,” March 9, 1967, in DOJ Civil Rights Division Records, Records of John Doar: Desegregation (Reel 8).

equipment, services, courses of instruction, and instructional materials of schools previously maintained for Negro students up to the level in schools previously maintained for white students.” This was to include the elimination of “disparities reflected in different pupil-teacher ratios, survey classifications of buildings and sites, per pupil expenditures, valuation of school property, library books per pupil, course offerings, accreditation, and transportation.” School systems were instructed to report at specified times to the state superintendent, and the state superintendent to the court.¹³

Per agreement with Judges Rives and Grooms, Judge Johnson had followed the proposed decree submitted by the Civil Rights Division very closely, making only minor changes. It was not unusual for a federal court to rely upon the Justice Department in such a way. Judges had no staff save a few clerks and marshals. In a case in which a state government was defying a federal agency while continuing to flout established Constitutional law, the court and the Justice Department were, in a sense, on the same team. In Johnson’s case, too, there was an immense amount of mutual respect between the judge and the federal attorneys at the CRD. Johnson held Assistant Attorney General John Doar in especially high regard. Doar’s former special assistant, the legal scholar Owen Fiss, explained that the two “relied upon each other because they had this total respect, and they respected their differences . . . in roles.” Fiss recalled that Doar had a “special place in Frank Johnson’s courtroom.” Johnson “wanted the government to back him up,” and Doar was “very aware of that.” When Doar addressed the court, “He made sure he spoke with full appreciation of the expectations that Johnson had of him and the [Civil Rights] Division.” A former U.S. Attorney himself, Johnson appreciated that the federal lawyers always had, in his own words, an “excellent understanding of the applicable law,” an “enthusiastic attitude,” and a “common-sense approach” to problems. Often, when he ordered the U.S. into cases as an *amicus curie*, it was because he “wanted to make certain the case was investigated thoroughly and presented fully and fairly” so that the court could “reach a full and fair result.” He added that perhaps the most

¹³ Lee v. Macon County Board of Education, Opinion, Order, and Decree of March 22, 1967, 267 F.Supp. 458, 483-91.

important reason for including the U.S. in such cases was that DOJ “had the resources.” Fiss called the relationship “the truest sense of *amicus* ever in American law.” It is not surprising, then, that as the court moved forward in its new role as statewide desegregation monitor, the attorneys from Justice would continue to play an important role in assisting the court, utilizing those resources in manpower, time, and authority.¹⁴

The 1967 *Lee v. Macon* decision had an immediate and jarring impact on school desegregation litigation. It also had lasting implications for civil litigation more broadly and for federalism. First, the *Lee* court acknowledged that relief in school desegregation cases ought to be formulated so as to not only remove official discrimination and prevent its recurrence, but to also eradicate the effects of past discrimination. Preventative or regulatory injunctions, then, were not sufficient for this task; it required remedial relief. As an HEW attorney observed, the southern dual school system had been “institutionalized through long years of law and tradition,” and such institutions “[did] not just go away any more than they just happen[ed].” The court followed Judge Wisdom’s lead in approaching this problem, where Wisdom himself had followed the suggestion of the Civil Rights Division in *Jefferson*. What made *Lee v. Macon* unique was the omnibus, statewide nature of the relief. The court found that segregated public education in Alabama was a state institution which continued to systematically deprive black children of their Fourteenth Amendment rights. Remedial relief aimed at this system required the development of a statewide “structural injunction,” the first such in United States legal history.¹⁵

¹⁴ Frank Johnson to Richard Rives and Hobart Grooms, March 15, 1967, in Frank Johnson Papers: *Lee v. Macon* Case File, Container 28, Folder 6; Landsberg Interview; see, for Fiss quotations, excerpts from Fiss interview in Bass, *Taming the Storm*, pp. 230-5, 480 fn. 32.

¹⁵ A statewide desegregation order had been entered years before in an early Delaware school case, but that injunction was aimed specifically at a single state segregation statute, the type of which Alabama had long since jettisoned. See Landsberg, *Enforcing Civil Rights*, p. 140; Landsberg Interview; Landsberg, *Lee v. Macon County Board of Education*, manuscript in possession of the author, book forthcoming; see for HEW attorney quotation, James Dunn, “Title VI, The Guidelines, and School Desegregation in the South,” *Virginia Law Review* 53.1 (Jan., 1967): 42-88, p. 88; see also Fiss, *The Civil Rights Injunction* (Bloomington: Indiana University Press, 1978), pp. 4, 17, 49, 98 fn. 18, 101 fn. 35, 104 fn. 16; Fiss, *Injunctions*, pp. 415-17, 449-50, 645-90; Belknap,

The *Lee v. Macon* injunction touched every aspect of the state's myriad educational controls. The court pledged to maintain its hold on these controls until every vestige of the dual system was eradicated and its lingering effects ameliorated. The judges thus thrust themselves into the realm of what have been called "hard judicial choices," or those pitting federal district court judges against state and local officials. The court took up the task of monitoring the desegregation efforts of the state officials, who were themselves tasked with monitoring the non-party local school systems. The local systems were expected to adopt and implement a model desegregation plan. If progress was not satisfactory, then the plaintiffs could request a court order for more specific or more immediate relief. In this way, the entering of the injunction was as much of a beginning as it was an end. The court became the steward of school desegregation in the state of Alabama – along with the Justice Department and the LDF. Not only was the decision, in Fiss's words, "tremendously transformative in terms of what school desegregation could do," it had clear implications for federalism. There sat the federal court, in the state's capitol, orchestrating the restructuring of an entire state system, over an extended period of time, in order to force lasting and meaningful compliance with Constitutional law. Other judges would go on to use this kind of structural injunctive power in similar, and usually controversial, ways.¹⁶ Johnson himself later used remarkably similar relief – in *James v. Wallace*, *Pugh v. Locke*, and *Wyatt v. Stinkney* – to reform Alabama's prison and mental health systems, in which

Administrative History of the Civil Rights Division of the Department of Justice During the Johnson Administration, pp. 70-2; *Southern School Desegregation*, A Report of the U.S. Commission on Civil Rights (Washington, D.C.: Government Printing Office, July, 1967), pp. 44, 124-6; Read and McGough, *Let Them be Judged*, pp. 398-405; and Phillip J. Cooper, *Hard Judicial Choices: Federal District Court Judges and State and Local Officials* (New York: Oxford University Press, 1988), passim.

¹⁶ Landsberg, *Enforcing Civil Rights*, p. 140; Landsberg Interview; Landsberg, *Lee v. Macon County Board of Education*; see, for Fiss quotation, excerpts of Fiss interview in Bass, *Taming the Storm*, pp. 230-235, 480 fn. 32; see also Fiss, *The Civil Rights Injunction*, pp. 4, 17, 49, 98 fn. 18, 101 fn. 35, 104 fn. 16; Fiss, *Injunctions*, pp. 415-17, 449-50, 645-90; Belknap, *Administrative History of the Civil Rights Division of the Department of Justice During the Johnson Administration*, pp. 70-2; *Southern School Desegregation*, U.S. Commission on Civil Rights (1967), pp. 44, 124-6; Read and McGough, *Let Them be Judged*, pp. 398-405.

overcrowding and otherwise abysmal conditions were found to be systematic human rights deprivations.¹⁷

The decision had important implications for the relationship between the courts and HEW as well. The Fifth Circuit panel in *Jefferson* had just sanctioned the HEW Guidelines in the hope that its authority might soften the blow for school officials dealing with distant federal bureaucrats. The appellate panel assumed that the HEW Office of Education could then alleviate some of the pressure on courts overburdened with school cases. A review in the *Yale Law Journal* in late 1967 concluded that, after the statewide *Lee* decree, it would “never be possible to tell whether the *Jefferson* opinion could have succeeded in giving the Office of Education sufficient stature to reverse opposition to the guidelines in the state that in the past had most vehemently opposed HEW efforts.” The *Journal* predicted that the *Lee* decree would “put the Office of Education out of business in the State of Alabama.” While this did not turn out to be the case, the decree certainly did “reverse the roles originally envisioned for the courts and the USOE under Title VI.” HEW officials expected the courts to establish desegregation standards, assuming that the USOE would then set about enforcing those standards on the ground. With the *Lee* decree, this situation was, indeed, to be reversed. As the *Journal* foreshadowed, the USOE would “at best” soon be “serving in an advisory role, helping the courts determine the applicable standards and then helping, in tandem with the Justice Department, to advise the courts on the adequacy of the desegregation plans submitted to school districts.”¹⁸

A more immediately recognizable reason why the *Lee v. Macon* order was significant was that it eliminated the need for 99 sets of plaintiffs, or the Civil Rights Division, to file 99 subsequent suits to

¹⁷ On the prison and mental health facilities cases, see Yackle, *Reform and Regret*, passim; Cooper, *Hard Judicial Choices*, pp. 163-204; James v. Wallace (prisons), 382 F.Supp. 1177 (MD, AL, 1974); Pugh v. Locke (prisons), 406 F.Supp. 318 (MD, AL, 1976); and Wyatt v. Stinkney (mental health facilities), 344 F.Supp. 373 (MD, AL, 1972); see also Note, “The Wyatt Case: Implementation of a Judicial Decree Ordering Institutional Change,” *Yale Law Journal* 84 (May, 1975): 1338-79.

¹⁸ “The Courts, HEW, and School Desegregation,” Comment, *Yale Law Journal* 77 (Dec., 1967): pp. 321-365, pp. 362-4.

desegregate the state's many school systems. It was the first school desegregation order to directly involve every school system in a state not already under court order. As Fred Gray remembered, "It saved us a lot of money, time, and effort." The *Christian Science Monitor* called it "the most sweeping implementation of the Supreme Court's 1954 school desegregation ruling yet rendered by a lower federal court." Some jurists, notably Wisdom, did not feel that such a "sweeping" single-order strategy was necessary, preferring that the circuit's uniform decree be applied only where individual suits were filed. *Lee* nonetheless soon proved to be influential in further school desegregation litigation. Jack Greenberg called it "an unprecedented victory" and "an important step in closing the doors to evasion of the Constitution." Greenberg indicated that the LDF would pursue "similar orders in other hard core states where massive resistance remains the order of the day." The LDF and the Civil Rights Division soon did exactly that, successfully seeking similar statewide relief in Georgia, Mississippi, Texas, Arkansas, and South Carolina based on the *Lee* decree.¹⁹

Owen Fiss later claimed that he saw in Johnson's handling of the *Lee* case "something as ingenious, as path-breaking, as innovative as *Marbury v. Madison*." From the vantage point of 1995, Fred Gray estimated that "probably over 300 opinions" had been written "on various aspects of the case." By that time, *Lee v. Macon* had served as the inspiration for Alabama's landmark, omnibus voting rights case, *Dillard v. Crenshaw County*. Former Vernon Crawford associate James Blacksher had

¹⁹ Landsberg, *Enforcing Civil Rights*, p. 140; Landsberg Interview; Landsberg, *Lee v. Macon County Board of Education*; Norman, "The Strange Career of the Civil Rights Division's Commitment to Brown," p. 987 (Norman somehow fails to mention *Lee v. Macon* as the benchmark for statewide school desegregation); Fiss, *Injunctions*, pp. 415-17, 449-50, 645-6; Fiss, *The Civil Rights Injunction*, p. 4, 6; Bass, *Taming the Storm*, p. 230-5, Fiss quotation from p. 235; Greenberg quoted in NAACP Press Release, "Alabama Schools Must End Bias Next Fall," March 24, 1967, in *Facts on Film, 1966-1967 Supplement*, Miscellaneous Materials; Gray, *Bus Ride to Justice*, pp. 215-18; *United States v. State of Georgia*, 428 F.2d 377 (5th CCA, 1970); *United States v. State of Texas*, 321 F.Supp. 1043 (ED, TX, 1970); *United States v. Hinds County (Mississippi)*, 417 F.2d 852 (5th CCA, 1969); on the Mississippi case, see also Charles Bolton, *The Hardest Deal of All: The Battle over School Integration in Mississippi* (Oxford: University of Mississippi Press, 2005), pp. 128-31. Johnson himself forwarded copies of the opinion and decree to American Civil Liberties Union attorney Charles Morgan, Assistant Attorney General Burke Marshall, and then U.S. Senator Robert Kennedy; see Frank Johnson to Charles Morgan, March 27, 1967; Frank Johnson to Robert Kennedy, March 27, 1967; and Burke Marshall to Frank Johnson, April 4, 1967; all in Frank Johnson Papers: *Lee v. Macon* Case File, Container 28, Folder 6.

theorized that if a court could accept that there was statewide control and a statewide policy of racial discrimination in education, then the same might be achieved relative to voting practices. With the assistance of historians at the University of South Alabama, Blacksher was able to demonstrate a long history of changes in county and city election laws – all regulated by the state legislature – which were clearly designed to prevent or limit the effect of the black vote. The plaintiffs also successfully argued that the passage of at least two state laws was secured for the expressed purpose of blunting the effect of black voting. With this evidence, Blacksher was able to convince the court to consolidate into one case a number of challenges to the discriminatory at-large system of county commissioner election. *Dillard* was a product of *Lee v. Macon*, perhaps even more so that the prison and mental health systems cases. Alongside the Fifth Circuit Court of Appeals' affirmation of *U.S. v. Jefferson*, though, *Lee v. Macon's* immediate impact was even more staggering.²⁰

U.S. v. Jefferson Affirmed En Banc

Alabama's segregationists scarcely had a chance to react to the earth-shaking decision in *Lee v. Macon* before the *en banc* decision in *U.S. v. Jefferson* came down like a terrible aftershock. One week after the *Lee* announcement, the Fifth Circuit released its 8-4 ruling, affirming the panel's judgment in a *per curiam* opinion. The majority essentially adopted Judge Wisdom's opinion and decree with only minor changes. The court held that "if Negroes [were] ever to enter the mainstream of American life, as school children they must have equal educational opportunities," which meant, in Wisdom's words, access to "a unitary system in which there are no Negro schools and no White schools – just schools." It explicitly repudiated *Briggs* and overturned all prior decisions which relied on it. It held that freedom of

²⁰ *Dillard v. Crenshaw County*, 640 F.Supp. 1347 (MD, AL, 1986), 686 F.Supp. 1459 (MD, AL, 1988); see also, on *Dillard*, Payton McCrary, et al., "Alabama," in *Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965-1990*, Chandler Davidson and Bernard Grofman, Eds (Princeton: Princeton University Press, 1994), pp. 38-66; see, for the connection between *Dillard* and *Lee v. Macon*, Payton McCrary, forthcoming article in festschrift for Sheldon Hackney (Montgomery: New South Books, in press). Gray, *Bus Ride to Justice*, pp. 215-18; Bass, *Taming the Storm*, p. 230-5, Fiss quotation from p. 235.

choice was “not a goal in itself [but] a means to an end” and was acceptable only if it worked to bring about a unitary system. The full court agreed that the HEW revised Guidelines were acceptable minimal standards to which courts in the circuit should afford “great weight.” The percentages so often assailed were not meant to strike a balance, the judges determined, they were “rules of thumb.” Most controversially, the court endorsed the line Wisdom had drawn between *de jure* and *de facto* segregation, and it reserved judgment on the latter. This effectively adopted the Congressional compromise which was intended to spare metropolitan areas outside the South from Southern-style school desegregation. Finally, the uniform decree Wisdom had drawn up was approved, with minimal adjustments, as the standard for the Circuit.²¹

Jack Greenberg at the LDF celebrated the decision, saying that “in conjunction with [*Lee v. Macon*]” it gave the LDF “new judicial tools” to begin moving “scores of cases . . . forward.” The “extremely detailed decree and the clear-cut majority” meant that the organization was, Greenberg added, “in a position to bring about substantial school desegregation in the Deep South for the first time.” The Southern Regional Council dubbed *Jefferson* the beginning of a “new judicial era” in school desegregation and argued that *Jefferson* and *Lee v. Macon* were “the most significant school desegregation actions of the 1960s.” The *Yale Law Journal* concluded that *Jefferson* and *Lee* were “judicial acknowledgements of the inability of the administrative process to desegregate schools when acting alone” and were “massive reaffirmations of the courts’ concern with the problem.”²²

Despite what Greenberg called a “clear-cut majority,” the *Jefferson* decision was not without its vehement detractors, however. Judges Gewin, Bell, and Godbold dissented, and Judge Coleman wrote a

²¹ United States v. Jefferson County Board of Education, 380 F.2d 385, 389-96.

²² See, for Greenberg quotations, *Birmingham News*, March 29, 30, 1967 and NAACP Legal Defense Fund Press Release, “Appeals Court School Ruling Provides New Platform for LDF Attorneys in South,” April 1, 1967, in *Facts on Film, 1966-1967 Supplement*, Miscellaneous Materials; see on the *Jefferson* decision, generally, Fiss, *Injunctions*, pp. 449-50; Bass, *Unlikely Heroes*, 297-310; *Lawlessness and Disorder: Fourteen Years of Failure in Southern School Desegregation*, Special Report of the Southern Regional Council (Atlanta: Southern Regional Council, Nov. 4, 1968), passim and p. 26, in *Facts on Film, 1968-69 Supplement*, Miscellaneous Materials.

partially concurring opinion. Each strongly disagreed with significant portions of the majority's opinion. The conservative Gewin wrote that the "thesis of the majority" was "like Minerva (Athena) of the classical myths," that is, "spawned full-grown and fully-armed." It had, he argued, "no substantial legal ancestors." Wisdom's original opinion had "[espoused] the cause of uniformity . . . asserting that there must not be one law for Athens and another for Rome," but it had not followed its own logic. Gewin thought that artificially separating segregation into *de jure* and *de facto* and then applying those concepts sectionally was punishing the South while allowing the rest of the country to continue unmolested in substantially the same practice. Further, Gewin charged that the issue of the HEW Guidelines was never properly introduced into the trial court proceedings and never should have been considered by the court in the first place (the United States had asked for a decree based on the revised Guidelines while the cases were on appeal). Judge Godbold added a belated dissent. Godbold was an Alabamian, a Harvard Law graduate, and a Johnson-appointee who later admitted that "with hindsight," a remedial order like *Jefferson* was necessary. At the time he argued that it was "especially unfortunate" that the *en banc* court had "discussed validity and constitutionality" of the Guidelines when *NAACP v. Wallace* was pending before the three-judge court in Alabama. Godbold noted that in *NAACP v. Wallace* the issue "had been squarely raised, a record developed, and the application, effect, operation and validity of the 1966 Guidelines litigated at length, including the difficult question of presidential approval." Of course, once the *en banc* court ruled – without the benefit of a fully developed record – the three-judge court waiting to decide *NAACP v. Wallace* was then bound by the circuit court's decision. Speaking to the Guidelines anyway, Gewin indicated that he believed that the grounds on which the court was basing its approval of pupil and teacher percentage guidelines were very thin and hastily constructed. "If the alleged *Briggs* dictum," he wrote, was "so clearly erroneous and constitutionally unsound," then it was "difficult to believe that it would have been accepted for a period of almost 12 years and quoted so many times." The Supreme Court had never altered *Briggs* and

had, in fact, affirmed it indirectly by affirming *Shuttlesworth* (wherein Judge Rives had quoted from it). Additionally, Gewin felt that adopting a uniform decree disregarded the myriad local differences which *Brown II* had charged the trial courts with managing. He called the majority's opinion "pessimistic" and expressed "faith" that the trial courts and local school officials would soon arrive at a constitutional compliance.²³

Judge Bell went further, charging the majority with "eroding the doctrine of separation of powers" and with judicial "overreach." The court, he wrote "should cooperate with HEW," but it should not "be made to play the part of any stick" to HEW's "carrot of federal funds." The judgment was also an "unclear and unfair" infringement on personal liberty, he thought. Judge James Coleman – a former Mississippi governor – agreed with much in the majority opinion but also agreed with Judges Gewin and Bell that the decision "strongly portended" the possibility of the court "arbitrarily" mandating a "specified percentage of the various races" or "proportional representation of the races" in public schools. Elaborating on Judge Bell's contention that the ruling was an infringement on personal liberty, Judge Godbold argued that freedom of choice, once exercised, was a choice "of associates." The "constitutional depths" of this choice were, he wrote, "not yet fully explored." Freedom of association was most often evoked when "the affairs of a group or association" were at issue, but in this context it meant "the area in which the associational rights are not organizational but personal in nature." Godbold cited a *Yale Law Journal* article by the influential law professor Thomas Emerson, who had argued, "'No one can doubt that freedom of association, as a basic mechanism of the democratic process, must receive constitutional protection . . .'" By threatening it, the court had sent "paternalistic authoritarianism" colliding "head-on" with individual freedom. "No more invidious discrimination, or improper government objective, can be imagined," he wrote, "than national power setting aside the valid exercise by members of a class in the name of the constitutional objective for

²³ United States v. Jefferson County Board of Education, 380 F.2d 385, 397-410 (Gewin), 420-27 (Godbold); Bass, *Unlikely Heroes*, pp. 303-4.

which the choice was granted in the first place.” Godbold was arguing that blacks who chose to remain in black schools would soon have their choice of association disregarded by requirements for racial percentage quotas. In the near future, many whites would use this same logic for all of its worth. They would claim with great fervor their right to “freedom of association” as it applied to their private academies and suburban school systems.²⁴

Segregationist Reaction to *Lee v. Macon* and *U.S. v. Jefferson*

The day after the Fifth Circuit ruling in *U.S. v. Jefferson*, Governor Lurleen Wallace went before a joint session of the Alabama State Legislature and delivered a televised speech which was surprising only in that it was Mrs. Wallace delivering it and not her husband. Lieutenant Governor Albert Brewer caught himself accidentally introducing *George Wallace* – a perfectly natural mistake. The former Governor Wallace had held closed-door meetings all day with local boards of education, at which over 300 individuals signed a resolution calling on the state’s attorney general and the current governor to somehow oppose *Lee v. Macon*. Lurleen Wallace’s speech that night was largely prepared by George Wallace and his advisors, of course, and contained many of the same defiant tropes people had come to expect from the acting Governor Wallace. In recklessness and sheer absurdity, however, it actually surpassed many of the former governor’s previous harangues. The Wallace camp undoubtedly reasoned that it could make the court profoundly uncomfortable by inviting it to jail the nation’s first female governor for contempt. Lurleen Wallace’s address would certainly not go unnoticed by the court or anyone else in the state. It was covered by 20 television stations and 43 radio stations. According to the governor’s office, this made it the most widely covered political event in Alabama history. Frank

²⁴ United States v. Jefferson County Board of Education, 380 F.2d 385, 410-17 (Bell), 417-220 (Coleman); on white flight and freedom of association, see Kruse, *White Flight*, pp. 161, and Kruse, “The Fight for Freedom of Association: Segregationist Rights and Resistance in Atlanta,” in Webb, *Massive Resistance*, pp. 99-116.

Johnson had advised John Doar, “You might make arrangements, as you see fit, to have the address taped.”²⁵

Lurleen Wallace strode confidently into this fire on the night of March 30, displaying a seemingly genuine anger and anguish, even appearing on the verge of tears at times. The “Associate Editor for Women” of the *Birmingham News* described the governor as a “grim-faced slip of a woman Eyes red-rimmed, lips set, [with] nothing coy about her demeanor. Even her navy dress, with navy and white striped blazer, bespoke the seriousness with which she approached the matter.” Wallace began by serving notice to “the people who would attack our children and our institutions” that “Alabama and its elected officials dare defend our rights.” The floor erupted in applause here, and multiple times throughout, as the governor denounced both the *Lee v. Macon* decision and the *U.S. v. Jefferson* decision. They were, she explained, collectively “calculated to destroy the school system of Alabama.” They constituted “the last step toward a complete takeover of children’s’ hearts and minds,” and such a takeover was “exactly what Hitler did in Germany.” They were, in short, “beyond the law which governs us as a people.”²⁶

Wallace said she wanted “all the people of Alabama to understand what this decree purports to do.” Though it was sometimes unclear if the governor was talking about *Lee* or *Jefferson*, or both, she insisted that “the order” took over “every single aspect of the operation of every school system within the state of Alabama” and “destroy[ed] the authority of local school boards, the State Board of Education, the Superintendent of Education, and the Governor.” It gave that authority, she claimed, to “agents of the district court, who must execute the commands of three judges, who will determine all

²⁵ *New York Times*, March 29, 1967; *Washington Post*, March 29, 1967; *Birmingham News*, March 29, 30, 31, 1967; *School Desegregation in the Southern and Border States*, March, 1967, SERS.

²⁶ Address by Governor Lurleen Wallace, Joint Session, Alabama Legislature, March 30, 1967 (Copy of Speech with Handwritten Notes by Judge Frank Johnson) in Frank Johnson Papers: *Lee v. Macon* Case File, Container 21, Folder 5 [hereinafter cited as “L. Wallace Address, March 30, 1967”]; *New York Times*, March 29, 1967; *Washington Post*, March 29, 1967; *Birmingham News*, March 29, 30, 31, 1967; *School Desegregation in the Southern and Border States*, March, 1967, SERS.

matters of policy.” For example, the court would now tell parents “what bus a child must ride on,” and it would close certain schools “and send the children to another part of town or to another part of the county.” In addition to giving the court total control over all aspects of “education policy,” the order “force[d] white children to go to all-Negro schools, and Negro students to go to predominantly white schools.” It demanded plans for “massive reassignment and transfer of children and teachers.” The governor suggested that should anyone resist this forced assignment, the court would “put their parents in jail.” No parents were free “to discuss the order of the court, other than to express approval thereof,” because “any open expression of disapproval subjects the individual to contempt.” Of the “so-called freedom of choice” desegregation plan, Wallace understood the court to mean that such a plan “does not work unless you obtain balance in each and every school system.” Most Alabamians were probably unaware of the mind-boggling irony of the governor’s next statement, in which she charged the federal judges with threatening “to have your elected public officials coerce local school boards and cut off state funds to any of our public schools and state colleges which fail to abide by their interpretation.”²⁷

The governor determined that compliance with the decrees would be “a physical impossibility” and that, in any case, the decisions were unconstitutional. They had been rendered “in malice and animosity”: in malice, she said, “against a free people who would exercise their sovereign power through the accent of Washington, Jefferson, Madison, and Monroe . . .” and in “animosity against the leadership expressed by Alabamians through my husband, which brings this nation to a moment of truth.” Wallace then embarked on a hopeless defense of a rapidly evaporating understanding of the United States’ federal system. “There is a higher power than this three-man court,” she asserted, “and it finds itself in the power given by the people to their elected officials.” This was “the police power of the state, the right of state government to take whatever action which may be necessary to protect the

²⁷ L. Wallace Address, March 30, 1967, Johnson Papers.

morals, health, and welfare of its citizens, the peace and tranquility of its people.” It was “the highest law . . . above the individual and above the three judge Federal district court.” Alabamians were bound to “obey the law,” but they did not “have to take action beyond the law. And let this be understood, too,” she paused, “federal judges are not beyond the law.”²⁸

Lurleen Wallace concluded her speech with a call to arms. The citizens of Alabama had a “standard of courage,” she argued, which could “not falter in its dedication to principle and to doing whatever may be necessary to fulfill our duties.” She said plainly, “We must resist this decree in every way possible” She asked the legislators to “resolve [themselves] into a committee of the whole and . . . if necessary, invoke the police powers of this state.” The state was appealing the decision and appealing for a stay of the order pending the appeal. In the event that these were unsuccessful, Wallace asked the proposed “committee of the whole” to issue a “cease and desist order” to the three federal judges who have issued the “unfounded decree,” to consider placing all authority over education in the hands of the governor, and to “consider whether additional state troopers will be required in order that the children of our state be protected.” In doing this, she declared, they could “win this battle, day by day, inch by inch, and decree by decree, all within the law.” Evoking Andrew Jackson, she added defiantly, “They have made their decree; now let them enforce it. . . . We shall never quit,” she concluded, “and we shall win.”²⁹

Shortly after the speech, Frank Johnson drafted a list of statements made by the governor “which [did] not appear to have any basis in fact.” Johnson was irritated by what he understood were a series of confusions and deliberate mischaracterizations which littered the speech. Since Fred Gray had included the text of the governor’s address a memorandum in opposition to the defendants’ request for a stay pending appeal, Johnson was able to incorporate a rebuttal of sorts into an order denying the request. Johnson explained that the recent order “did not involve any new or novel constitutional or

²⁸ L. Wallace Address, March 30, 1967, Johnson Papers.

²⁹ L. Wallace Address, March 30, 1967, Johnson Papers.

legal principles and did not add to the defendants' obligations to eliminate discrimination in Alabama's public schools." It only "made those obligations specific." Without mentioning Lurleen Wallace by name, Johnson wrote, "Interpretations of the order of this Court to the contrary are erroneous and not factually sound, particularly public statements, now a part of the record in this case, made by one of the defendants in this case to the following effect" He then listed the various misinterpretations, including: that the order forced white children to go to black schools and vice versa; that the court would determine such assignments; that it required bussing to achieve racial balance; that the court would close schools and send students across town or county; that it required the closure of all black junior colleges and trade schools; that the court would determine teacher certification; that no one could criticize the order; and that it was "rendered in malice and animosity." Johnson added, "Such statements (and no attempt is made to enumerate all that are erroneous) may have the effect of misleading the parents, school authorities, and other citizens of Alabama who are not personally familiar with the decree" Federal judges generally considered themselves above the fray of state politics, and Johnson was no exception. But he was not going to allow the defendants' outright lies about the court's order to influence the public, who would after all be the ones who had to live with it.³⁰

In the days following his wife's defiant speech, George Wallace took his own, familiar shots at the desegregation orders and the courts. Of the *Lee v. Macon* decree, Wallace said specifically, "[It] is 'impossible. It won't work. It won't work here and it won't work in California, or Washington, D.C., or New York, or Chicago. It's intellectually moronic control of our children.'" He surmised that the "Federal Government" would nonetheless try to "cram this decree down our throats." This was the same federal government, he railed, which tried to tell Americans who they could "take a showerbath with" and who

³⁰ "Statements in Governor Lurleen Wallace's speech to the Joint Session, Alabama Legislature, on March 30, 1967, concerning the decree of this Court of March 22, 1967, that do not appear to have any basis in fact," Frank Johnson Papers: Lee v. Macon Case File, Container 21, Folder 6; Plaintiffs' Opposition to Defendants' Application for a Stay, April 13, 1967, and Order Denying Stay, April 15, 1967, Lee v. Macon County Board of Education, Frank Johnson Papers: Lee v. Macon Case File, Container 29, Folder 2; *Washington Post*, April 16, 1967; *Birmingham News*, April 16, 1967.

they had to “let use [their] restrooms. . . . It’s all beginning to grate on people’s nerves,” Wallace said, “Can’t the people have something to say about their own destiny. They’re just ordinary mortals.” He predicted, “A clash and a collision is coming between moronic intellectual bureaucracy and the people and the people’s representatives.” A Los Angeles *Times* national political correspondent observed that what appeared “to Wallace fans outside the South” to be a variant of the states’ rights argument actually “looked to many of the state’s educators and many citizens very much like another Wallace bluff that could disrupt the gains the state has made and possibly even result in bloodshed.” He astutely concluded, “Wallace apparently plans to use his defiance of the court’s edict in his campaign as a states’ rights candidate for president in 1968.”³¹

The white citizens of Alabama soon showed their own disapproval of the court’s actions. Two white youths burned a cross on Johnson’s lawn, and hate mail and death threats began to pour into the district court.³² One letter demanded that Johnson “withdraw, rescind, cancel, [and/or] void,” the order. It continued:

We mean every word of this demand and if you ignore or fail to carry out the instructions outlined above, your son, an innocent person will pay the penalty first, then your mother who is also innocent, then will be your time. We will get you regardless of how many bodyguards you have. At home, at the office, in court or in transit from your home to the office. . . . We have plenty practice killing Viet Congs off by the dozens. We do not have freedom in the U.S. anymore but we will soon have some satisfaction in getting rid of some of the bastards causing the trouble. Singed FIVE VOLUNTEERS³³

A similar letter addressed to all three judges on the *Lee v. Macon* panel demanded, “The order you issued must – I mean MUST be rescinded – reversed – done away with altogether or you or your families will pay a mighty big price for it.” These men, possibly the same as the authors of the first letter, were

³¹ *Los Angeles Times*, April 23, 1967.

³² A special folder in Judge Johnson’s personal file was dedicated to “threatening letters,” many of which were sent in response to *Lee v. Macon* rulings; see Frank Johnson Papers: General Correspondence, 1956-1979, Container 156; see also Read and McGough, *Let Them Be Judged*, pp. 395-6, and “Interpreter in the Front Line,” *Time*, May 12, 1967.

³³ Read and McGough, *Let Them Be Judged*, pp. 395-6.

“Armed Service men” who had spent “two years in Vietnam killing, sniping, and going through hell . . .”

They warned:

If you, by this order force the schools and teachers against their will to mix in the Alabama schools you will not live to see the end of the year – Your families will also suffer severe punishment – possible death due to your efforts. Judge Grooms, that fine daughter of your [sic] will pay the penalty with you. Judge Johnson, if your son should survive he will have to enroll in a public school – not a private school this year. This had better be arranged at once and The [Montgomery] Advertiser be advised so they can give due publicity of your action in a news item. We mean NOW. Judge Rives, YOU OLD SOB had better get ready also, you don’t have much longer to live and the sooner we get rid of you the better it will be. ALL THREE OF YOU GET READY TO GO OUT LIKE A LIGHT.³⁴

The letter-writers had determined that the court order was “more than [they would] stand for.”

George Wallace and some of those around him continued to indirectly encourage such defiance. “You know what we goin’ to tell them when they ask us to give ‘em more in the schools of Alabama this fall,” Wallace at one point asked reporters. “I’ll tell you what we’ll tell ‘em,” he said, “Goddamnit, we jus’ ain’t.” When the state legislature met as a “committee of the whole” as Lurleen Wallace had suggested, Lieutenant Governor Albert Brewer, Wallace’s legislative point man, argued that the court order in *Lee* was going to “destroy public education because our people are not going to sit still for someone to come and tell them that their children must be transferred to a school of another race.” Brewer added, “You are going to have riots; you are going to have knifings and stabbings in every school in this state. The people of Alabama are not going to suffer their children to be trifled with, not in Alabama or any other state.” Ten days after the denial of the stay request, Frank Johnson’s mother sat watching television in an upstairs bedroom of her south Montgomery home when an explosion blew out windows on the ground floor and blew a two-foot hole under the foundation. Someone had made good on their threats, planting a crude and fortunately non-lethal bomb under the kitchen window. In the spirit of law and

³⁴ Read and McGough, *Let Them Be Judged*, pp. 396.

order, George Wallace denounced the attack as a “cowardly act” and contributed to a reward fund for the outing of the perpetrators.³⁵

While state officials continued to bluster, reaction to the decisions from local school officials included a mixture of trepidation and relief. Most state legislators had publically expressed support for the governor, voicing their “bitter opposition” to the *Lee* decree and pledging to support the “exhaustion of all legal remedies.” Several thought Wallace had “expressed the viewpoint of a great majority of Alabamians” or had spoken “for the masses.” State Senator and Crenshaw County Board of Education counsel Alton Turner called it “the greatest speech I have ever heard in eight years of service in the legislature.” When the legislators met as the “committee of the whole” and held hearings and heard testimony from local superintendents, however, the tone was different. Most of the local officials indicated a preference to retain what local control they had. They continued to express concern over finding competent black teachers and over impending violence if there was “a massive move towards integration.” Some noted the potential impact of dealing with the court, as opposed to HEW, with one indicating that he and his school board had been “doing as little as [they] could,” that is, “talking a lot to HEW” but “doing little.” This would not be possible under the watch of Johnson’s court, he felt. Outside the hearings, others privately confided that the *Lee v. Macon* ruling was a blessing in disguise, insofar as it alleviated some of the conflicting pressures they had been under. One said, “I feel like it is going to help us some” because “it puts the monkey on somebody else’s back.” In short, they could blame the court if they were criticized by state authorities or by segregationists in their communities. They could tell people that defiance would only invite a motion to add their systems as actual parties defendant and that defiance beyond that would bring contempt. Thus freed to say, “We resisted as long as we could,” many resolved to comply with the court’s order. When George Wallace called a meeting with state Superintendent Stone and all local superintendents on March 30, the newfound reluctance of the local

³⁵ Read and McGough, *Let Them Be Judged*, p. 405; *School Desegregation in the Southern and Border States*, April, 1967, SERS; *Birmingham News*, April 29, 1967 (attack on Johnson home).

officials became evident. Wallace told them that they could be more influential than the legislature if they would only denounce the *Lee* decision and school desegregation in general. Wallace suggested that the Alabama Association of School Administrators might declare itself in session then and there and issue some sort of “expression,” and then he left the auditorium. No one motioned for either a session declaration or for the drafting of a resolution.³⁶

At the same time, Lurleen Wallace was meeting with the governors of Georgia, Mississippi, and Louisiana at a summit on school desegregation “problems” occasioned by *Jefferson*. It was George’s idea. The fact that only four southern governors attended, including his wife, was a setback for Wallace. The group still issued a joint statement in which they denounced *Jefferson* and *Lee v. Macon* and argued that these would “bring nothing but chaos in the field of education.” The decisions required “ultimate extremes” which simply could not “be accomplished in this area or in any other area of the nation without destroying public education.” In individual statements to the press, none of the other three governors would advocate or lend support to the kind of defiance Wallace had suggested in her speech, though. Criticism and concern from other potential supporters followed. The Alabama Association of School Boards sent a telegram to the governor asking her to “maintain the autonomy of the local boards of education.” Dr. Alton Crews, the superintendent of Huntsville City Schools, argued in a late April speech before the Alabama Congress of Parents and Teachers that it was “high time we recognize that we’ve got to live with these people within the framework accepted by a majority of the people of these United States.” Crews added that they could no longer “equate states’ rights with the denial of human rights.” The *Lee* and *Jefferson* rulings thus seemed to significantly swell the ranks of the law-and-order compliance camp. With a court order binding them, many local school officials resigned themselves to at least system-wide freedom of choice and token faculty desegregation. At the same time, law-and-order defiance continued to emanate from Montgomery, encouraging recalcitrant local educators and

³⁶ *School Desegregation in the Southern and Border States*, April, 1967, SERS; *Birmingham News*, March 24, 30, 31, 1967.

enraged segregationist lay people alike. And if the tone of some of the mail arriving at the federal courthouse in the state's capitol and the bomb which nearly killed Frank Johnson's mother were any indication, not all of them were willing to eschew violence.³⁷

The state's major daily newspapers reflected the disappointment and resignation felt by a number of segregationists. They also expressed incredulity over the state government's continuing defiant posturing. The Birmingham *News* called *Lee v. Macon* a "sweeping statement with historic implications," noting that "13 years later" the "shoe" had finally fallen "on the 90 and 9." It lamented the ruling and wondered if the court might "see fit to modify its insistence of rapid and disruptive change in school areas, such as faculties, where immediate and wholesale change would prove highly injurious to the state's school children, Negro and white alike." The order for faculty desegregation, in particular, did not "begin to come to grips with either the practical problems this would create or the human realities inherent in such a transition." Despite its disapproval, the *News* was more concerned with the response from the governor's office. It was unbelievable, it reasoned, that the Wallaces would lead the state's school systems "on another – and undoubtedly futile – political snipe hunt. . . . Excesses created by official state reaction," it continued, would do "nothing to thwart implementation of federal court orders." But "proponents of civil rights" would certainly welcome "help in their cause in the form of officially-inspired disturbance in Alabama." The destruction of "relative racial peace" and the restoration of "racial turbulence [and] all the danger it portends" would be the only tangible results of the governor's propositions for defiance. The *News* concluded that Wallace's plan was essentially another form of interposition, "a simple but potentially uproarious position" which still "excite[d] the fancy of southerners," but which was "discredited as far back as 1809 and [had] yet to carry any weight in any instance in which it [had] been raised" When the Wallaces were spurned by several governors at the proposed desegregation summit, the *News* considered it an indication that other

³⁷ *School Desegregation in the Southern and Border States*, April, 1967, SERS.

states' leaders understood Alabama's course to be "doomed to failure, possibly disastrous to public education, and an invitation to dangerous disorder." The declining governors had probably concluded that "shaking fists at federal courts" was "not going to accomplish anything." Many similarly astute observers in Alabama understood the Wallace speech and proposals to be nothing more than empty political gestures, whose real consequences would be largely extralegal and wholly negative.³⁸

Meanwhile, black leaders in the state served notice that they planned to use the *Lee* and *Jefferson* decisions as springboards to more meaningful changes. At the annual convention of the black teachers' organization – the Alabama State Teachers Association (ASTA) – Executive Secretary Joe Reed secured passage of a resolution declaring freedom of choice unworkable. Reed said that there would "never be integrated schools as long as the burden is placed on the parents to break the tradition by transferring a Negro child from a previously all-Negro school to a previously all-white school." Reed explained that "economic reprisals, political repercussions, and social insecurity" could all be brought to bear, all of which made freedom of choice "in this sense . . . no choice at all." The teachers also resolved to initiate a campaign to reform the state's history textbooks. Some texts were less blatantly racist and pro-segregationist than *Know Alabama*, but they still distorted black history by generally limiting it to the persons of George Washington Carver and Booker T. Washington. The association also announced a challenge to the building of a second four-year college in Montgomery. The plans to open a satellite campus of Auburn University in the city were widely understood to be part of a segregationist effort to avoid integrating or upgrading the black teachers' college in the city – Alabama State. Reed called the plans "absurd, ridiculous, [and] ludicrous," adding that Montgomery needed another four-year institution "like a moose needs a hat." The featured speaker at the ASTA meeting was the LDF's Jack Greenberg. The New York attorney encouraged the teachers to keep up their fight. He told them the LDF had represented teachers successfully in discrimination suits before and added, "if we're needed,

³⁸ *Birmingham News*, March 30, 31, April 16, 1967.

we can fight and win in Alabama.” The association’s president, Choctaw County educator Anthony Butler, responded, “We believe what you say, and we’re going to call on you.” Butler said that ASTA was particularly concerned about black teachers and administrators getting displaced or demoted in desegregation restructuring because of their supposed inferiority. He told the crowd, to great applause, that the organization would fight such discrimination “until Hell freezes over.”³⁹

NAACP v. Wallace Decided

When some of the furor over *Lee v. Macon* and *U.S. v. Jefferson* had finally begun to die down, the court considering *NAACP v. Wallace* rendered its judgment. At that point it was nearly an afterthought. In a *per curiam* opinion handed down May 3, the court unanimously determined that it was “too clear for extended discussion” that the Alabama Anti-guidelines Act was “in conflict with Title VI of the Civil Rights Act and, therefore, unconstitutional.” The statute had the “effect of deterring and interfering with the efforts of local school boards in Alabama” which were trying to comply with HEW regulations by signing 441-B. The Fifth Circuit had, of course, declared the Guidelines valid in *U.S. v. Jefferson*, but the court here explained that the Alabama statute was invalid and unconstitutional regardless of the Guidelines’ validity. It was, as the Civil Rights Division had suggested, violative of the Supremacy Clause of Article VI of the federal Constitution. A state simply could not, except through proper federal court action, “undertake to declare null and void any action of a federal department or agency to implement or effectuate a federal statute.” This was particularly true “where such declaration is a part of the State's effort to obstruct or interfere with the operation of such statute.” In short, the state could not “take the law into its own hands.” The *Lee v. Macon* injunction had made any injunction against the Anti-guidelines Act’s enforcement seem redundant, so the court let its invalidation stand alone, while retaining jurisdiction to take any such other action as might be necessary. On the basis of

³⁹ *Birmingham News*, March 15, 17, 1967.

the *en banc U.S. v. Jefferson* ruling, the court held that the Guidelines were constitutionally valid and within the scope of the legislative intent of the Civil Rights Act. The three-judge court was bound by the appellate court's decision, and even if it was not, the judges determined that the *en banc* decision was "entitled to such great deference and respect that we would be unwilling to depart from it."⁴⁰

The court added several "ancillary" findings, mostly to facilitate the efficient implementation of the *Lee v. Macon* decree. It held that the Guidelines were "simply a statement of policies" and did not have the force of law. This meant that any termination of federal funds was subject to plenary judicial review. In the absence of judicial review, school systems ought to respect the Guidelines as "a reliable guide" to Title VI compliance. The court emphasized that Title VI compliance did not mean "compulsory mixing of the races," only the elimination of discrimination. Obviously, state and local officials disagreed with HEW and the courts over the meaning of "elimination of discrimination," so the court added that this should mean the elimination of the "dual structure" and the removal of "every vestige of legal discrimination." There were need to be "some compulsory association of the races" in some systems, but only for the purpose of eliminating the dual structure. This seemed like an attempt to assure people that recent decisions of the courts would not automatically lead to "forced assignments" for the purpose of achieving system-wide "racial balance," while at the same time maintaining that non-discrimination no longer meant mere tokenism. To further mollify school administrators' concerns, or to prevent further chicanery and evasion, the court added that the controversial requirement in 441-B binding systems to "any amendment" of the Guidelines ought to be construed to mean "any valid and lawful amendment." Had the federal bureaucrats drafting the Guidelines fully understood how far some Alabamians would go to avoid desegregation, they might have thought to include such language to begin with. Finally, the court sounded an ominous reminder to HEW: systems that were subject to a final order of a federal court were to be deemed in compliance with HEW. "As courts attempt to co-

⁴⁰ NAACP v. Wallace, 269 F.Supp 346, 348-50; *School Desegregation in the Southern and Border States*, May, 1967, SERS.

operate with executive and legislative policies,” it wrote, “so too the Department must respect a court order for the desegregation of a school or school system.”⁴¹

Implementing *Lee v. Macon*

The mechanics of the statewide structural injunction in *Lee v. Macon* began to quickly manifest themselves that spring. While the case was assigned to a three-judge court, Judge Johnson was the primary administrator of the injunction. A letter from Judge Rives – the senior of the three and the only Circuit Judge among them – revealed Johnson’s unique role. Rives wrote fellow Circuit Judge John Brown in April to thank him for commending the judges on a fine opinion in *Lee v. Macon*. “The responsibility,” Rives candidly wrote, “was and is that of all three judges but the glory belongs entirely to Judge Frank Johnson. Since that is true,” he continued, “I can agree wholeheartedly with all of the good things you have to say about this opinion as well as about the vast amount of administrative work he has done and is continuing to do in this case.” Having agreed to take on this “vast” workload, Judge Johnson subsequently contacted John Doar to ensure the Civil Rights Division would assist the court in implementing the decree. Johnson called Doar in early April to advise him, in Johnson’s own words, that “it was important for his office to be gathering the necessary factual data that might be needed in the enforcement of [the] decree.” Johnson suggested that Doar consider maintaining a group of attorneys in Montgomery for the purpose of monitoring the state legislature, should it decide to act on any of Governor Wallace’s defiant suggestions. The ever vigilant Doar had already done so. If the legislature stripped the state superintendent of his authority, the CRD was prepared to enter a motion asking that this be declared unconstitutional. The CRD had also prepared to enter further motions should the state continue to disburse funds to non-complying school systems. Division attorneys were also ready to move to have individual school systems added as parties defendant in the case if they failed to adopt

⁴¹ NAACP v. Wallace, 269 F.Supp 346, 350-2; *School Desegregation in the Southern and Border States*, May, 1967, SERS.

the court's model desegregation plan. Johnson advised Doar at one point that he had been "receiving information indicating that there may possibly be some official state interference and quite probably will be interference from private individuals and groups at some of the schools" Johnson assumed any state interference would again be based "upon the theory that it is incumbent upon the governor, in the exercise of her police power, to maintain 'law and order'" The Division was ready act in such case, and it was generally ready to be the court's right arm as the first stage in the implementation of the decree approached.⁴²

In mid-April, Ernest Stone dutifully reported to the court which systems had adopted and submitted desegregation plans, per the decree. According to Stone, 98 of the 99 school systems named in the *Lee* decree had submitted some sort of plan. The court called upon the CRD to analyze the plans and submit its own report. St. John Barrett bore the bad news to Judge Johnson in person first: nearly half of the systems had submitted unacceptable plans, mostly because they refused to account for faculty desegregation and the elimination of duplicate bus routes. Johnson warned the other two judges that a "very disappointing" report was forthcoming. The CRD's analysis revealed that 15 systems had adopted plans "conforming to the Court's model plan in all particulars," while another 24 had adopted a model plan with only minor deviations in choice period dates. Seventeen systems had adopted close-to-model plans, which the CRD felt could be easily corrected. Most of these had made subtle changes in the language of the court's model plan which they felt would allow them to stall for time or to avoid some particularly onerous detail. Ten school systems claimed to have closed all previously black schools for the upcoming term; all of these systems had relatively few black students and could thus absorb them into white schools with relatively few problems. Two of those 10 systems,

⁴² Richard Rives to John Brown, April 19, 1967; Frank Johnson to Richard Rives and Hobart Grooms, April 4, 1967; both in Frank Johnson Papers: Lee v. Macon Case File, Container 28, Folder 10; Frank Johnson to John Doar, Aug. 16, 1967, Frank Johnson Papers: Lee v. Macon Case File, Container 29, Folder 3. Judge Rives at one point wrote to Judge Johnson: "Let me emphasize, however, that in this, as in nearly all administrative decisions in this case, it is my disposition to rely heavily on your good judgment"; see Richard Rives to Frank Johnson, Aug. 27, 1969, Johnson Papers: Lee v. Macon Case File, Container 30, Folder 7.

though, were city systems which had failed to ensure that their black students would not simply be bussed out to all-black county schools. Ten others had simply sent in the text of press releases indicating that they were in compliance with the outdated 1965-66 HEW Guidelines; these lacked any provisions for facilities equalization, consolidation and construction, periodic reporting, or substantive faculty desegregation. Another 17 had sent in HEW Form 441-B agreements, which included some of the “principle features” of the court’s model plan, but which also “omit[ted] a number of its principle provisions,” including those for equalization, consolidation and construction, and periodic reporting. Five systems sent in plans which were neither patterned after the court’s plan nor HEW’s, and which thus failed to meet the court’s standards in any way.⁴³

The court ordered Stone to notify the systems with unsatisfactory plans that revisions were needed. Most submitted or agreed to submit revised plans. As Doar had indicated to Judge Johnson that it would, the CRD then promptly moved to bring the most recalcitrant systems into compliance. Four systems failed, even after Stone’s notices to revise, to submit plans anywhere close to embodying the standards of the model plan: Autauga County, Cullman County, Pickens County, and Bibb County. The CRD moved to have them added as actual parties defendant to the case. Judge Johnson granted the motion and ordered the systems to show cause why they should not be added as such.⁴⁴

At an early May hearing, St. John Barrett revealed that Autauga, Cullman, and Pickens had filed answers to the show cause order in which they agreed to adopt the model plan. In subsequent correspondence with the court, they had agreed to address certain specific issues in their respective

⁴³ State Superintendent’s Report on School Systems Submitting Desegregation Plans, April 17, 1967; Report of the United States on Desegregation Plans Submitted, April 22, 1967; both in Frank Johnson Papers: Lee v. Macon Case File, Container 29, Folder 2; Frank Johnson to Richard Rives and Hobart Grooms, April 20, 1967, in Frank Johnson Papers: Lee v. Macon Case File, Container 28, 10; *School Desegregation in the Southern and Border States*, April, 1967, SERS; *Birmingham News*, April 13, 1967.

⁴⁴ Order Adding Parties Defendant and Order to Show Cause, April 24, 1967, Lee v. Macon County Board of Education, in Frank Johnson Papers: Lee v. Macon Case File, Container 29, Folder 2; Transcript of Proceedings, May 13, 1967, Lee v. Macon County Board of Education, in Frank Johnson Papers: Lee v. Macon Case File, Container 21, Folder 5; Order of May 18, 1967, Lee v. Macon County Board of Education, in Frank Johnson Papers: Lee v. Macon Case File, Container 29, Folder 1.

districts; for example, Cullman County agreed that black students from a closed black school would be absorbed into the County's white schools, not bussed out of the county to another system's schools. Bibb had made no response whatsoever. In fact Bibb had zero desegregated pupils and had resolved to fight its inclusion as a party defendant, having secured noted segregationist attorney Reid Barnes to plead its case. At the hearing, Barnes made an ill-prepared, stumbling, but insistent objection to Bibb being directly enjoined by the court. But the judges were unconvinced. Barrett successfully parried all of Barnes' attempts to persuade the court, which had already made up its collective mind in any case. The only question which gave the court any pause was that of jurisdiction: did the court have jurisdiction over Bibb in this instance, since Bibb was in the Northern District of Alabama, not the Middle District. The court found that it did, either via an ancillary proceeding or a properly joinable separate claim. The court agreed to discharge Autauga, Cullman, and Pickens as direct parties to the case, but the Bibb school board and its individual members and superintendent were enjoined from failing to adopt the model desegregation plan.⁴⁵

One week after the court issued the order enjoining Bibb County, the Supreme Court denied the defendant state officials' application for a stay pending the appeal of the March 22 decision in *Lee v. Macon*. At the same time, the Civil Rights Division submitted its analysis of the revised desegregation plans submitted by 48 school systems in April. The CRD determined that 38 had submitted revised plans that conformed to the model plan and that another 5 had agreed to submit necessary adjustments within three days. The remaining five had failed to submit satisfactory plans. The CRD entered a motion

⁴⁵ Order Adding Parties Defendant and Order to Show Cause, April 24, 1967, *Lee v. Macon County Board of Education*, in Frank Johnson Papers: *Lee v. Macon* Case File, Container 29, Folder 2; Transcript of Proceedings, May 13, 1967, *Lee v. Macon County Board of Education*, in Frank Johnson Papers: *Lee v. Macon* Case File, Container 21, Folder 5; Order of May 18, 1967, *Lee v. Macon County Board of Education*, in Frank Johnson Papers: *Lee v. Macon* Case File, Container 29, Folder 1.

asking that these five – Jasper, Linden, Marion, Marengo County, and Thomasville – be added as parties defendant and be ordered to show cause why they should not be enjoined.⁴⁶

The recalcitrant school boards were learning quickly about Judge Johnson. If these systems demonstrated good faith, or even just showed a genuine willingness to cooperate, he was quite understanding. If they appeared to be uncooperative or unconcerned, however, he would not hesitate to use the full power of the court to change their minds. He entered an order on May 26 adding the five systems as parties to the suit and set a show cause hearing for June 9. At the conclusion of the hearing, Marion and Thomasville found themselves the second and third systems under *Lee v. Macon* to be enjoined individually. Linden, Marengo, and Jasper were not enjoined but simply ordered to report to the court within the next several weeks as to their progress in adopting satisfactory plans. By the end of the month, Linden had been discharged as a defendant, and the other systems were making efforts to be similarly dismissed. Bibb remained obdurate and appealed its injunction to both the Fifth Circuit and the Supreme Court, uncertain of which court had appellate jurisdiction.⁴⁷

Ernest Stone had to work ceaselessly that summer compiling reports for the court. In addition to reports on individual systems' compliance status, Stone's office had to compile a comprehensive plan for the equalization of facilities in those systems, a similar plan for the elimination of dual transportation systems, and another for encouraging faculty desegregation. When Stone submitted his initial plans to the court, Judge Johnson submitted them to the CRD attorneys and to Fred Gray for analysis. The CRD found both the proposed facilities and transportation plans inadequate and asked the court to require "further implementation" of its decree. It suggested that the court require Stone to "prepare a further and more detailed proposed plan for equalization in accordance with the Decree and [to] submit such

⁴⁶ Report of the United States on Amended Desegregation Plans Submitted, May 25, 1967, *Lee v. Macon County Board of Education*, Frank Johnson Papers: *Lee v. Macon* Case File, Container 29, Folder 1.

⁴⁷ Orders Enjoining Marion and Thomasville City Boards of Education, June 14, 1967, *Lee v. Macon County Board of Education*, Frank Johnson Papers: *Lee v. Macon* Case File, Container 29, Folder 5; Order Discharging Linden City Board of Education, June 27, 1967, as listed on Docket Report, *Lee v. Macon County Board of Education*, *Lee v. Macon Trial Record*, United States Federal District Courthouse, Montgomery, AL.

plan to this Court no later than August 15, 1967.” Stone had submitted a very vague plan, so the CRD suggested that the revised plan include “an itemized inventory of all existing inequalities between schools attended predominantly by Negro children and schools attended predominantly by white children in each of the 99 systems” It further suggested 13 categories into which the inventory should be itemized, including per pupil spending, valuation of facilities and equipment, availability of textbooks, accreditation, and courses offered. Finally, the CRD proposed that Stone be required to work with each school system on individualized equalization plans and to submit those collectively to the court in the fall. When Stone submitted such plans for transportation desegregation, the CRD scrutinized each system’s plan and motioned for “more specific relief.” It asked the court to require each system to make certain modifications, including reports as to the number of expected black and white students on each bus and their ultimate destination. The court immediately approved each of the U.S.’s motions and ordered Stone to make the necessary changes, using the exact language from the CRD motions.⁴⁸

The avowedly segregationist Stone was obliged to carry out the court’s orders, faced as he was with contempt proceedings if he failed to do so. At the same time, the Justice Department was obliged to work with Stone to ensure that systems were complying. Johnson wrote to John Doar after entering the orders requiring further relief, advising him, “This Court expects, and requires, your office to ‘follow through’ on these matters by consultation with the State Superintendent of Education and the various local school authorities in an effort to eliminate these inequalities and, if necessary, as a final resort, by appropriate petition or petitions presented to the Court.” Johnson thus monitored the CRD’s progress,

⁴⁸ Motion for More Specific Relief Implementing Section III of the Court’s Decree of March 22, 1967, Lee v. Macon County Board of Education, Aug. 2, 1967; Motion of the United States for an Order Requiring State Superintendent Ernest Stone to Further Implement Section IV of the Decree of March 22, 1967, Lee v. Macon County Board of Education, Aug. 2, 1967; Frank Johnson Papers: Lee v. Macon Case File, Container 29, Folder 4. Order Granting U.S.’s Motions, Aug. 2, 1967, Lee v. Macon County Board of Education; Frank Johnson to Richard Rives and Hobart Grooms, July 19, 1967; both in Frank Johnson Papers: Lee v. Macon County Board of Education, Container 20, Folder 6.

while the CRD monitored Stone's progress. After hearing from the CRD attorneys, Stone often wrote to Johnson to emphasize his good faith and to beseech the court for more time. When the CRD advised Stone that he was behind in submitting the revised report on equalization, he wrote to Johnson, "The State Department of Education is woefully lacking in personnel to handle the obligations of the Court and the regular obligations to the schools. We are working overtime most every day," he continued, "in an effort to satisfy these obligations [and] pray that the Court will understand our problems and will bear with us as long as we put forth every possible effort" Johnson believed Stone was doing his best and generally granted the state superintendent the extensions he requested.⁴⁹

Johnson was patient with Stone because he understood the difficult task which he had been assigned. The plaintiffs, the CRD, and the court had envisioned Stone acting in the same capacity as Attorney General Meadows had recently acted, only he would be insisting upon desegregation rather than discouraging it. Johnson understood that, in doing so, Stone had to work very closely with very reluctant and often recalcitrant school boards and superintendents. For example, Stone wrote to the superintendent of Escambia County Schools, "Upon examination of your Inventory of Equalization . . . we find what appear to be inequalities. In further compliance with the special order," he continued, "it will be necessary for you to submit to me in triplicate your plans in detail to correct the inequalities listed by item on the attached sheet." These were inequalities which had been red-flagged by the CRD attorneys. Stone advised, "Barton Elementary with an enrollment of 64 is substandard in size. The site is classified for temporary use only. Are there any plans to close and consolidate this school and enroll pupils in other schools meeting desirable standards?" Stone was also obliged to point out, "Life Science and General Shop in grades 9, 10, and 12 is not taught in predominantly Negro schools whereas this subject is taught in these grades in predominantly white schools." Stone similarly informed Conecuh

⁴⁹ Frank Johnson to Assistant Attorney General John Doar, Civil Rights Division, Nov. 30, 1967, Frank Johnson Papers: Lee v. Macon Case File, Container 20, Folder 6; Ernest Stone to Frank Johnson, Nov. 22, 1967, Frank Johnson Papers: Lee v. Macon Case File, Container 20, Folder 2.

County that its per pupil valuation of school buildings was \$313.28 in black schools, compared to \$582.91 in white schools. The same for “furniture and fixtures” was \$2.16 to \$4.45. Per pupil expenditures on instructional materials was \$1,875 to \$3,400. Such systems were expected to submit appropriate changes to Stone, who forwarded them to the CRD and the court. These were the early mechanics of the *Lee v. Macon* statewide decree. Johnson and the Civil Rights Division attorneys at the Department of Justice supervised and advised state Superintendent Stone, who tried to keep local systems on schedule in submitting satisfactory plans.⁵⁰

The Court v. HEW

As the court went about implementing its decree through the Justice Department and Superintendent Stone, HEW continued to monitor school systems in Alabama. The two entities quickly clashed over jurisdiction. As early as April, school systems began complaining to Judge Johnson that they were being harassed by HEW investigators. Johnson called John Doar and asked him to talk to HEW officials and to ascertain their intentions relative to the *Lee v. Macon* school systems. Doar told Johnson that HEW felt it had “a continuing responsibility to audit the performance of all school boards,” whether they were under a court order or not. But HEW officials assured Doar that, pursuant to the revised Guidelines, HEW would consider systems “in-compliance” if they were “subject to a final order” of a federal court. Doar and Johnson assumed that this meant the *Lee* systems were “in-compliance” as long as they had adopted the court’s model plan and submitted an assurance of compliance to HEW. St. John Barrett had argued as much in court during the April hearing on the *Lee v. Macon* stay application. Problems arose, however, with respect to those systems which HEW had already cited for non-compliance prior to the March 22 *Lee v. Macon* order. HEW refused to give those systems an assurance

⁵⁰ Ernest Stone to Harry L. Weaver, Superintendent, Escambia County Schools, Dec. 1, 1967; Ernest Stone to Davis Brown, Superintendent, Colbert County Schools, Nov. 29, 1967; both in Frank Johnson Papers: *Lee v. Macon* Case File, Container 20, Folder 6.

that their funds would be restored, despite their adoption of the court's model plan. The affected school boards could not, then, hire and place teachers, because they did not know if they could pay them, and they could not plan remedial education programs, because they did not know if they would be funded. Johnson alerted the other two panel judges and suggested that they "advise the Department of Justice attorneys that such action on the part of HEW is thwarting the implementation of our order." Johnson felt that should ask DOJ to "attempt immediately to make arrangements with HEW officials for a continuation of funds" for all of the 99 *Lee* systems, and to attempt to "work out some policy on this point" in a "high level conference with HEW officials."⁵¹

When local school officials began complaining of HEW investigators demanding pupil assignments to meet percentage quotas, Johnson became more irritated. Doar assured the judge that these must have been the actions of "some low level bureaucrat" proceeding without the authority of established HEW policy. The judges considered enjoining HEW itself. Johnson felt it would have been counterproductive. The court would need HEW later, once securing "paper compliance" had given way to monitoring "actual performance" in the 99 systems. Johnson believed that enjoining HEW would have had the effect of "sabotaging" the department's effectiveness in this regard. But if HEW actually did adopt, at its highest levels, the "unrealistic policy" of waiting until after school had begun to assure compliant systems of funds reinstatement, or of requiring pupil assignment to achieve quotas, then he would "feel it necessary to take some action." Judges Rives and Grooms agreed. Rives commented that it appeared HEW was "not complying with the spirit or the letter" of the Guidelines. Doar continued to meet with HEW officials, but he was frustrated in his efforts to secure some sort of arrangement which would have kept HEW and the court from what appeared to be an increasingly serious confrontation.⁵²

⁵¹ Frank Johnson to Richard Rives and Hobart Grooms, April 13, 1967; Frank Johnson to Richard Rives and Hobart Grooms, April 24, 1967; both in Frank Johnson Papers: *Lee v. Macon* Case File, Container 23, Folder 3.

⁵² Frank Johnson to Richard Rives and Hobart Grooms, May 4, 1967; Richard Rives to Frank Johnson, April 24, 1967; Hobart Grooms to Frank Johnson, April 1, 1967; all in Frank Johnson Papers: *Lee v. Macon* Case File, Container 20, Folder 6.

The department and the court simply disagreed fundamentally as to HEW's role moving forward, as far as the *Lee* systems were concerned. The court felt that HEW ought to continue to monitor these systems, just as the Civil Rights Division was doing. But the judges assumed that HEW would not defer or terminate funds without first bringing the matter before the court. Any analysis or determination the CRD made was submitted to the court in the form of a recommendation or motion for some sort of action. HEW did not see its role in this way. Its position was that the 99 systems were *not* "subject to a final order" of a federal court, because other than Bibb and a few others, the systems were not actual parties to the suit. Therefore, systems which were notified of non-compliance before the *Lee v. Macon* order needed to take some action to restore their complaint status, beyond simply adopting the court's model plan. Accordingly, Peter Libassi, head of the HEW Office of Civil Rights, instructed HEW officials to continue in their funds deferral and termination process where systems were found to be inadequately proceeding towards meaningful desegregation. HEW Secretary John Gardner had recently given Libassi control over all HEW civil rights enforcement, meaning that the controversial Harold Howe was no longer in charge of school desegregation compliance. This was widely seen as an effort to mollify the concerns of irritated southern Democrats, whose support the Johnson Administration needed to renew the Elementary and Secondary Education Act. Removing Howe's enforcement powers undoubtedly helped bring some Democratic legislators on board with the administration. But if Libassi's appointment was supposed to signal an HEW retreat, Alabama's Democrats were quickly disappointed.⁵³

In June HEW moved to terminate federal funds to the Lanett city system, one of the 99 *Lee* systems. This action brought matters to a head with the court. Lanett had been deemed a non-complier before the March order. HEW investigators found that the system was maintaining a black

⁵³ *New York Times*, May 14, 1967; Order Adding Parties Defendant and Temporary Restraining Order, July 14, 1967, *Lee v. Macon County Board of Education*, Frank Johnson Papers: *Lee v. Macon* Case File, Container 29, Folder 5; "The Courts, HEW, and School Desegregation," Comment, *Yale Law Journal* 77 (Dec., 1967): pp. 321-365, pp. 323-4.

high school which the department felt ought to be closed and its student body consolidated. They also determined, in the words of the Lanett superintendent, that the Lanett school board “did not have enough mixing as a result of freedom of choice.” The school board had submitted an adequate plan to the court and had submitted all necessary reports to Stone as ordered. Indeed, as part of its approved plans, Lanett was scheduled to rectify the problem areas cited by HEW investigators. But HEW was not satisfied. Doar wrote Judge Johnson and tried to lobby for HEW, prompting Johnson, in an extremely rare difference of opinion, to accuse Doar of being “high-handed.” HEW then moved to defer funds to Talladega County, another *Lee* system, whose compliance efforts Johnson described as “magnificent.” At this point, Johnson wrote Rives and Grooms, calling their attention to the “ridiculous situation” and suggesting that it made an injunction “even more necessary than the Lanett situation” The court decided that it could not allow school boards to be subject to such conflicting pressures and requirements, nor was it prepared to let its authority be challenged in such a way. Johnson drafted and entered an order adding Libassi, Secretary Gardner, and HEW attorney James Dunn as defendant parties in *Lee v. Macon* and temporarily enjoined them from terminating funds to any of the 99 systems.⁵⁴

To consider the enlargement of the restraining order into an injunction, the court on July 22 held a hearing, the circumstances of which could be described as farcical. The Justice Department attorneys already working on the *Lee* case were put in the position of defending Gardner, Libassi, and Dunn. And St. John Barrett did so with determination. All three judges were of the opinion that HEW had overstepped its newly proscribed bounds in Alabama by moving to terminate the funds. In their minds, HEW was essentially attempting to pass judgment on which systems were actually in compliance with the court’s own order. In a mirror image of most proceedings in *Lee v. Macon* – or any school

⁵⁴ Order Adding Parties Defendant and Temporary Restraining Order, July 14, 1967, *Lee v. Macon County Board of Education*, Frank Johnson Papers: *Lee v. Macon* Case File, Container 29, Folder 5; Prehearing Memorandum with Handwritten Notes, Frank Johnson Papers: *Lee v. Macon* Case File, Container 21, Folder 8; Frank Johnson to Richard Rives and Hobart Grooms, July 27, 1967, and Frank Johnson to John Doar Aug. (date missing), 1967, in Frank Johnson Papers: *Lee v. Macon* Case File, Container 29, Folder 3; *New York Times*, July 15, 1967.

desegregation case – the defense counsel for the state officials found themselves in total agreement with the court, while the CRD attorneys vigorously defended HEW against the court’s interpretation. Barrett called Libassi to the stand in an attempt to establish HEW’s position. Libassi’s testimony was frequently sidelined, however, as the CRD’s point man argued openly with Judge Rives, who became visibly angry, saying at one point, “We’ve gone about our limit in trying to work with HEW.” Towards the end of the day-long hearing, Barrett maintained that school boards subject to termination proceedings had the recourse of “judicial review,” meaning they could appeal for a stay of any termination action pending court review. There was a question, even then, of whether this would be reviewed by the Washington, D.C. district court or the three-judge court with jurisdiction in *Lee v. Macon*. Johnson, Rives, and Grooms mostly felt that question was moot, however, which only served to enhance their irritation.⁵⁵

Judge Johnson spoke to the fundamental issue, “Before that final determination is made [to terminate federal funds], as Judge Rives says, which has the practical effect of hurting the school system . . . it must be submitted to the Court so the Court can determine whether or not its order has been complied with.” That determination could then be made on the basis of the factual record developed by HEW during its administrative procedure. At the end of the hearing, Johnson noted the bizarre circumstances:

The court observes – and I guess it is permissible for me to say this – that there are several ironies in this case; at this posture it has reached the point, almost, of being ridiculous: That HEW failed to achieve school desegregation here in Alabama and, through the Justice Department, sought the aid of this Court and requested a Court order. And now HEW claims authority to determine if the Court order is being complied with. The defendants opposed the entry of a Court order in this case and contested vigorously the jurisdiction of the Court to enter it, but now they maintain that it should be strictly complied with. The defendants have the court order on appeal contesting its validity, and the [federal] Government is maintaining, on appeal, that the Court order is valid. . . . All of that is designed to point out the position that

⁵⁵ Transcript of Proceedings, *Lee v. Macon County Board of Education*, July 22, 1967, Frank Johnson Papers: *Lee v. Macon* Case File, Container 21, Folder 8 (See Frank Johnson’s Handwritten Notes from Hearing at Container 21, Folder 5); *School Desegregation in the Southern and Border States*, July, 1967, SERS.

Judge Rives stated originally in this hearing, that there must be some authority to determine these issues insofar as those 99 systems are concerned, and the Court is the only authority to do it.⁵⁶

On June 28, 1967, the court enlarged the temporary restraining order into a preliminary injunction. It ordered HEW to rescind its termination of federal funds to the Lanett system and to refrain from any further terminations without first submitting such a matter to the court. Judge Johnson argued that the March 22 order had effectively restored the 99 systems to “in-compliance” status for the purpose of federal funding. All of the *Lee v. Macon* systems, save Bibb, had subsequently submitted plans and assurances of compliance. When HEW made an independent determination, after the fact, that Lanett was not in compliance, it violated the federal regulation respecting systems subject to a court order. The court rejected the argument that the systems were not technically subject to a final court order. According to Johnson, it overlooked “the real basis for the entry of [the] Court’s statewide desegregation decree” and ignored “the fact that said school systems, by filing their desegregation plans with [the] Court as ordered, submitted to the jurisdiction of [the] Court.” Johnson also determined that HEW’s finding of non-compliance, based as it was on meeting quotas, was an “attack on the ‘freedom of choice’ method of desegregation.” The judges had acknowledged that freedom of choice might not work, but at that time it was still the policy of the Fifth Circuit to give it the opportunity to work. In closing Johnson wrote, “To permit the Department of Health, Education, and Welfare to terminate funds to school systems under the order of this Court would be an abdication on the part of the Court of its authority to require compliance with a court order. There can be no administrative supervision or review of a judicial decree.”⁵⁷

⁵⁶ Transcript of Proceedings, *Lee v. Macon County Board of Education*, July 22, 1967, Frank Johnson Papers: *Lee v. Macon* Case File, Container 21, Folder 8 (See Frank Johnson’s Handwritten Notes from Hearing at Container 21, Folder 5).

⁵⁷ Opinion and Order for a Preliminary Injunction, July 28, 1967, *Lee v. Macon County Board of Education*, 270 F.Supp. 859; see hard copy with handwritten notes at Frank Johnson Papers: *Lee v. Macon* Case File, Container

HEW Acting Director of the Office for Civil Rights Derrick Bell called it a “pseudo-legal interpretation.” Bell indicated that an appeal of the decision – which would have run to the Supreme Court – was unlikely, however. He called HEW’s enforcement program “one of the few positive steps the government can point to in these troubled times,” and he expressed “hope” that it would not be “scuttled” on the basis of the trial court’s ruling. He noted that the court still expected HEW to conduct reviews of desegregation in court-ordered districts. The department would attempt to continue in this role. Nonetheless, Bell said, “In Alabama, the decision certainly means that our basic tool for bringing about compliance – if not taken away – is at least placed in the background.”⁵⁸

The U.S. Civil Rights Commission released a report on school desegregation that summer, 1967. The Commission found that there had been “significant progress” since the passage of the Civil Rights Act and the implementation of Title VI by HEW. But when that progress was “measured against the constitutional rights of Negro school children,” it became “clear that the task of securing compliance [had] only begun.” The fight over the validity of the HEW Guidelines had obscured this fact. The vast majority of black school children who had entered the first grade the year after *Brown* had graduated that spring “without ever having attended a single class with a single white student.” Most of the progress that had been made had been progress towards only token pupil desegregation. In the Deep South, over 90 percent of black students still attended all-black schools. The commission determined that the “central fact” to emerge from its investigations was that “the vast majority of Negro school

29, Folder 5; see the opinion and order also reported at *Race Relations Law Reporter* 12.3 (Fall, 1967), pp. 1208-14; *School Desegregation in the Southern and Border States*, July, 1967, SERS; *Birmingham News*, July 29, 1967.

⁵⁸ *Atlanta Constitution*, Aug. 2, 1967.

children [were] being denied the rights declared to be theirs in the School Segregation Cases and the Civil Rights Act of 1964.”⁵⁹

Making the law “work” was the principle task moving forward, and the “real issue” involved in that task was “whether further delays [were] permissible” There would be costs, but they had to be “weighed against the costs of continuing disrespect for the law [and] the damage already sustained in the loss forever to a generation of Negro children of their right to a desegregated education and the prospect that the same loss [might then] be inflicted upon many thousands of children of a new generation.” The Civil Rights Commission’s recommendations hinted at the abandonment of freedom of choice as a preferred desegregation method. It determined that “substantial desegregation” could not be achieved unless there was “a rapid acceleration in the numbers of Negro students attending desegregated schools” and a similar acceleration in the pace of eliminating racially identifiable schools. Moving forward in Alabama, it would be up to the court to determine what made the law work, what freedom of choice really meant, and what it would take to grant black students their constitutional rights. *Lee v. Macon County Board of Education* had ensured that.⁶⁰

⁵⁹ *Southern School Desegregation, 1966-67*, A Report of the U.S. Commission on Civil Rights (Washington, D.C.: Government Printing Office, July, 1967), pp. 90-4.

⁶⁰ *Southern School Desegregation, 1966-67*, U.S. Commission on Civil Rights, pp. 90-4.

CHAPTER 13: THE FLEETING FREEDOM TO CHOOSE, 1967-68

When school opened in the fall of 1967, there was a modest increase in pupil and teacher desegregation in Alabama and across the South, the vast majority of it through some form of freedom of choice. By the summer of 1968, though, freedom of choice was all but dead. In June, 1968 Governor Albert Brewer reacted to recent decisions of the U.S. Supreme Court and Fifth Circuit Court of Appeals by announcing, “Because of . . . innovation by judicial decree, the courts are now declaring that a person in this republic no longer can exercise a choice.” But Alabamians, he concluded, were “satisfied with the operation of the freedom of choice plan” and therefore stood poised to resist the recent decisions and to defend freedom of choice as a preferred method of desegregation. Why did the courts begin to scrutinize free choice plans more closely, and what would make a career segregationist like Albert Brewer defend them?¹

The short answer was: because freedom of choice did not work. It proved to be what most thought it would be – an avenue to tokenism. Brewer, the Wallaces, and most white Alabamians supported it for this reason. It was clearly better for segregationists than the alternative, that is, the actual eradication of the dual school system based on race. Throughout 1967-68, the plaintiffs in *Lee v. Macon County Board of Education* continued to use that case as a means to bring Alabama’s dual system to an effective end by making the *choice* in freedom-of-choice actually free. The Civil Rights Division of the Justice Department and the NAACP Legal Defense Fund, represented by Fred Gray, entered motions which took *Lee v. Macon* into several different “phases.” The first of these were aimed at eliminating the last major state-sponsored attempts at total defiance, at forcing some meaningful measure of faculty desegregation, and at desegregating the state’s high school athletics associations. Whites across the state – at the state and local level, officially and unofficially – continued to resist even the

¹ *Birmingham News*, June 1, 1968.

incremental changes which these efforts produced. Meanwhile, decisions in several of the state's other desegregation suits – *U.S. v. Jefferson*, *Carr v. Montgomery*, and *Davis v. Mobile County* – closely anticipated the U.S. Supreme Court's most important school desegregation decision since *Cooper v. Aaron*, or perhaps even since *Brown II*.

In September, 1967, the school desegregation watchdog the Southern Education Reporting Service determined, "Court action continues to play a central role [in school desegregation] despite the considerable pressure exerted by the federal guidelines for compliance with the Civil Rights Act." The Service indicated that the efforts of the federal courts and those of the HEW Office for Civil Rights were both concentrated that fall on faculty desegregation. In the 99 systems under the *Lee v. Macon County* order, there were reportedly 7,441 black students and 541 black teachers in formerly all-white schools, as well as 346 white teachers in all-black schools. The 19 systems under prior, independent court orders had seen their requirements brought up to the standards of *Lee v. Macon* and *U.S. v. Jefferson* through various motions for further and supplementary relief. Including those 19 systems, there were around 16,000 blacks in school with whites in Alabama. This remained a fraction of a percent, as the vast majority of black students continued to attend all-black schools. Faculty desegregation rarely exceeded more than one teacher of the opposite race at a given school, black or white, and many schools still had single-race faculties.²

Perhaps because there was still only token change, there were no high profile incidents of violence or direct interference. The courts had obtained reasonable compliance from the state's local school officials, who seemed to be resigned to carrying out their duties, free to deflect pressure by blaming the federal court. Most were simply relieved to be able to share in the state's \$37 million Title I federal funds allocation for 1968, which had increased by \$7 million from the previous year. Governor Lurleen Wallace's speech and charge to the legislature in the wake of *Lee v. Macon* and *U.S. v. Jefferson*

² *School Desegregation in the Southern and Border States*, Sept., 1967, SERS; *Birmingham News*, Sept. 5, 1967, Jan. 30, 1968.

had apparently not produced any sort of third 'stand in the schoolhouse door.' At least, there were no elaborate shenanigans designed to prevent the actual entry of students into schools. Of continuing defiance, however, there was plenty, even before freedom of choice appeared to be on its way out of judicial favor.³

The Teacher Choice Act and the Third Tuition Grant Act

Just after schools opened that fall, the Wallace Administration asked that school systems circulate "teacher choice" forms to their students' parents. The forms asked parents to indicate a preference: would they rather their child be taught by a teacher of his or her own race, or by a teacher of the opposite race. The administration knew that very few white parents would indicate a preference for black teachers, and it had guessed that probably very few blacks would prefer white teachers. The survey was flawed, of course. It did not ask if parents would object to their child having a teacher of the opposite race, only if they preferred that to the status quo. Some school systems understood this and added the option, "I prefer that the board of education assign qualified teachers, regardless of race." Some systems did not give out the forms at all. At least one board told the governor's office frankly that they felt the survey would have no bearing on their assignment of teachers and suggested that they were a waste of time. Most were not so bold. The superintendent of Butler County Schools called Frank Johnson on the telephone to complain and expressed to Johnson's law clerk that the "request" of the governor amounted to a demand that school boards deliberately violate the lawful orders of the court. He expressed the "fervent hope" that "someone should go to jail." He indicated that the survey was already having one of its desired effects: parents were sending him petitions requesting "a teacher of their own race" for their children. He was bewildered about anyone finding out that he called, telling Johnson's clerk to "forget that he called" and agreeing to send in a copy of the survey form only if he

³ *School Desegregation in the Southern and Border States*, Sept., 1967, SERS; *Birmingham News*, Sept. 5, 1967, Jan. 30, 1968.

could address it to the clerk personally – so that he could “look anyone in the eye and say I never did so and so.” The attorney for the Washington County school board placed a similar call to Judge Richard Rives, displaying a “general aura of disgust for state government antics.” Many local officials were exhausted from state-level defiance, but they were still held hostage by the effect that it had on whites in their districts.⁴

The governor’s office received around 300,000 responses, out of an estimated statewide enrollment of over 800,000. Lurleen Wallace announced, “The significant part of the poll indicates that 99 percent of the parents of both races either prefer a teacher of their own race or do not have a preference and, therefore, would not be harmed if given a teacher of their own race.” Wallace said that the results proved “conclusively that the March 22 [*Lee v. Macon*] order was erroneous.” She added that she would “call upon the court to admit its error and reverse the ruling it has made.” It was an utterly fantastic suggestion. But it was the Wallace way. It was intended to increase community pressure on long-besieged school boards and to further aggrandize the administration in the eyes of the mass of segregationists, who clung to the notion that dogged resistance would one day result in victory. It was also designed to supplement another maneuver with only a slightly greater chance of success: the passage of yet another defiant law.⁵

On September 1, 1967, the state legislature approved Act Number 285, the “teacher choice” law. Governor Wallace called it “one of the most meaningful pieces of legislation ever passed by the Alabama legislature.” It declared, “Local boards shall have the authority to assign and reassign or transfer all teachers in schools within their jurisdiction; provided, however, all students, acting through their parent or guardian, shall be required to exercise a choice . . . of the race of the teacher desired” The law included a sample form which read, “I (we) prefer that my (our) child be taught by a

⁴ Memo of Phone Call, Sept. 8, 1967, H.L. Terrell to the Court; Richard Rives to Hobart Grooms and Frank Johnson, Sept. 11, 1967; both in Frank Johnson Papers, *Lee v. Macon* Case File, Container 29, Folder 7; *School Desegregation in the Southern and Border States*, Sept., 1967, SERS.

⁵ *School Desegregation in the Southern and Border States*, Sept., 1967, SERS.

teacher of the following race: White ___ Negro ____.” This was identical to the form that the state asked systems to circulate. Indeed, the governor had sent out a form letter to all superintendents in the state which read, “In order to get evidence to present to the Court . . . in connection with the Teacher Choice law, I request that you take action immediately and . . . allow parents or guardians of students to exercise a choice of the race of teacher they prefer.” The law aimed to force local school boards to do what the Tuscaloosa board had been unwilling to do before: allow white students to transfer classrooms when they objected to black teachers. It declared, “No child shall be required to have a teacher of a race different from the one preferred by his or her parent or guardian except where the preference made does not reflect the majority will of parents or guardians similarly situated.” It threatened local school boards which did not carry out the requirements with the cut-off of state funding, and it gave the governor the authority of enforcement through “such administrative action as is deemed necessary.”⁶

Fred Gray immediately filed a motion for further relief in *Lee v. Macon*, asking the court to declare the act unconstitutional and to issue a preliminary injunction against its enforcement. “Apart from its obvious incompatibility with the Equal Protection Clause of the Fourteenth Amendment,” Gray wrote, the act “could not be more obvious in its design to thwart this Court’s decision of March 22, 1967.” He quoted from the March order, which had allowed for considering race in teacher assignments for remedial purposes. “It cannot be seriously suggested,” Gray argued, “that the purpose of the Teacher Choice Act is to correct the effects of past faculty desegregation. Rather, it constitutes the most recent – and reckless – form of ‘dramatic interference with local efforts to desegregate public schools.’” The Civil Rights Division soon filed its own supplemental complaint, also asking for a declaration of the act’s unconstitutionality and for a preliminary injunction. The CRD attorneys argued that “the inevitable

⁶ Plaintiffs’ Motion for Further Relief, Sept. 2, 1967, copy of Alabama Act 285 attached, *Lee v. Macon County Board of Education*; See copy of Alabama Act 285, with handwritten notes, also at Frank Johnson Papers, *Lee v. Macon Case File*, Container 22, Folder 1; Governor Lurleen Wallace to Superintendents of Education, Sept 6, 1967, Frank Johnson Papers: *Lee v. Macon Case File*, Container 29, Folder 7; *School Desegregation in the Southern and Border States*, Sept., 1967, SERS.

effect of enforcing [the act]” would be to “perpetuate the dual system based on race, and to impede and interfere with efforts of local school systems to transform” their dual systems into unitary ones. The state NAACP in Birmingham also filed its own complaint against the law, as a motion within the *Brown v. Bessemer* litigation. George Wallace acknowledged that the law’s fate was thus “up to the judges,” adding that its invalidation would “prove once again that the Constitution has been raped and the courts and the federal government have taken over completely.”⁷

The teacher choice law was not the only obstructionist bill passed by the state legislature that fall. The legislators passed a bill directing all state-supported colleges to fly the Confederate flag and play the unofficial anthem of the Confederacy – Dixie – at all homecoming football games. Of more immediate relevance, though, was the bill passed on August 31, which became Act Number 266. It was yet another tuition grant law, the third of its kind to be passed by the Alabama legislature since *Brown*. Like one of its predecessors, this one was patterned after a recently passed Louisiana statute. It created a “Financial Assistance Commission” to administer funds “for the purpose of providing financial assistance to students attending private non-sectarian elementary or secondary schools in [the] state.” The governor was to appoint a three member commission, which could then establish local “offices” to administer the grants.⁸

Fred Gray moved to have the court strike this law as well. He argued that “no difference of any legal significance exists between Act. No. 266 . . . and the Tuition Grant Statute invalidated by this

⁷ Plaintiffs’ Motion for Further Relief, Sept. 2, 1967, copy of Alabama Act 285 attached, *Lee v. Macon County Board of Education*; United States’ Supplemental Complaint, Motion for Preliminary Injunction, and Memorandum in Support of the Motion for a Preliminary Injunction, Sept. 4, 1967, *Lee v. Macon County Board of Education*; Frank Johnson Papers: *Lee v. Macon* Case File, Container 30, Folder 2. See copy of Alabama Act 285, with handwritten notes, also at Johnson Papers, *Lee v. Macon* Case File, Container 22, Folder 1; *School Desegregation in the Southern and Border States*, Sept., 1967, SERS; *New York Times*, Aug. 27, 1967.

⁸ Plaintiffs’ Motion for Further Relief, Sept. 2, 1967, copy of Alabama Act 266 attached, *Lee v. Macon County Board of Education*; Temporary Restraining Order, Sept. 5, 1967, *Lee v. Macon County Board of Education*; both in Frank Johnson Papers: *Lee v. Macon* Case File, Container 30, Folder 2. See copy of Alabama Act 266, with handwritten notes, also at Johnson Papers, *Lee v. Macon* Case File, Container 22, Folder 1; see the temporary restraining order also reported at *Race Relations Law Reporter* 12.3 (Fall, 1967), pp. 1215; *School Desegregation in the Southern and Border States*, Sept., 1967, SERS.

Court's Decree of March 22, 1967; for Act No. 266 was nonetheless born of the effort to discriminate against Negroes." Gray quoted the section of the decree which compared that statute with the statute struck down in the 1964 order and wrote, "Act. No. 266 calls for the third – and hopefully last – strike." The plaintiffs moved for a temporary restraining order against both the Tuition Grant Act and the Teacher Choice Act, pending a judgment on injunctions against each. The court issued such an order against the Teacher Choice Act but not the Tuition Grant Act. Using the standard of "immediate and irreparable injury and damage," the court determined that the tuition grant law could await a proper hearing. The judges then set the motions for preliminary injunctions for such a hearing, to be held September 16.⁹

Lurleen Wallace called the issuance of a restraining order against the Teacher Choice Act a "Star Chamber type of procedure." Her husband refused to allow a U.S. Marshall to serve the order on his wife, telling him to inform the Attorney General of the United States, "Rather than go around attacking the individual rights of school children, he could spend his time better prosecuting these people who burn the country down and preach violence and overthrow of the government." Mrs. Wallace had recently been diagnosed with cancer. Her condition began to worsen that summer, and her involvement in the day-to-day affairs of governing soon diminished. Not eager for a fight under the circumstances, the Marshall simply left the order on the desk of Wallace advisor Hugh Maddox. Days later George – who kept up his torrid presidential campaign pace during Lurleen's convalescence – asked a crowd in Mobile at a Labor Day rally, "Is it unconstitutional to have mothers and fathers say who they want to teach their children?" Those children's "hearts and minds," he added, ought not to "belong to politicians and judges." An informal survey conducted by the *Birmingham News* concluded that the teacher choice law "appeared to rate high in public regard." School systems were under so

⁹ Plaintiffs' Motion for Further Relief, Sept. 2, 1967, copy of Alabama Act 266 attached, *Lee v. Macon County Board of Education*; Temporary Restraining Order, Sept. 5, 1967, *Lee v. Macon County Board of Education*; both in Frank Johnson Papers: *Lee v. Macon Case File*, Container 30, Folder 2; *Race Relations Law Reporter* 12.3 (Fall, 1967), pp. 1215; *School Desegregation in the Southern and Border States*, Sept., 1967, SERS.

much pressure not to defy the Wallace regime that some sent out the teacher choice forms with disclaimers, mindful of the restraining order placed on the teacher choice law. The Montgomery school board wrote on its survey forms, "This notice is not intended in any way to enforce, take any steps to implement, or otherwise put into effect any of the provisions of Act No. 285 of the legislature."¹⁰

Almost no one outside the Wallace Administration expressed much hope that the teacher choice bill would escape court censure. But there was some thought that the court would refuse to strike the tuition grant bill until the "commission" had been appointed and grants had actually been paid out. Anticipating this latter quandary, Fred Gray filed a supplemental memorandum with the court just prior to the September 16 hearing. Gray predicted that the defendant state officials would argue that "the actual effect of Act No. 266 must be demonstrated at the hearing . . . before its enforcement [could] be enjoined. Gray argued, "The state of desegregated public education in Alabama is too precarious to permit yet another scheme for frustrating *Brown v. Board of Education* and the Court's order of March 22, 1967 to come to fruition." There was "no doubt" as to what the effect of the act would be, he felt: the subsidization of "the flight of white students from desegregated schools." Gray quoted the court's observation in the March, 1967 *Lee* ruling that, under the previous tuition grant law, "every dollar paid during the 1965-66 school year went to students enrolled in all-white private schools established when the public schools desegregated." He warned that the effect this time could be significantly different. Prior to the March decree, only 19 school systems were subject to court orders, and the amount awarded to nascent segregationist academies was a mere \$28,000. Now, Gray observed, every system in the state was subject to a court order, and the state had appropriated over \$3 million for grants. The law's passage clearly demonstrated state officials' "determination that the magnitude of the refuge from desegregated education in Alabama [would] keep pace with the

¹⁰ *School Desegregation in the Southern and Border States*, Sept., 1967, SERS; *Atlanta Constitution*, Sept. 6, 1967; *Birmingham News*, Sept. 7, 11, 1967; Carter, *Politics of Rage*, pp. 300-6; Notice to Parents and Guardians of Students of Montgomery County Public School System, Frank Johnson Papers: *Lee v. Macon* Case File, Container 29, Folder 7.

implementation of *Brown* and [the District] Court's orders." Fortunately for the plaintiffs, a three-judge court in Louisiana had recently struck down that state's latest tuition grant law on the basis of its "purpose and reasonable effect," in a case styled *Poindexter v. Louisiana Financial Assistance Commission*. Gray quoted that opinion, arguing that the new Alabama statute would "make previous tuition grant schemes seem 'but a drop in the bucket compared with its future costs.'"¹¹

Gray knew that the *Lee* court was already aware of the *Poindexter* case and the defiant actions of the Louisiana state government in general. Judge Rives sat on the three-judge panel hearing the long-running *Bush v. Orleans Parish* case, in which much of Louisiana's defiance had been litigated. Rives had compared the political situation in Alabama to that of Louisiana as far back as April. Not long after Lurleen Wallace's defiant speech in March, Rives wrote Judges Johnson and Grooms, telling them he had "turned back to all the schemes attempted by the Louisiana legislature and declared null and void by the three-judge district court of Rives, [Herbert] Christenberry, and [Skelly] Wright" and found that each of them was affirmed by the Supreme Court. Rives wondered "whether the Alabama legislature [could] be any more ingenious," cleverly alluding to the Supreme Court's acknowledgment in *Cooper v. Aaron* that states could not nullify school desegregation law through "evasive schemes . . . whether attempted 'ingeniously or ingenuously.'" The day the *Poindexter* decision came down, Rives wrote Johnson and Grooms and again acknowledged that the Alabama legislature seemed to be "repeating so much that [had been] done by the Louisiana Legislature" Rives was confident that the court could and would strike the recent Alabama action with minimal effort. It was virtually identical to the Louisiana statute. "I would doubt," he wrote, "whether any intelligent person can hope to defeat our [March 22] decree legally. It is the actually but covertly illegal moves which will probably trouble us most," he ominously cautioned, "the attempts to work some people up into a frenzy and practically to substitute mob rule for

¹¹ Supplemental Complaint in Support of Plaintiffs' Motion for a Preliminary Injunction, Sept. 16, 1967, *Lee v. Macon County Board of Education*, Frank Johnson Papers: *Lee v. Macon* Case File, Container 22, Folder 2; Gray quoting from *Poindexter v. Louisiana Financial Assistance Commission*, 275 F.Supp. 833, 857 (ED, LA, 1967).

a rule of law.” One week after Lurleen Wallace signed the tuition grant bill into law, she vowed to withhold a \$470,000 grant to Tuskegee Institute if the court struck the law. The state had been paying the Tuskegee grant for 50 years to finance nursing, engineering, and veterinary medicine programs for black students. The governor said she saw “absolutely no difference between the payment of tuition grants to students who may wish to attend a private school like Macon Academy and state grants to a private school like Tuskegee Institute.”¹²

The September 16 hearing to consider the latest legal schemes of evasion quickly became an omnibus affair, reflecting the ever-increasing complexity of the *Lee v. Macon* litigation. In addition to the two state statutes, the court had to consider motions of the United States to add more school systems as parties defendant and a motion to intervene filed by the Alabama State Teachers Association (ASTA). On September 4, the CRD motioned to have seven systems (Baldwin, Cherokee, Chilton, Dallas, Limestone, Pickens, and Washington Counties) added as parties defendant, citing their inadequate progress in faculty desegregation. Cherokee, for example, had only desegregated two of its seven all-white faculties (with one black teacher each) and had relied on volunteers for the task. None of the systems had achieved any substantial desegregation of faculties at all-black schools. The CRD also objected to the particular assignments given to black teachers in white schools. According to the Division, there were seven black teachers in formerly all-white schools in Washington County, and none of them was “scheduled to instruct in substantive courses”; it was also “apparent that four [would] do no teaching at all.” Many desegregating black teachers were assigned to physical education classes, study halls, and libraries. At the same time, many desegregating white teachers were assigned to black schools on a part-time basis. The school boards in each system argued that they had limited their

¹² Richard Rives to Hobart Grooms and Frank Johnson, April 4, 1967, Frank Johnson Papers: Lee v. Macon Case File, Container 28, Folder 6; Richard Rives to Hobart Grooms and Frank Johnson, Aug. 25, 1967, Frank Johnson Papers: Lee v. Macon Case File, Container 22, Folder 1. Addenda to Prehearing Memorandum, Sept. 16, 1967, Frank Johnson Papers: Lee v. Macon Case File, Container 22, Folder 1; *School Desegregation in the Southern and Border States*, Sept., 1967, SERS.

assignments because they could not obtain any more volunteers. The CRD responded that the systems could not ‘transfer their constitutional obligations from themselves to the teachers.’ They had not met their obligations “in numbers or in substance,” so the CRD attorneys suggested that each be enjoined from refusing to implement more specific provisions.¹³

The ASTA was also concerned with the particulars of faculty desegregation and filed a complaint seeking to intervene in *Lee v. Macon* as a plaintiff for this reason. Fred Gray’s partner, Solomon Seay, Jr., represented the organization. Seay was the son of the Montgomery reverend and civil rights leader Solomon Seay, Sr., a veteran of campaigns against police violence and of the famed bus boycott. The younger Seay attended Howard University, where he obtained his J.D. at the state of Alabama’s expense, just as his predecessors had done. Like Gray, he returned to Alabama on a mission to bring down the last bastions of Jim Crow. Seay joined Gray in 1964 and soon inherited much of the leg work in the *Lee v. Macon* litigation. In representing ASTA, the two attorneys argued that the 99 *Lee* systems were disregarding the March decree when forced to close substandard all-black schools. School boards were supposed to reassign teachers from closed schools without regard to race. Gray and Seay maintained that some systems were instead simply dismissing black teachers, administrators, and staff, or at best, demoting them upon reassignment. Furthermore, school boards were often transferring uncertified white teachers to black schools or allowing new teachers to use black schools as a “back door” to the white schools. At the same time, school boards were privately insisting that black teachers in white schools be, in Seay’s words, “light, bright, or damned-near white.”¹⁴

¹³ Plaintiff-Intervenor’s Brief in Support of Its Motion to Have Parties Added as Defendants, Sept. 26, 1967, *Lee v. Macon County Board of Education*, Frank Johnson Papers: *Lee v. Macon* Case File, Container 22, Folder 2.

¹⁴ Complaint in Intervention of Alabama State Teachers Association, Sept. 2, 1967, *Lee v. Macon County Board of Education*, Frank Johnson Papers: *Lee v. Macon* Case File, Container 30, Folder 2; Memorandum in Support of Motion for Leave to Intervene, Sept. 16, 1967, *Lee v. Macon County Board of Education*, Frank Johnson Papers: *Lee v. Macon* Case File, Container 22, Folder 2; Solomon Seay, Sr., *I Was There by the Grace of God* (Montgomery: New South, 2002); Seay, Jr., *Jim Crow and Me*, pp. 89-98; Seay Interview; see for “back door” to the white schools characterization, Steering Committee of the Burrell-Slater PTA to Frank Johnson, Sept. 11, 1968, Frank Johnson Papers: *Lee v. Macon* Case File, Container 25, Folder 11. There was some question as to whether

The court granted ASTA's motion to intervene, and the organization was allowed to file its own complaint in intervention and to seek injunctive relief against the discriminatory placement of black teachers, administrators, and staff. Gray and Seay prepared to represent ASTA at the September 16 hearing. The white teachers' organization, the Alabama Education Association (AEA), declined an invitation from the administration to participate alongside the state in the hearing. The AEA announced in rejecting the invite that it had a "long-standing policy" of supporting "local control of schools by local boards of education" and that it looked "with disfavor on laws or court decrees which limit[ed] the power of local boards." AEA was also involved in a pending merger with ASTA, as ordered by its parent national organization, the National Education Association (NEA). It need not tangle in court with the organization with which it was soon forced to merge. The two would have enough to mediate without the extra burden.¹⁵

At the September 16 hearing, the defendant state officials' defense team – including Attorney General MacDonald Gallion, Assistant Attorney General Gordon Madison, and Wallace legal advisor Hugh Maddox – tried to call the teacher scheme a "freedom of choice plan." Maddox, a onetime law clerk for Judge Johnson, took the stand himself to introduce the teacher choice poll results. He tried to present the returns as indicating that less than one percent of white and black parents wanted their children to have teachers of the opposite race. Maddox claimed that 77 of the state's 119 school districts had replied with results. But Judge Johnson pressed his former assistant. Maddox was forced to admit that the actual number of districts reporting was 45, and that the number of student's parents indicating a choice was less than half of the state's total enrollment. "Do you contend that this has any value as an indication of what the parents want," Johnson asked. Maddox stubbornly maintained that

ASTA could litigate on behalf of its members and whether it could then intervene in *Lee v. Macon* for these reasons. Gray and Seay argued, of course, that it could, citing *NAACP v. Alabama*, among other cases. They added that the passage of the Teacher Choice Act was clear evidence that ASTA's members needed the injunctive protection of the court.

¹⁵ *School Desegregation in the Southern and Border States*, Sept., 1967, SERS; Seay Interview.

“white and Negro parents overwhelmingly prefer a teacher of their own race.” Gordon Madison at one point suggested that parents might exercise their choice in teachers at some point after faculty desegregation had taken place. Johnson stopped him to ask if there was any indication in the act that it should *not* operate until that point, which was very unlikely to be soon reached. Madison was forced to concede that there was not. Newly assigned Civil Rights Division attorney Alexander Ross argued that the teacher choice law had “no legitimate educational goal for operation of public schools.” Neither the administration nor the legislature had consulted any educators at any point in the drafting of the bill, Ross added, which had not really been debated, either. Turning to the tuition grant bill, the state argued as Gray had predicted, claiming that the law was perfectly constitutional on its face. Johnson tried repeatedly to get the state’s attorneys to admit its real purpose, asking why the state needed to “establish a school system in addition to the public school system already established.” At the conclusion of these phases of the hearing, Judge Rives asked defense attorneys if the language in the two bills did not corroborate the earlier finding in *Lee v. Macon* that the state controlled the “purse strings” attached to all of Alabama’s school systems. No one could give a satisfactory reply.¹⁶

The court also heard the issue of adding more school boards as parties defendant. The CRD withdrew its motions to add Baldwin and Pickens after adequate agreement had been reached between the systems and the CRD attorneys. Judge Johnson concluded that none of the remaining five systems in question had “adequately complied” with the March order. But he was unimpressed with the CRD’s eleventh-hour motions; they were “simply not timely.” He argued that the U.S. had adequate time over the summer to challenge the systems’ faculty desegregation plans. In a recent and similar scenario in the *Carr v. Montgomery* case, Johnson had told the CDR attorneys, “I just don’t have any sympathy with you at all in this case.” He agreed that to force school boards to alter their plans’ so late in the summer “would unduly disrupt the orderly operation of the schools and educational process therein.” Johnson

¹⁶ *School Desegregation in the Southern and Border States*, Sept., 1967, SERS; *Birmingham News*, Sept. 17, 1967; *Atlanta Constitution*, Sept. 17, 1967.

made it known that he was not “exactly satisfied” with the level and nature of faculty desegregation in these systems, and he put the five systems on notice that the U.S. or the plaintiffs could renew the motion at a time sufficient to effect some change prior to January, 1968. Judges Rives and Grooms agreed that the could not sanction the placement of a few black teachers in vocational education, physical education, and library work, where “contact with students [would] be minimal.” This would leave faculties segregated “for all practical purposes” and would influence students’ choices. Accordingly, the court accordingly entered a *per curiam* order denying the motion to add the systems but ordering them to take steps to further desegregate their faculties before the beginning of the next term. If systems were making reasonable efforts to comply, the court demonstrated that it would protect them from state interference and from unreasonable demands from the plaintiffs or Justice Department. But it continued to hold them accountable.¹⁷

State Court Interference: *Elmore v. McClain*

After the September hearing, the judges took the injunctions against Acts 266 and 285 under advisement. Meanwhile, an altogether different style of interference emerged, the latest episode in what was quickly developing into a *Lee v. Macon* saga. The Henry County Board of Education was one of the 99 systems under desegregation orders in *Lee*. The Henry County school officials had instituted system-wide freedom of choice as part of their court-approved desegregation plan. When choice forms were returned that summer, a black high school showed significantly reduced enrollments. The white high school in the same town, less than a mile away, was to have a particularly low enrollment as well. The Newville School was to have 65 students in its 9-12 grades, and the Rosenwald School was to have

¹⁷ Frank Johnson to Richard Rives and Hobart Grooms, Oct. 10, 1967, Frank Johnson Papers: *Lee v. Macon* Case File, Container 29, Folder 7; *School Desegregation in the Southern and Border States*, Sept., 1967, SERS; Order Denying Motion Seeking to Add Parties Defendant, Oct. 12, 1967, *Lee v. Macon County Board of Education*, *Race Relations Law Reporter* 12.4, Winter, 1967, pp. 1841-4; see hard copy at Frank Johnson Papers: *Lee v. Macon* Case File, Container 30, Folder 1.

52 students in those grades. These enrollments were less than 15 and 10 percent, respectively, of the recommended state minimum of 525 students for high schools. Both schools had been slated for closure in the last state school survey. Systems were encouraged by the court to close schools facing these conditions. Accordingly, the Henry County school board took the initiative to close both high schools (technically the high school grades at the K-12 schools) and consolidate their students system-wide. Since this increased desegregation and expedited the elimination of the dual system, the court looked upon it favorably. Many parents did not.¹⁸

Parents of students from all-white Newville and all-black Rosenwald filed separate suits in state circuit court against the Henry County superintendent, W.J. McLain, seeking an injunction to force the reopening of the closed grades at the two schools. Many blacks lamented the closure of black community schools, in which they often took a great deal of pride.¹⁹ But in this case, it is possible, if not likely, that the black petitioners were encouraged or even coerced into filing the suit. Both actions were filed by a local white attorney. The state circuit court, in *Elmore v. McLain* and *Johnson v. McLain*, issued injunctions and ordered the Henry County board to reopen the closed grades. When the CRD moved in *Lee v. Macon* for an injunction to prevent this action, the governor took the liberty to respond to the show cause order directed at Henry County, claiming that the school board closed the grades under “pressure” from the Justice Department. Wallace’s attorneys argued that DOJ was “interfering” with the county school system in seeking to “control the assignment of students” and to close schools “in violation of the policy of the Congress of the United States.” They cited some of the statements from the governor’s March speech which Judge Johnson noted as “erroneous,” namely those predicting that “the court” would assign pupils and close schools. The Henry County officials did not contest the motion

¹⁸ Opinion and Decree, Oct. 30, 1967, *Lee v. Macon County Board of Education*, *Race Relations Law Reporter* 12.4 (Winter, 1967), pp. 1844-50; see also at Frank Johnson Papers: *Lee v. Macon* Case File, Container 30, Folder 1; Motion of the United States to Add Parties Defendant and for an Order to Show Cause, Sept. 30, 1967, in Frank Johnson Papers: *Lee v. Macon* Case File, Container 30, Folder 1-2.

¹⁹ See a lengthier discussion of this phenomenon in CH 17, *infra*.

for an injunction in *Lee v. Macon*. The school board's attorney met with Judge Johnson and assured him that the schools were closed in furtherance of the court's March decree and in the best interest of the pupils involved. Johnson agreed.²⁰

Johnson drafted an order which the court entered on October 30. It enjoined the Henry County officials from giving any force or effect to the state circuit court's order and rebuked the circuit court and the petitioning parents' attorney. Johnson characterized the entry of the injunction against the Henry County school board as "in flagrant violation" of established principles of both state and federal law. With the matter of desegregation of Henry County's schools before the federal court, the circuit court should have declined jurisdiction in the cause in the first place. Johnson dismissed claims by the circuit court that Henry County had failed to follow Alabama Code in closing the schools, calling them "completely erroneous" and having "no bearing whatsoever." Johnson also chastised the attorney who filed the claims. As an officer of the federal district court, he was "certainly possessed of the knowledge that this court was open and available to adjudicate matters over which it had already assumed jurisdiction." Filing the suit in state court was impeding the federal court's jurisdiction, and such action would, in Johnson's words, "not be further tolerated."²¹

Lee v. Macon Affirmed, Freedom of Choice Challenged

Four days after entering the Henry County order, on November 3, the court entered separate orders declaring the Teacher Choice and Tuition Grant Acts unconstitutional. Judge Rives wrote both. In the opinion and order striking the tuition grant law, Rives noted its similarity with the Louisiana statute

²⁰ Opinion and Decree, Oct. 30, 1967, *Lee v. Macon County Board of Education*, *Race Relations Law Reporter* 12.4 (Winter, 1967), pp. 1844-50; see also at Frank Johnson Papers: *Lee v. Macon* Case File, Container 30, Folder 1; Response to Show Cause Order by Governor Wallace, Oct. 10, 1967, *Lee v. Macon County Board of Education*, Frank Johnson Papers: *Lee v. Macon* Case File, Container 30, Folder 1; *School Desegregation in the Southern and Border States*, Sept., 1967, SERS.

²¹ Opinion and Decree, Oct. 30, 1967, *Lee v. Macon County Board of Education*, *Race Relations Law Reporter* 12.4, (Winter, 1967), pp. 1844-50; see also at Frank Johnson Papers: *Lee v. Macon* Case File, Container 30, Folder 1.

and quoted at length from *Poindexter*, in which Judge Wisdom had “relied heavily” on *Lee v. Macon*. The court determined that the new Alabama law contained “all of the malignant coloring which so fatally marked its two predecessors, plus the fresh evidence of its contemporaneous enactment and like sponsorship with Act No. 285” Not only was the law “clearly . . . no more than an evasive scheme to circumvent *Brown*,” it was also an inducement to “private persons to engage in the kind of racial discrimination which would be condemned if attempted by the state.” This was “wholly impermissible.” Rives was similarly abrupt in his explanation of the court’s judgment of the teacher choice statute: “We adhere to [the March] opinion and decree and cannot permit their frustration by the expedient of Act No. 285. That act is clearly unconstitutional.” Rives cited *Loving v. Virginia* – the Supreme Court decision which had recently invalidated Virginia’s anti-miscegenation law. The Supreme Court in *Loving* had determined that laws which made use of racial classifications had to “be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate.” No such objective, “free from invidious racial discrimination,” could justify Act No. 285. Indeed, race was “the only factor upon which Act No. 285 operate[d].” As 1967 drew to a close, the door appeared to shutting on Wallace-style, state-sponsored, bitter-ender resistance. The court had again cleared the way for freedom of choice to work in Alabama. But its position at the top of the judicial list of remedies was increasingly tenuous.²²

In December the U.S. Supreme Court, having heard the appeal of the Bibb County Board of Education and the governor, affirmed the March 22 *Lee v. Macon* decision. It thereby sanctioned the statewide, structural injunctive approach. It also upheld the July *Lee v. Macon* ruling invalidating the tuition grant law. Attorney General MacDonald Gallion had futilely argued that ordering the state to dictate to local school boards was beyond its powers. The CRD had reiterated its claim that the

²² Opinions and Decrees (2), Nov. 3, 1967, *Lee v. Macon County Board of Education*, *Race Relations Law Reporter* 12.4 (Winter, 1967), pp. 1835-40; see also at Frank Johnson Papers: *Lee v. Macon* Case File, Container 30, Folder 1; John Minor Wisdom to Frank Johnson, Aug. 28, 1967, Frank Johnson Papers: *Lee v. Macon* Case File, Container 29, Folder 3.

defendant state officials were “plainly no strangers to the Alabama school system.” And Solicitor General Ralph Spritzer had argued that as the state officials had since been ordered to use their authority “in the opposite direction,” it was then ‘ill-becoming’ of them to deny their jurisdiction. The Court issued a generic, 11-word *per curiam* opinion affirming the decision. It had recently denied *certiorari* in *U.S. v. Jefferson*, allowing the many desegregation orders already affected by that case to remain in effect and the dozens of LDF and government appeals based on it to proceed. Granting *cert* and affirming *Lee v. Macon* was a much easier way of placing some measure of Supreme Court approval on *U.S. v. Jefferson*-influenced desegregation plans, because the model decree in *Lee* was almost identical to that in *Jefferson*.²³

Meanwhile, a few days after the *Lee* affirmation, the Court agreed to hear the plaintiffs’ appeal of *Green v. County School Board of New Kent County*. A Virginia district court had approved the New Kent freedom of choice desegregation plan, under which no whites had chosen black schools and 18 percent of blacks had chosen formerly all-white schools. Jack Greenberg and the LDF appealed to the Fourth Circuit appellate court, arguing that this was not a plan which held out hope of eliminating the dual system. The circuit court ultimately affirmed the judgment sitting *en banc*. When the plaintiffs’ petition for *certiorari* was granted, John Doar suggested that the Civil Rights Division support the LDF’s appeal. Derrick Bell, the Deputy Director of the HEW Office for Civil Rights, advised the CRD’s Stephen Pollack to include a statement of HEW policy in its *amicus* brief – that freedom of choice plans were only acceptable under Title VI if they worked. This was the Fifth Circuit’s *Jefferson* standard and already the position of the Justice Department. The Supreme Court’s terse affirmation of *Lee v. Macon* had seemed to support the *Jefferson* model decree, but the Court had said nothing explicitly about the limitations of freedom of choice. If the united front of the LDF, the CRD, and the HEW-OCR had its way, it would force

²³ *Lee v. Macon County Board of Education*, affirmed *sub nom* *Wallace v. United States*, 389 U.S. 215; *United States v. Jefferson County Board of Education cert. denied* 389 U.S. 840; *Washington Post*, Dec. 5, 1967; Belknap, *Administrative History of the Civil Rights Division of the Department of Justice During the Johnson Administration*, pp. 75-80; Landsberg, *Enforcing Civil Rights*, pp. 140-1; Bass, *Unlikely Heroes*, p. 307.

the issue in *Green v. New Kent*. The looming decision thus had the potential to be the most important High Court pronouncement on school desegregation since *Cooper v. Aaron*.²⁴

John Doar indicated the potential impact in a letter to Solicitor General Spritzer. "The Supreme Court has seldom granted review of school desegregation cases," he wrote, and "when it has, the decision has usually represented an important addition to the law. This case will be no exception." Doar added that the Court would "almost certainly have to consider the HEW Guidelines and the *Jefferson County* decree in reaching its decision." Pollack felt that the Court ought to enter an order which would "preserve the continuity with the course of judicial decisions," and he believed *Jefferson* was "the present high water mark to which . . . the Supreme Court wishes to bring the other circuits." Solicitor General Spritzer proposed submitting an *amicus* brief which called for a declaration that freedom of choice itself was *per se* unconstitutional. Pollack advised that this would be a "tactical mistake" and questionable policy. It would be asking the court to use the "most far-reaching grounds" possible for its decision and to put itself on a limb upon which neither the CRD, nor HEW, nor any of the appellate courts had been willing to climb. It would, in short, necessitate the abandonment of the *Jefferson* decree and "disrupt the enforcement relationship" that had been developing between the appellate courts, the trial courts, and the CRD. "Progress is being made," Pollack wrote. Even "school systems in Mississippi and Alabama" were "accepting the necessity for change." Jettisoning freedom of choice at that point would threaten that progress.²⁵

Pollack prevailed, and the government's brief was restrained. Nonetheless, if the Court adopted the government's position, some systems would have to use some other means beyond freedom of

²⁴ *Green v. New Kent County Board of Education*, 382 F.2d 326 (4th CCA, 1967); Belknap, *Administrative History of the Civil Rights Division of the Department of Justice During the Johnson Administration*, pp. 75-80; Landsberg, *Enforcing Civil Rights*, pp. 140-1.

²⁵ *Green v. New Kent County Board of Education*, 382 F.2d 326 (4th CCA, 1967); Belknap, *Administrative History of the Civil Rights Division of the Department of Justice During the Johnson Administration*, pp. 75-80; Landsberg, *Enforcing Civil Rights*, pp. 140-1; Memorandum from John Doar to the Solicitor General, December 19, 1967, and Memorandum from Assistant Attorney General Stephen J. Pollack to the Solicitor General, February 23, 1968, in Belknap, *Administrative History of the Civil Rights Division of the Department of Justice During the Johnson Administration, Part II*, pp. 5-9; *Washington Post*, Dec. 5, 1967.

choice to eliminate their dual structure. Federal district judges in Alabama had only just begun shutting the door on state-level defiance. If freedom of choice was in jeopardy, their task was very likely far from over. This was to say nothing of the lingering effects of previous official defiance. Local resistance was sure to continue, if not intensify. The day the Supreme Court upheld *Lee v. Macon*, Governor Wallace had predicted “the people are ultimately going to change the effect of this ruling.”²⁶

Faculty Desegregation and School Closures

As segregationists listened to the resounding echo of yet another defeat for massive resistance, and as freedom of choice hung in the balance in Washington, local school boards were left again to implement their desegregation plans in the spring of 1968. The complexities and conflicts only grew as the requirements became more stringent. Though law and order had prevailed over violent resistance, resistance nonetheless remained, even as the forces of compliance moved to thwart the growing movement to abandon public schools. Communities often had unique problems. In southwest Alabama, for example, eliminating discrimination in education meant eradicating “tri-segregation.” In and around the Mobile-Tensaw River Delta, a number of people who identified as Cajun had been barred from white schools for as long as blacks. The Alabama laws regulating racial definitions had long classified them as non-white at best. The Cajuns themselves celebrated their unique culture and their French, Spanish, Mexican, and Native American ancestry. But they deeply resented any assertion that they had “black blood” or that they were in any way of African descent. The Cajuns in Mobile, Baldwin, and Washington Counties, therefore, refused to send their children to black schools. They generally attended small, dilapidated Cajun-only schools in their tiny communities. One boy had attempted to desegregate a white school in Mobile County in the 1950s, but a circuit court and the Alabama Supreme Court had ruled that the burden of proof of “whiteness” was on the pupil, not the school system. When

²⁶ Belknap, *Administrative History of the Civil Rights Division of the Department of Justice During the Johnson Administration*, pp. 75-80; Landsberg, *Enforcing Civil Rights*, pp. 140-1; *Washington Post*, Dec. 5, 1967.

white county school systems were faced with admitting black students to white schools, though, they began to relent on the Cajun students. They perhaps saw the racial writing on the wall from *Loving v. Virginia* and its application to the state's teacher choice statute. According to a state department of education report, by the spring of 1968, Baldwin County had closed its 28-student Cajun school, and Washington County had closed two of its five. A large, 500-student Cajun school remained in operation in rural Mobile County.²⁷

While the problem of "tri-segregation" was unique to southwest Alabama, a number of conflicts across the state that year sprang from two universal issues: school closure and faculty desegregation requirements. Many white students across the state were being taught by black teachers for the first time. Black teachers had undoubtedly not been given the opportunities that white teachers had. Acutely aware of this, many black teachers themselves were nervous in their new assignments. Under the scrutiny that came with their new roles, it was almost inevitable that some black teachers would fail to live up to the standards of certain white parents. Parents and administrators often jumped at the opportunity to condemn black teachers in white schools. In some communities, faculty desegregation occurred with little trouble, but in most others there was significant resistance. Incompetence could be found among white and black teachers alike. If it was more widespread among black teachers, it was likely the result of inequitable opportunities and administrative indifference. As one Mississippi state official admitted, southern school boards' apathy became "untenable" as a result of faculty desegregation. "They've had a black teaching for 15 years," he said, "and suddenly, now that she's teaching white children, they discover she's incompetent."²⁸

Exemplary of the latter was the situation in Dale County, in the Wiregrass of southeast Alabama. The Dale County superintendent, Joe Payne, wrote state Superintendent Ernest Stone a letter in

²⁷ *School Desegregation in the Southern and Border States*, Nov., 1967, SERS; *Birmingham News*, Nov. 6, 1967.

²⁸ *National Observer*, Aug. 10, 1970.

exasperation. Payne wrote, "I am receiving complaints daily about the Negro teachers. . . . It is getting to the point that we all dread to see someone come in or dread to hear the phone ring." Payne wanted "advice" and "help now, not later." He advised Stone, "The whole problem is that these Negro teachers are not capable to teach in the white schools. They give tests and write words on the chalkboard with incorrectly spelled words. They are using verbs in the wrong place," Payne ran on, "using plural words in the wrong place, their sentences are incorrect, they are using words in places they do not fit, and none of them have any discipline." Payne told Stone that he was fed up with the black students in white schools as well, a number of which had been moved into white schools after the closure of two black schools in the fall. Payne had made an "oral survey" of those students' performance. "It is disgusting for me to have to say," he wrote, "that 86 percent of them are failing." As long as he was superintendent, he told Stone, these things would "not be tolerated." In closing he added, "These incapable Negro teachers is why these students are failing today in our white schools [*sic*]. If we have to lower our educational standards, we might as well close the schools down and return to the jungles of prehistoric time."²⁹

Besides coming to Stone with their many problems and complaints, a number of school officials wrote directly to Judge Johnson. While Johnson was eager to work with school boards in conference with their counsel, he always referred such letters to Stone or to the Justice Department attorneys. In addition to complaints about teachers, many school boards were happy to forward complaints about school closures. Often black parents and students did not want to close black schools any more than the local authorities did. Officials jumped at the chance to use this as leverage to return to the status quo. Joe Payne in Dale was no exception. He wrote Johnson, "Since equality entered in on the Negro schools, we would like to know the status of three white schools in the county." Many school systems had been frantically trying to upgrade black facilities for years in the hopes that separate but equal might remain

²⁹ Joe Payne to Ernest Stone, Sept. 20, 1967, Frank Johnson Papers: Lee v. Macon Case File, Container 24, Folder 18.

legal if it were actually true. This was what Payne meant when he referenced equality “entering in on the Negro schools.” The superintendent wondered why the school board was asked to close two newer and “equal” black schools in the county while three of the white schools were both older than the black schools and inadequate to handle the potential transfer of black students. This was a serious problem, but the parties litigating the case and the court understood that whites would generally refuse to attend formerly all-black schools, even in the unlikely event that they happened to be “equal” to the white schools in a district. Payne probably knew this, too, but the chance to direct the court’s attention to a real conundrum which its decree had created was too much to pass up. Similarly, Marengo County Superintendent Fred Ramsey wrote Johnson to advise him that the parents of the all-black Shiloh school asked him to “continue its operation for at least several more years.” Ramsey had only recently harassed black teachers and students in an attempt to discourage desegregation, prior to the statewide *Lee v. Macon* order. Now he was purportedly lobbying for black parents who wanted to keep a black school open.³⁰

Ramsey was nothing if not an opportunist and a committed segregationist. As the chief of Marengo schools, he exemplified the schoolman committed to law and order but hell bent on frustrating desegregation efforts in any way possible. Two encounters between he and attorney Solomon Seay are indicative of the hurdles the plaintiffs’ attorneys in *Lee v. Macon* faced in dealing with such officials, even after favorable orders had been entered. When Seay took over the representation of ASTA, he subsequently began barnstorming the state, just like the CRD attorneys, working with local school officials to craft acceptable desegregation plans. He remarked later that he “became quite familiar with the highways and byways in all but a handful of the state’s sixty-seven counties.” It was Seay’s job to ensure that black teachers were not dismissed or unfairly demoted when black schools

³⁰ Joe Payne to Frank Johnson, Jan. 19, 1968, Frank Johnson Papers: Lee v. Macon Case File, Container 24, Folder 18; Fred Ramsey to Frank Johnson, Feb. 20, 1968, Frank Johnson Papers: Lee v. Macon Case File, Container 26, Folder 4.

were closed and to ensure that qualified black teachers were hired any time they were needed and available. Seay also represented ASTA in its merger with the all-white AEA and became co-counsel for the integrated organization. When he first met Fred Ramsey, it was just prior to a hearing in Judge Johnson's chambers. Ramsey, a rather large man at around six feet seven inches and two hundred and fifty pounds, approached Seay, introduced himself, and proceeded to lecture the Howard-educated attorney on the constitutionality of segregated schools. "Now, I'm not a racist, Seay," was his concluding remark. Seay, a skinny but tall and headstrong man at around six feet three inches, was not about to back down. He challenged Ramsey, suggesting that the superintendent might like to bring back slavery, considering his position. Ramsey indicated that in that case he would like to own Seay. Seay replied that this would not be preferable for Ramsey, as he would have to "make a house nigger" out of him, and surely Ramsey did not want "this big, black buck anywhere around the big house."³¹

While this tense incident produced a measure of "grudging respect" between the two men, another indicates more directly what the plaintiffs' attorneys were faced with. Once when Ramsey was scheduled to be deposed at the county courthouse in the Marengo County seat of Linden, he asked that the ASTA and CRD attorneys first confer with him in another room. The CRD attorneys did not show up, but "motivated solely by curiosity," Seay did. He entered the room to find it full of black teachers and administrators. Ramsey shamelessly revealed the pitch used by many local school boards in counseling school desegregation resistance in their local black communities. He told Seay that he had invited "his good friends" to the meeting so that Seay could tell them what he planned to do "to help them feed their families when [Seay] and the Justice Department" succeeded in "shutting down the school system and leaving them with no jobs." Ramsey and the Marengo County school board may have been the "most recalcitrant" Seay ever dealt with, but this line of reasoning was common throughout the state, especially in the Black Belt. It was not simply rhetorical. Men like Ramsey believed this to be inevitable:

³¹ Seay, *Jim Crow and Me*, pp. 89-91; Seay Interview.

that when the plaintiffs pressed for school closure and teacher reassignment, it would drive whites from the system into private schools. When this “destroyed” the public school system, it was the fault of the Justice Department, the LDF, the plaintiffs, and lawyers like Seay. Ramsey and others saw it as almost a sacred duty to try and avert such an outcome at all “legal” costs. Rather than using the powers of their office to facilitate community acceptance, they used them to hamper the elimination of the dual system in any way possible, and in doing so they probably only hastened the very exodus which they were trying to prevent.³²

Plotting the Next Course in *Lee v. Macon*

While the fall, 1967 court orders in *Lee v. Macon* curtailed the latest in state-level interference with school desegregation, it was clear that continuing performance evaluation was needed for the 99 school systems themselves. Beginning that fall, and into the spring of 1968, the court established an orderly process to ensure compliance. The first task was to reintegrate HEW and make use of its resources, while continuing to control its ability to cut-off federal funding. Ernest Stone attempted to use the March, 1967 order to keep HEW investigators away from local school boards altogether. He wrote Peter Libassi at the Office for Civil Rights and argued that the order did “not call for additional reports or field visits,” only the evaluation of reports to Stone’s office. Stone pleaded, “Our school boards, Mr. Libassi, are near the breaking point!” He told Libassi, “We want to work with your office, but extensive additional reporting on the part of your office plus visits by different people making conflicting demands may completely close many of Alabama’s school systems.” Stone contended, “It would take us right back to where we were before July 28, 1967” – when the court enjoined HEW from funds deferral or termination. After discussing the matter with Judge Rives, Judge Johnson tried to break the impasse. Johnson told Stone that there appeared to be “some misunderstanding regarding

³² Seay, *Jim Crow and Me*, pp. 94-5; Seay Interview.

the duty and obligation on the part of various school systems and officials in the State of Alabama . . . to comply with the reporting requirements” of HEW. According to Johnson, the court had anticipated that HEW would continue to examine and audit the policies of Stone’s office and those of the 99 systems. This would include regular reporting and field visits, with which state and local officials were obliged to cooperate. The court thus ensured that it would have not only the Civil Rights Division, but also the Office for Civil Rights monitoring compliance with its orders, regardless of whether Stone felt that local school boards were “near the breaking point.”³³

It was the Civil Rights Division which continued to work most closely with the court in the administrative task of structuring compliance. Johnson suggested a procedure to Judges Grooms and Rives. He believed that the court ought to be primarily concerned with making sure that freedom of choice plans were truly free. This meant removing “choice influencing factors,” chief among which were segregated faculties and grossly inferior black school facilities and curricula. Johnson closely scrutinized the CRD’s own analysis of the 99 systems’ efforts entering the spring of 1968. The CRD had determined that, on average, 6 percent of a given system’s black students were in desegregated schools. If a system had achieved more than this, Johnson suggested being lenient as to requiring further steps. Otherwise, he felt that the court should push for a plan which would effect an acceptable level of faculty desegregation and the closure of substandard black facilities. He suggested that the court avoid entering show cause orders and adding lagging systems as defendant parties, arguing that the “ice [had] been broken” and that progress could be made in negotiation without further proceedings “if the right approach [were] taken.” Johnson wanted to have the CRD representatives work with Stone’s office to arrange conferences with each school system to work out acceptable plans. If school boards refused to work with the CRD or otherwise failed to implement their plans, then the CRD could move to have them

³³ Peter Libassi to Ernest Stone, Sept. 6, 1967; Ernest Stone to Peter Libassi, Sept. 22, 1967; Frank Johnson to Ernest Stone and Peter Libassi, Sept. 25, 1967; all in Frank Johnson Papers: Lee v. Macon Case Files, Container 29, Folder 7.

added as parties defendant. The three judges understood that what Judge Rives called this “almost entirely administrative, most important and difficult” phase of the case was going to be “necessarily left to [Johnson’s] capable hands alone.” As all of this had to be done in time to implement changes by the fall of 1968, Rives and Grooms allowed Johnson and the CRD to go to work.³⁴

Johnson’s longtime point man at the CRD, John Doar, had stepped down, and Stephen Pollack had taken his place. So Johnson wrote Pollack in January to advise him of the court’s expectations. “For the time being,” Johnson wrote, “the Court is not particularly concerned with further implementing the March 22 order with the idea of attempting to directly increase the percentage of desegregation through the ‘freedom of choice’ plans in the various systems covered by this order.” However, the court was “vitally concerned” with ensuring that systems’ plans were “indeed free choice plans.” Johnson indicated which school boards needed to increase faculty desegregation and which needed to close substandard black schools, and he advised Pollack to begin working with these districts as soon as possible to implement workable plans. “As amicus,” Johnson wrote, “you are hereby requested to speak for the Court in this regard.” To make sure Pollack understood the urgency of beginning this process quickly, Johnson admonished him for previously lax communication. “I have been experiencing some difficulty,” he wrote, “in securing responses to requests that I have made of your division in connection with this case,” and “as a matter of fact, in several instances, months have passed and I have received no response to my communications.” Johnson made sure Pollack knew that he was “requesting a prompt acknowledgement” this time.³⁵

Pollack immediately began formulating a program to insure compliance in *Lee*. But the Justice Department did not, for once, share Judge Johnson’s views about the CRD’s role in the pending phase of

³⁴ Frank Johnson to Richard Rives and Hobart Grooms, Dec. 29, 1967; Richard Rives to Frank Johnson and Hobart Grooms, Jan. 4, 1969; Hobart Grooms to Frank Johnson and Hobart Grooms, Dec. 14, 1967; all in Frank Johnson Papers: Lee v. Macon Case File, Container 29, Folder 7.

³⁵ Frank Johnson to Stephen Pollack, Jan. 17, 1968, Frank Johnson Papers: Lee v. Macon Case File, Container 29, Folder 7.

the case. “In certain of the earlier phases of the litigation,” Pollack wrote to Johnson in February, “the United States was defending the process of this court against official interference. However, in the proceedings leading up to the decree of March 22 and since the entry of that decree, the Department of Justice has been representing the interest of the United States as an active litigant in this case.” Pollack felt that an active litigant should not speak for the court. The CRD was prepared to continue in its capacity as a plaintiff-intervenor. In this capacity it would continue to analyze school systems plans and reports, to submit its analyses to Stone, and if necessary, to initiate appropriate proceedings against recalcitrant individual school systems. Pollack indicated that the CRD would maintain an office in Montgomery, staffed with an attorney who would be available to school officials in an advisory role. He had been in discussions with HEW, as well, and indicated that that department was also going to make someone available to assist in this way. Pollack told Johnson that HEW’s Office for Civil Rights was going to start contacting the school systems with insufficient progress to try and initiate negotiations and, if necessary, to conduct field investigations. Johnson told Pollack that this arrangement was “entirely satisfactory.”³⁶

This was how *Lee v. Macon* would progress. HEW would do much of the ground work. The CRD would make its own independent analyses and initiate proceedings as necessary. The state department of education would continue to monitor all of these developments and ensure that school boards understood their obligations. Stone himself would continue to report regularly to the court and the Justice Department. And the administration of the entire system would remain, for the most part, in Judge Johnson’s “capable hands alone.” Judge Rives even suggested that the three-judge court might tentatively be dissolved or that Johnson might otherwise exercise the authority of a single judge. Johnson preferred to leave the three-judge court intact, as the specter of state intransigence still loomed, and since it made it easier on everyone when there were three judges to blame. If anything,

³⁶ Stephen Pollack to Frank Johnson, Feb. 19, 1968; Frank Johnson to Stephen Pollack, Feb. 20, 1968; both in Frank Johnson Papers: *Lee v. Macon* Case File, Container 29, Folder 7.

the denunciations of the court and the individual judges were growing more frequent as the requirements of the decree came to bear in actual schools themselves. They certainly increased that spring, as the court and the CRD initiated the first of several off-shoot phases of *Lee v. Macon*: the desegregation of the state's athletics systems.³⁷

Desegregating the AHSAA

The Alabama High School Athletic Association (AHSAA) remained largely segregated in 1968. A select few of the black students who had transferred to white schools to that point played on desegregated teams. Indeed, black student-athletes in many cases transferred to white schools for the primary purpose of taking advantage of the white schools' athletics programs, and coaches at the formerly all-white schools actively recruited a number of them. But there was still only one association for the formerly all-white schools – the AHSAA – and one for the all-black schools – the Alabama Interscholastic Athletic Association (AIAA). The AHSAA belonged to a national organization which recognized only one state association. This meant that for national organizational purposes, the AIAA did not exist. Among the consequences of this was that black athletes did not receive recognition for many of their achievements. For example, if the white champion in the men's 100 yard dash ran the event in 10-flat, he was the state champion, even if the AIAA champion could, as one person described it, “run a 9.6 barefoot in a cow pasture.”³⁸

³⁷ Richard Rives to Frank Johnson, Jan. 4, 1968, Frank Johnson Papers: Lee v. Macon Case File, Container 29, Folder 7.

³⁸ In fact, the official state champion in the 100 yard dash was a white student from Sidney Lanier High in Montgomery, who ran a 9.8, while the court recognized that “it may well be that a Negro high school student athlete from Greenville holds the record of 9.6 for this event in Alabama.” Seay Interview; Opinion and Decree, April 1 1968, Lee v. Macon County Board of Education, 283, F.Supp. 194; see also at Frank Johnson Papers: Lee v. Macon Case File, Container 19, Folder 4; Depositions of Ernest Stone, John L. Meadows, and William Hayes Henderson, in Summaries of Depositions, March 14, 1968, Lee v. Macon County Board of Education, Frank Johnson Papers: Lee v. Macon Case File, Container 29, Folder 8; *School Desegregation in the Southern and Border States*, April, 1968, SERS.

There were more serious problems with the segregated athletics system. White schools which belonged to the AHSAA did not play black schools in AIAA. In the brief period in which blacks at formerly all-white schools had begun playing on sports teams – usually one or two on a football or basketball team – those teams continued to play against AHSAA competition. Desegregated teams were often harassed when playing teams that remained all-white. More often than not, this type of harassment came not from the opposing players or coaches, but from the fans. In at least one instance, it came from uniformed local and state law enforcement. In this case, the local superintendent, R.W. Hollingsworth of Fayette County, wrote to Judge Johnson to inform him of the affair. At a season-opening September, 1967 football game against neighboring Carrollton, two state troopers and a local sheriff's deputy "harassed the Hubbertville High School Coach and his players throughout the football game" The men "continued intimidation which could have resulted in an ugly scene" after the game. Hubbertville had two black players, while Carrollton had none. The Hubbertville team was scheduled to play all-white Lynn High the following Friday, at which time Hollingsworth expected "a repeat of the Carrollton affair." Johnson forwarded Hollingsworth's letter to John Doar, advising him that this was "a matter which may need some investigation and appropriate action." The CRD followed through on Johnson's suggestion and in February filed a motion to force Stone to merge the associations.³⁹

When it came to the particulars of how the athletic associations would merge, there was much disagreement, particularly over compulsory scheduling of games between formerly all-white schools and all-black schools. AIAA president Allen Frazier favored compulsory scheduling, but others wanted to avoid this at all costs, including state Superintendent Stone and AHSAA executive director Herman Scott. Stone argued that compulsory scheduling would "kill" high school athletics, because formerly all-white

³⁹ R.W. Hollingsworth to C.W. Russell, Director of Public Safety, c.c. Frank Johnson, Sept. 11, 1967; Frank Johnson to John Doar and Ben Hardeman, Sept. 12, 1967; both in Frank Johnson Papers: Lee v. Macon Case File, Container 19, Folder 4.

schools would eliminate their programs rather than play the black schools. He also predicted that “blood [would] flow” if any of these contests ever actually took place. In his response to the government’s motion in *Lee v. Macon*, Stone argued that he could not “sit by idly and submissively accept the Justice Department’s plan for reordering Alabama athletics without making known to [the] Court his strong conviction that, if the Government prevails on this motion, the result could very easily be disastrous.”⁴⁰ Scott registered opposition to the merger because he felt the AIAA did “not have anything to merge” because it had no full time staff and that it was “not nearly so tight” as the AHSAA. Scott also pointed to desegregated teams at formerly all-white schools as a sign that the present system was working and needed no adjustment. He cited the fact that there were four black starters at Birmingham’s Ramsey High; Tuscaloosa High’s football team had 6 black starters; the runner-up for the Most Valuable Player award given at the state’s most recent basketball tournament was a black student-athlete from Butler High in Huntsville. These desegregated teams were actually encouraging further freedom of choice desegregation and further extra-curricular participation from black transfer students; it was true. Detractors argued that compulsory scheduling would ruin such progress.⁴¹

Stone and Scott were particularly concerned about fan violence in the case of compulsory interracial games. They and a number of coaches expressed apprehension that the games would turn into “clashes of the races.” What they did not wish to admit to was fearing that white schools would be defeated by black schools, perhaps even badly, and that this would be the proximate cause of these “clashes.” On the other hand, if white schools were to routinely defeat black schools, this would create other problems. Some coaches at the formerly all-white schools felt that this would bring pressure to

⁴⁰ Memorandum Brief for Defendant, Dr. Ernest Stone, State Superintendent of Education, March 16, 1968, *Lee v. Macon County Board of Education*, Frank Johnson Papers: *Lee v. Macon* Case File, Container 29, Folder 8, emphasis in original.

⁴¹ Depositions of Ernest Stone, Herman Scott, and Severne Allen Frazier, in *Summaries of Depositions*, *Lee v. Macon County Board of Education*, March 14, 1968; Memorandum Brief for Defendant, Dr. Ernest Stone, State Superintendent of Education, March 16, 1968, *Lee v. Macon County Board of Education*; both in Frank Johnson Papers: *Lee v. Macon* Case File, Container 29, Folder 8.

bear from the black community on black transfer athletes, who would be accused of “beating their own people.” At the same time, white coaches recruited black athletes to win, and they were not about to let them go without a fight. For example, Tuscaloosa County High beat Tuscaloosa High in basketball for the first time in 10 years thanks to the “assistance” of its star black player. What if he were convinced to return to the county’s black school? In fact such conflicts had already occurred, without compulsory scheduling. The principal at Opelika’s all-black Darden High convinced four black student-athletes to return from formerly all-white Opelika. This prompted the principal of Opelika High to complain to the school board, which prevented the boys’ transfer back to Darden. As long as there were black schools and a black athletic association, the formerly all-white schools would continue to prevail in such circumstances. According to AIAA’s Frazier, he received nearly 20 complaints in 1967-68 on account of white schools “raiding and taking away their best athletes.” White coaches deposed by defense attorneys for this phase of the *Lee* litigation may have couched their concerns primarily in terms of the impedance of integration, but the more immediate concern was probably the loss of their relative competitive edges.⁴²

For the court itself, these questions were largely immaterial. The March, 1967 decree had placed an affirmative duty on state officials to abolish the dual school system, and this included athletics. There simply could not continue to be two statewide athletic associations. The Justice Department filed its motion on February 20 asking the court to require Stone to notify the 99 *Lee* systems that they could no longer belong to segregated athletic associations and that they must begin scheduling their contests without regard to race. After hearing testimony in early March, Judge Johnson decided to allow Stone and the two associations to work out the particulars themselves, under certain

⁴² Depositions of Ernest Stone, Herman Scott, John L. Meadows, Louie William Harrelson, William Stone Doty, William Hays Henderson, Frank Thomas Sadler, Thompson Clay “Mutt” Reynolds, James L. Lovvorn, Harold E. Lutz, Billy P. Ship, Andrew T. McKenzie, Severne Allen Frazier, Robert Mosby, Walker S. Alexander, John Fulgham, and Herman Shaw, in Summaries of Depositions, *Lee v. Macon County Board of Education*, March 14, 1968, Frank Johnson Papers: *Lee v. Macon* Case File, Container 29, Folder 8.

parameters. On April 1, the court entered a decree directing the three entities to prepare a merger plan. He enjoined each from participating in the operation of a dual athletics system based on race and served notice on the 99 school systems that if they belonged to any athletics association at all, it had to be the one formed by said merger. Johnson also entered an order in *Carr v. Montgomery* aimed at bringing that system within the bounds of the April 1 order. This put the other 18 non-*Lee* systems on notice that they might as well proceed as though they were next. Stone tried to wash his hands of the matter, telling Frazier and Scott that he had “no official responsibility in working out the details of [the] merger.” But Johnson and Rives decided that the opposite was true, advising the state superintendent to actively participate in the discussions and to ensure that the merger was effective and fair.⁴³

The completed merger plan called for open membership to all schools in the state, the creation of geographical districts, and the creation of a biracial legislative council and central board. The court had stopped short of ordering compulsory scheduling between black and white schools, but the newly created geographical districts necessarily meant there would be some measure of such scheduling. The plan also contained a special provision for the recruiting of athletes. To prevent “raiding” of black schools’ players by predominantly white schools, the plan called for investigations upon complaints of such practice. However, the Executive Secretary of the merged association was to have sole discretionary authority in these cases, and the Executive Secretary was going to be Scott. The AIAA chose not to retain Fred Gray and Sol Seay during the merger negotiations, and Seay privately criticized the organization for conceding too much. There was an understanding that Frazier or some black successor would serve in an Associate Executive Secretary role, but there were no guarantee as to that person’s authority, compensation, or benefits. And there were no guarantees that recruiting of black

⁴³ Opinion and Decree, April 1 1968, *Lee v. Macon County Board of Education*, 283, F.Supp. 194; see also at Frank Johnson Papers: *Lee v. Macon* Case File, Container 19, Folder 4; Frank Johnson to Ernest Stone, April 9, 1968, Frank Johnson Papers: *Lee v. Macon* Case File, Container 29, Folder 7; Proposed Basic Findings on the Dual Athletic Systems Phase of 604-E and Proposed Method for Commencing to Abolish the Dual Athletic System, Johnson Papers: *Lee v. Macon* Case File, Container 29, Folder 8; *School Desegregation in the Southern and Border States*, April, 1968, SERS.

athletes to formerly all-white schools would not continue to the chagrin of the black schools.

Nonetheless, the court approved the plan May 3, and the AHSAA and AIAA ceased to exist in their past forms. The first off-shoot phase of *Lee v. Macon* thus began and ended rather quickly.⁴⁴

“Beyond Tokenism” in *Carr v. Montgomery*

While much of the state’s attention in the spring of 1968 remained on developments in *Lee v. Macon*, Judge Johnson entered an order in the *Carr v. Montgomery* case which proved to be both highly controversial and ultimately influential. The previous fall, when the CRD had moved to accelerate faculty desegregation, Johnson had sided with the Montgomery Board of Education over the Justice Department. The judge chided the CRD for its untimely motion and afforded the Montgomery authorities the chance to progress on their own. It soon became clear that not only had the school board failed to move forward in faculty desegregation, it had built three new schools and was blatantly marketing them as safely all-white alternatives to its existing schools. The CRD filed a motion for further relief in February, which was joined in by Fred Gray and Sol Seay. Nothing irritated Johnson more than a lack of good faith, especially when it proved that he had misplaced his confidence in litigants who then failed to demonstrate it. He took the opportunity created by the plaintiffs’ motions to enter an omnibus order in *Carr* that addressed the faculty and school construction issues, along with several others.⁴⁵

Since Johnson had given the Montgomery board a reprieve the previous fall, it had assigned 75 new teachers to faculties in which their race was a majority. Those were 75 chances to increase faculty desegregation which the board had chosen to ignore. The only faculty desegregation which it had undertaken since the beginning of the school year was the placement of seven white teachers in black

⁴⁴ Merger Plan of the AHSAA and AIAA and Other Matters Pursuant to Court Decree Dated April 1, 1968; Order, May 3, 1968, *Lee v. Macon County Board of Education*; both in Frank Johnson Papers: *Lee v. Macon* Case File, Container 19, Folder 4; Seay Interview; *Birmingham World*, April 10, 1968.

⁴⁵ *United States and Carr v. Montgomery County Board of Education*, Opinion and Order 289 F.Supp. 647; see for a discussion of the *Carr* case, generally, and Johnson’s use of the structural injunction as exemplary, Fiss, *Injunctions*, pp. 415-81.

schools. The board had also failed to undertake any desegregation of its substitute or student teacher programs. Additionally, it had initiated the school construction projects, which Johnson determined had violated “both the spirit and the letter of [its] desegregation plan.” Specifically, the board had constructed three new schools in an affluent white section of the city, had ascertained the number of white students in the surrounding area, and had tailored the schools’ size to accommodate only these students. The board had hired a principal, three coaches, and a band director for the high school, all of whom were white. These individuals had actively engaged in fundraising campaigns only in the white community and had begun to schedule competitions against other white schools. The football coach had distributed literature about the commencement of spring practice only to white students. The school was to be “non-transported,” meaning the school board would not provide bus service, while it provided such transportation to formerly all-white Robert E. Lee and Sidney Lanier High Schools. Transportation would not a problem for the wealthy white families in the new high school’s vicinity. If this picture were not clear enough, the school’s name should have unclouded it: Jefferson Davis High School was intended to be a predominantly white school, and everyone knew it. At the same time, the Montgomery officials had expanded Hayneville Road School and George Washington Carver High, both all-black schools in all-black neighborhoods. The Jefferson Davis school project and contemporaneous expansions at Carver constituted, in Johnson’s words, “one of the most aggravating courses of conduct on the part of the defendants and their agents and employees.” The order he drafted was reflective of his exasperation.⁴⁶

On February 24 Johnson entered the order, indicating that further delay would “not be tolerated.” Johnson insisted that the reluctance of teachers to take desegregated assignments was not an excuse for the school board to fail to make such assignments. He added, “Unless the ‘freedom-of-choice’ plan is more effectively and less dilatorily used by the defendants in this case, the Court will have

⁴⁶ United States and Carr v. Montgomery County Board of Education, Opinion and Order 289 F.Supp. 647, 649-54; *Birmingham News*, Feb. 25, 1967.

no alternative except to order some other plan used.” In accordance with those “caveats,” Johnson ordered the Montgomery school board to adopt a supplement to its desegregation plan, which the judge attached to the order. The board was ordered to obtain approval from the state department of education for any new construction projects, effectively putting it under the requirements of *Lee v. Macon* in this regard. It was ordered to temporarily provide transportation to any students who elected to attend Jefferson Davis High, provided they lived closer to Davis than Lee or Lanier. Johnson added other steps to help “eradicate the effect of the efforts . . . to create the impression throughout the school system that Jefferson Davis High School, Peter Crump Elementary School and Southlawn Elementary School [were] to be used primarily by white students.” These included sending letters to all students in the system regarding their eligibility to attend the schools, the text of which the CRD provided and Johnson included in the order. They also included visiting existing schools to inform student-athletes of their eligibility to play at Davis and honoring “the choice of each Negro student who chooses to attend Jefferson Davis High School during the 1968-69 school year, in the absence of compelling circumstances approved by [the] Court on the school board’s motion.”⁴⁷

As significant as these requirements were for the Montgomery authorities, the most immediately controversial aspect of Johnson’s order involved the specific program he prescribed for faculty desegregation. The supplemental plan read:

In achieving the objective of the school system, that the pattern of teacher assignments to any particular school shall not be identifiable as tailored for a heavy concentration of either Negro or white pupils in the school, the school board will be guided by the ratio of Negro to white faculty members in the school system as a whole. The school board will accomplish faculty desegregation by hiring and assigning faculty members so that in each school the ratio of white to Negro faculty members is substantially the same as it is throughout the system. At present, the ratio is approximately 3 to 2.

⁴⁷ United States and Carr v. Montgomery County Board of Education, Opinion and Order 289 F.Supp. 647, 649-54; *Birmingham News*, Feb. 25, 1967.

Johnson included a schedule for achieving this system-wide ratio. For the upcoming year, he required that at least one out of every six teachers at a given school be of a different race than the majority, with this ratio to be increased the following year to one in five. He ordered the board to immediately achieve the system-wide ratio for student teachers and night school teachers and ordered it to stop hiring substitute teachers who refused to teach in desegregated assignments.⁴⁸

The order lit a firestorm in Montgomery and garnered criticism from whites across the state. It was interpreted by many segregationists as having laid out “strict rules” and having “set quotas for race mixing.” Former lieutenant governor and Democratic senate nominee Jim Allen said the order was “typical of the vindictive treatment the people of Alabama have been receiving from this Washington crowd.” Allen observed that the it had rightly “angered Alabamians not only in Montgomery but throughout the entire state,” because it went “far beyond any concept of freedom of choice.” The Montgomery school board immediately filed a notice of appeal and applied for a stay of the order pending the appeal. In its motion for a stay, the board called the order unprecedented, arguing that it contained “far reaching pronouncements of legal principles heretofore unprecedented in this District and this Circuit.” It noted that the new faculty requirements involved a “fixed ratio based on race” and that it required the board to give “an affirmative racial preference” to black students regardless of their proximity to the new schools. What immediately alarmed the city’s affluent whites most of all was the directive to notify all students in the system that they were “eligible to attend” Davis. They were interpreting the order to mean that any black students who wanted to attend Davis could do so, to the exclusion of the white students for whom the school was built. The prospect of a brand new, all-black school in the middle of the wealthiest white section of town was a segregationist’s nightmare. That it bore the name of Jefferson Davis would be a horrible irony which only added insult to injury. The board

⁴⁸ United States and Carr v. Montgomery County Board of Education, Opinion and Order of Feb. 24, 1968, 289 F.Supp. 647, 654-8.

of course could not couch its objections in these terms and opted instead to warn of “extensive student and procedural confusion” and disruption of “orderly school administration in [the] county.”⁴⁹

Judge Johnson surprised when, on March 2, he issued an order amending his previous order and staying its implementation until August 1, pending the school board’s appeal. In his supplemental remarks, Johnson first clarified his rationale for the previous order. He recounted the 1964 origins of the case and emphasized the Montgomery school authorities’ recalcitrance and the court’s own patience. He wrote, “Even though ten years had passed [since *Brown*] the Montgomery County Board of Education was allowed, by this Court, to proceed with desegregation gradually.” The court exercised restraint because it recognized desegregation would “cut across the social fabric of [the] community and that there would be both administrative and other practical problems for the board to cope with in order to comply with the law.” Johnson noted that the Montgomery board had adequately passed through the stages of “‘paper compliance’” and “‘token desegregation of pupils and faculty.’” But of the present state of the litigation, Johnson wrote, “We have reached the point where we must pass ‘tokenism,’ and the order that was entered in this case on February 24, 1968, [was] designed to accomplish this purpose.”⁵⁰

Johnson then generally stood by what he felt were requirements which were “not only authorized but required by the applicable law.” The judge called the charge that the order was unprecedented “incorrect – in both law and fact.” Regarding faculty desegregation, Johnson pointed out that the 3:2 ratio was simply a benchmark which could be gradually achieved. He argued that the court had actually required for 1968-69, “very little - if any – more” than the board already had planned, and certainly not more than the minimum at that point required under the law. Additionally, the Tenth

⁴⁹ *School Desegregation in the Southern and Border States*, Feb., 1967, SERS; *United States and Carr v. Montgomery County Board of Education*, Order of March 2, 1968, 289 F.Supp. 657, 657-8; *Birmingham News*, Feb. 25, 29, 1967; *Jackson Daily News*, Feb. 25, 1968.

⁵⁰ *United States and Carr v. Montgomery County Board of Education*, Order of March 2, 1968, 289 F.Supp. 657.

Circuit had already required a similar system-wide ratio, and the Fifth Circuit had anticipated such specificity in *Jefferson*.⁵¹ On the transportation requirements, Johnson noted that the 99 school systems in *Lee v. Macon* were already subject to such terms. He added that the court had “ordered no ‘busing’ of students other than requiring the board of education to provide exactly the same type transportation and upon exactly the same basis as that already provided by the board to students attending Lee and Lanier High Schools.” As to Jefferson Davis, Southlawn, and Peter Crump, Johnson reiterated that each was very obviously designed to be operated on a segregated basis and that the law would “simply not permit” this. The school board had gone to great lengths to dissuade any blacks from applying to the school. Johnson maintained that “fairness and justice” required that “something be done to counteract this aggravated type of discrimination.” He added that the Jefferson Davis scheme was class-discriminatory, “according to some theories.” Under the scheme, white children in less-exclusive neighborhoods outside the air-conditioned Davis’ “high-income tax bracket community” would bear the burden of desegregation alone. The requirement that the board honor the choice of black students requesting Davis was meant to be temporary, Johnson noted, and he had indicated that “reasonableness” would determine if “compelling circumstances” allowed the board to deny such applications.⁵²

Johnson then agreed to stay those “certain features of the order to which the Montgomery County Board of Education most strenuously [objected]” pending appellate review. He refused to stay the provisions to desegregate the substitute and student teacher programs and the night school program, as they did “not even approach new or novel areas.” He also declined to stay the general requirement for desegregated system-wide transportation and the requirements for obtaining

⁵¹ Board of Education of Oklahoma City Public Schools, 375 F.2d 158, 164 (10th CCA, 1967); United States v. Jefferson County Board of Education, 372 F.2d 836, 892-4 (5th CCA, 1967); the court in *Jefferson* wrote, “We anticipate that when district courts and this Court have gained more experience with faculty integration, the Court will be able to set forth standards more specifically than they are set forth in the decrees in the instant case.”

⁵² United States and Carr v. Montgomery County Board of Education, Order of March 2, 1968, 289 F.Supp. 657, 657-60.

permission for construction projects and for reporting to the state superintendent; they had recently been approved by the Supreme Court in its affirmation of *Lee v. Macon*. Johnson stayed, “for a limited time,” the portions of the order relating to the faculty desegregation ratio, the transportation requirements relative to the three new schools, and the requirement that black students choices of Jefferson Davis be honored in the absence of “compelling circumstances.” The judge also agreed to change the language in the letter of notice to students, from “You are eligible to attend Jefferson Davis” to “You are eligible to choose to attend Jefferson Davis.” Finally, Johnson ordered the attorneys on both sides to seek an expeditious appeal at the Fifth Circuit, and he set the stay for expiration on August 1 in the event that one was not secured.⁵³

The *Montgomery Advertiser* reasoned, “Some fears should now be allayed.” It assured the city’s whites that while pupil and faculty desegregation would be “on the far side of tokenism,” they would remain “short of anything revolutionary.” The three new schools would be “integrated by much the same standards which [applied] to all other city schools.” Jefferson Davis would “not be required to take all Negro applicants” as previously suspected. As segregationists were breathing a sigh of relief in the state’s capitol, however, they were soon hit with a newly alarming court order in the state’s port city of Mobile. The origins of this order – the Fifth Circuit Court of Appeals – were particularly foreboding for Montgomery’s whites, as the Fifth Circuit was the destination, of course, of the *Carr* appeal.⁵⁴

The Effect of *Jefferson* and *Lee* on *Davis v. Mobile*

The March 12, 1968 order in *Birdie Mae Davis v. Board of School Commissioners of Mobile* was a potentially devastating blow to segregationists and the latest signal that freedom of choice was on its way out. In 1966 the LDF had appealed U.S. District Judge Daniel Thomas’ approval of the Mobile school

⁵³ *United States and Carr v. Montgomery County Board of Education*, Order of March 2, 1968, 289 F.Supp. 657, 660-1.

⁵⁴ *School Desegregation in the Southern and Border States*, March, 1968, SERS.

board's desegregation plan. Later that year, the Fifth Circuit had found "no true substance to the alleged desegregation" which the plan might engender. The appellate panel determined that the plan was lacking in a number of specific ways: a fraction of a percent of black students were in white schools; the plan would take an inordinate amount of time to move beyond such tokenism; white students were given the option to transfer to other white schools, while black students were not afforded the same opportunity; black students were denied the opportunity to attend white schools when those schools offered courses their schools did not; and there had been a total failure to desegregate faculties. The appellate court subsequently ordered Thomas to have the board submit a revised plan, which he did. It was the implementation of this plan which the LDF had again appealed, leading to the March, 1968 decision.⁵⁵

Mobile was the largest school system in the state, with 93 schools and 75,000 pupils, 31,000 of which were black. Mobile County had a unified city-county school system, including the City of Mobile, its few suburbs, and the largely rural, unincorporated county surrounding it. The school board's revised plan had treated the city-suburbs (the metropolitan area) and the surrounding county separately. The board had created a hybrid geographic zone and freedom of choice plan for the city of Mobile and the adjacent cities of Prichard and Chickasaw, while it maintained traditional freedom of choice for the more sparsely populated surrounding county. It had redrawn attendance zones on a supposedly non-racial basis and made a larger number of schools – black and white – available to black students by choice. However, the option to attend schools outside one's zone only applied to incoming students, to those who had moved into a new zone, and to those who were matriculating from one school to the next. The board made a start to faculty desegregation, but on a strictly voluntary basis. The school board had facilitated a near 100 percent increase in pupil desegregation from 1966-67 to 1967-68. There were 33 desegregated schools in the district, enrolling 29,031 students, or 38 percent of its total system

⁵⁵ Davis v. Board of School Commissioners of Mobile County, 364 F.2d 896, 901 (1966), 393 F.2d 690 (1968).

enrollment. This was perfectly satisfactory for Judge Thomas, whose commitment to agonizingly slow gradualism was already notorious among LDF and CRD attorneys.⁵⁶

The Fifth Circuit again disagreed with the trial court. The panel assigned to the appeal included the former moderate Louisiana legislator Robert Ainsworth; the increasingly liberal Homer Thornberry, lately of the *U.S. v. Jefferson* majority; and Third Circuit Judge Albert Maris, sitting by designation. Thornberry wrote the decision, in which he argued that the numbers in Mobile were “superficially acceptable,” but that “beneath the surface” the picture was “not so good.” Thornberry argued that when applying the qualitative standard which he believed to be both the letter and the “spirit” of *U.S. v. Jefferson*, the court was “unable to say that Mobile's plan is working so well as to make judicial interference unnecessary at this time.” Two thirds of the system’s schools were still fully segregated. Furthermore, the number of pupils in “desegregated schools” had been drastically skewed by the fact that four white students attended formerly all-black schools. This added 1,316 black students at those schools to the number of students educated in biracial schools. More tellingly, there were only 692 black students attending formerly all-white schools. This was 511 more black students than had been enrolled in white schools the previous year, but it was still only 2 percent of the black student population system-wide. Thornberry wrote, “The number of Negro children in school with white children is so far out of line with the ratio of Negro school children to white school children in the system as to make inescapable the inference that discrimination still exists.”⁵⁷

In fashioning a remedy, the appellate court determined that its “primary concern” was to “see that the attendance zones in the urban areas of Mobile County be devised as to create a unitary racially nondiscriminatory system.” The plaintiffs pointed to overcrowded downtown schools next to under-populated white schools and to the fact that schools often sat on the edge of the zone they served as

⁵⁶ *Davis v. Board of School Commissioners of Mobile County*, 364 F.2d 896, 901 (1966), 393 F.2d 690 (1968).

⁵⁷ *Davis v. Board of School Commissioners of Mobile County*, Opinion and Decree of March 12, 1968, 393 F.2d 690, 690-4.

opposed to at their center. The court called the board's rebuttals of these points "somewhat unpersuasive." It ordered the Mobile officials to conduct a proper survey and redraw the zone lines "according to objective criteria with the caveat that a conscious effort should be made to move boundary lines and change feeder patterns." Zones would have to be "in terms other than race" or they would be "constitutionally suspect." Thornberry wrote, "To go a step farther, we hold that once attendance zones have been properly designated, the student's option to attend the nearest formerly white or formerly Negro school outside his zone must be eliminated." He continued:

The idea of superimposing limited options on an attendance-area plan has failed to bring Mobile very far along the road toward the ultimate goal of a unitary system wherein schools are no longer recognizable as Negro or white. . . . As the Court said in the per curiam entered in *Jefferson County*, freedom of choice is not a goal in itself but one of many approaches available to school boards. If it does not work, another method must be tried. Since the limited options have not worked, we hold that after the boundary lines have been redrawn on a nonracial basis, each student in the urban areas must attend the schools serving his attendance zone absent some compelling nonracial reason for transfer.⁵⁸

While the court left the rural half of the system alone, the effect of the foregoing passage was clear. Not only had the court thrown out freedom of choice for the city schools, it had determined that 2 percent of black students in formerly white schools was not even close to adequate progress towards elimination of the dual system, even when this was a 200 percent increase from the previous year's pupil desegregation. If the school board intended to comply in good faith, then there would be wholesale changes in Mobile schools the following fall.⁵⁹

On top of these pupil desegregation requirements, the court addressed faculty desegregation. There were 2,700 teachers in the school system. Under the voluntary transfer plan adopted by the board, 12 black teachers had elected to teach in formerly all-white schools, and 3 white teachers had

⁵⁸ Davis v. Board of School Commissioners of Mobile County, Opinion and Decree of March 12, 1968, 393 F.2d 690, 695.

⁵⁹ Davis v. Board of School Commissioners of Mobile County, Opinion and Decree of March 12, 1968, 393 F.2d 690, 694.

chosen to teacher in black schools. Thornberry argued that the “surface of the problem of faculty segregation” was “hardly scratched by the transfer of 15 teachers to schools of the opposite race.” The responsibility for desegregated faculties ought to lie, in any case, with the school board and not the teachers themselves. Again citing *Jefferson*, the court required that the Mobile school board adopt a “pattern of teacher assignment” which was not “identifiable as tailored for a heavy concentration of either Negro or white students.” At the very least, the board was to assign one teacher of the minority race at both predominantly white and black schools; it was to assign more than one “wherever possible.” The court finally embodied all of this in a comprehensive decree similar to the *Jefferson* and *Lee* decrees, except that it contained added provisions for the citywide survey and geographical zone plan. The crux of the decision was also the same as that of *Jefferson*: “The time for implementing programs that work,” Thornberry wrote, “is now.”⁶⁰

Three weeks after the Fifth Circuit panel handed down the *Davis* opinion and decree, James Earl Ray shot and killed Martin Luther King, Jr. King had been in Memphis, Tennessee to support a sanitation workers strike. His shocking murder outraged blacks, many of whom took their grievances and their grief into the streets of American cities. The latest in a disturbing trend in urban riots fueled segregationists’ preconceived notions of the volatile nature of black communities in general. This was particularly relevant in Mobile, where nascent white protest groups seized the opportunity to point to the riots as evidence that system-wide school desegregation would threaten their children’s lives. Some Americans understood that the violent protests were a desperate response to ghettoization, unemployment, police brutality, and racism in general. But many Alabama whites unsurprisingly shared George Wallace’s characterization of the problem of urban unrest as a telling representation of a segment of America which refused to work hard and obey the law.⁶¹

⁶⁰ *Davis v. Board of School Commissioners of Mobile County*, Opinion and Decree of March 12, 1968, 393 F.2d 690, 694-9.

⁶¹ *New York Times*, April 5, 1968; *Birmingham News*, May 27, 29, 1968; *Washington Post*, May 31, 1968.

Lurleen Wallace's untimely death followed one month later, on May 6. Her cancer had begun to spread relentlessly the previous fall, and her condition had steadily deteriorated thereafter. By April the cancer had reached her colon, liver, and lungs, and she weighed less than 80 pounds. Many Alabamians, even some blacks, grieved for the state's first female governor, but her painfully slow descent had prepared most for the inevitable. Her husband soon returned to the presidential campaign trail. His former legislative point man, Lieutenant Governor Albert Brewer, assumed the governor's office. And Alabamians quickly remembered that they were in the midst of a school desegregation crisis that would not go away on account of two tragic deaths.⁶²

In mid-May, the Mobile school board announced that the March court decree would "necessitate shifting a large number of students." The board had even begun to publicize a few of the newly redrawn districts. It warned citizens that the final plan would more than likely be "even more drastic" than what it was revealing. White residents of an upper-middle class neighborhood west of downtown Mobile learned that their children would soon be rezoned from Murphy High, Phillips Junior High, and Leinkauf Elementary to largely-black Williamson Junior-Senior High and Harmon Elementary. A group of them besieged the school board at a meeting on March 16 and hurled indignant protests at the board members. One mother argued that sending her daughter to Williamson instead of Murphy would be "jeopardizing a child's life. I wouldn't let my dog walk down some of those streets," she said, "and yet you're telling me I must send my 15-year-old daughter through one of the roughest sections of Mobile to go to school," referring to the Maysville section of town. Another white parent chimed in about Maysville, where Irish place names still adorned the street signs and where relative poverty was common. It was "known to police as a jungle, the worst colored area in Mobile," she said furiously, "How can you expect us to send our children into a jungle." A third parent demonstrated the attitude of what was to be a steadily increasing number of parents. "I'll tell you now," he said flatly, "my child is

⁶² Carter, *Politics of Rage*, pp. 315-22.

not going to that school, and that's final. And I think that goes 100 percent for all of us who live in these neighborhoods that are affected." The school board had received a number of similar indications that parents would either move, establish private schools, or simply disregard the state's compulsory education law rather than send their children to formerly black schools or school which would have anywhere near a black majority. Attorneys for the school board advised parents to wait before taking such action, because "a person may move into a worse spot than the one he's moving out of." The board knew that when the full plan was unveiled, there would be much more desperate protest from whites.⁶³

Meanwhile, whites and blacks began to mobilize. Blacks had recently resurrected the nearly moribund Neighborhood Organized Workers (NOW), in the wake of the King murder. NOW began to hold mass meetings and stage various protests, included marches on city hall and student-pickets of black high schools. This was not John Leflore's organization. Leflore's Biracial Commission was irrelevant, and his message of patient cooperation, in general, was losing traction rapidly. NOW members not only felt that the school and city authorities were not doing enough to end racial discrimination, they approached the issue with a sense of urgency and, some would have said, a militancy which many of Leflore's generation eschewed. Most NOW members were more receptive to the message of black power conveyed by former Student Nonviolent Coordinating Committee leader Stokely Carmichael, who addressed one the organization's summer rallies. White parents began to organize in opposition to the impending desegregation onslaught, forming such groups as "Operation Snowball," "Whites Rights," and "Whites Organized for Rights Keeping" (WORK). Such groups planned to stage mass protests and apply pressure on the federal courts, the Justice Department, and of course, the school board. School board chairman Arthur Smith announced that the board was "wholly sympathetic with those who are protesting. But just about everything we do now," Smith added, "is

⁶³ *Birmingham News*, May 17, 18, 1968.

under court order, and we aren't the court." WORK's leaders subsequently argued that school board members should defy the court's decree, accept contempt citations, and serve jail sentences in protest.⁶⁴

The group Stand Together and Never Divide (STAND) ultimately exerted more influence than any of the other white protest organizations. It was founded by a 37-year-old "tree surgeon" and small business owner named Lamar Payne. Payne modeled his organization after the Citizens' Council. It prided itself on an air of respectability. Its members were mostly middle class, rejected violence, and embraced law and order. They gave lip service to denouncing "racism and hatreds." But they were prepared to devote themselves wholly to avoiding widespread school integration at nearly any cost. One of STAND's seminal rallies drew nearly 10,000 whites to a local National Guard armory. Shortly thereafter, STAND's attorney – Harvard-educated state Senator and local Citizens' Council leader Pierre Pelham – filed a motion to intervene the group in *Davis* as a defendant. Pelham argued that white children would be in imminent danger in black schools and in black neighborhoods. He characterized the black community as increasingly hostile, citing the emergence of such leaders as Carmichael and the eruption of urban riots in cities across the nation. Pelham failed to appreciate that the most recent of these "disturbances" had been occasioned by King's assassination, or the significance of such connection. Nonetheless, Judge Thomas allowed the group to file a complaint in intervention and to thereby join the suit.⁶⁵

The white parents' revolt escalated on May 20 when the Mobile school officials held a full community hearing on the new desegregation plan at the city's Municipal Auditorium. Nearly one thousand angry whites stormed the auditorium and turned the school board's public hearing into what reporters called "the most turbulent and rowdiest meeting [it] ever held." White parents yelled at

⁶⁴ *Birmingham News*, May 27, 29, 1968; *Washington Post*, May 31, 1968; *New York Times*, June 10, 1968; *Pride, The Political Use of Racial Narratives*, pp. 61-2.

⁶⁵ *Birmingham News*, May 27, 29, 1968; *Washington Post*, May 31, 1968; *New York Times*, June 10, 1968; *Pride, The Political Use of Racial Narratives*, 61-2.

board members and vowed to circumvent the proposed plan at any cost. Several among the few hundred blacks either countered in support of the plan or argued that it did not go far enough. Police kept a tenuous peace as white and black parents sniped at each other. The hearing devolved into near chaos at several points, and the board almost adjourned it in disorder. A group of nearly 300 white parents eventually staged a walkout, barking at black audience members as they left. The walkout coincided with the emergence at the podium of leaders from the newly reinvigorated NOW. Jacqueline Jacobs, the wife of NOW president David Jacobs, shouted in frustration at the departing whites, “Run, run! You can’t run forever!” Jacobs continued screaming and gesturing animatedly, as board chairman Smith screamed for order. When police temporarily calmed Jacobs, and Smith restored a semblance of order, the NOW representatives were allowed to proceed. Jacobs argued that her children had been forced to go to Williamson, despite the rampant crime, which she readily conceded was a problem. Why should white children be exempt from such hardship? NOW’s direct action director Jerry Pogue then chided the board for its previous recalcitrance and wondered why there were not any black members on it, since the city was itself roughly 40 percent black. Jacobs and Pogue were followed by black community leader Jesse Thomas, who argued that Maysville was not some “jungle” wherein white children would be in danger. He added that the neighborhood certainly was not the only section of town with a crime problem; there were white neighborhoods with such issues, too. After this, the aging activist Leflore – architect of the city’s first desegregation attempts almost 15 years prior – strode to the podium. As the spokesmen for a bygone era, he called for biracial cooperation and understanding. Neither the blacks nor the whites in attendance seemed interested in such a message.⁶⁶

Leflore was followed by Catholic priest Leon Hill, whose comments were nearly smothered by abuse from the whites in attendance. Hill was the pastor of Our Mother of Mercy in the predominantly-black Plateau section of town. He tried to counsel acceptance of the inevitable and to encourage law

⁶⁶ *Birmingham News*, May 20, 1968; Pride, *The Political Use of Racial Narratives*, 61-2.

and order, arguing, “Changes are coming, whether we like it or not, so why delay, delay, delay?” He added, “If we’re going to cut off our tail, then let’s do it all at once.” Hill was run off the podium to a pointed catcall: “How many kids do you have, father?” It seemed that the gathered whites were only interested in the kind of defiant pronouncements which they had come to expect from their state government. Thus, the exact opposite reaction greeted several white parents who went before the raucous crowd. A few spoke again of a crime epidemic which they believed existed in Maysville, from whence they heard sirens and gunfire and even screams at night. Others spoke of a “burden” that was “too great . . . too heavy” for their children to bear. One white parent’s remarks could have just as easily come from a black parent. He told the board members, “We have begged, but we beg no longer. We have petitioned, but we petition no longer. We will stand together 100,00 strong – and more if necessary, God being our helper, we will succeed in saving our children and our schools.” The applause was even louder for another white parent who declared, to the blacks as much as to the board, “I don’t care how many plans you sit here and make, or how many court orders you get, my children are not going to Williamson or any other Negro school.” Many white parents – not just in Mobile but across the state – felt exactly the same way.⁶⁷

Green v. County School Board of New Kent

One week after the revealing Mobile school board hearing, the U.S. Supreme Court handed down its decision in *Green v. County School Board of New Kent County*. On May 27, the Court firmly embraced the Southern appellate courts’ trend towards more demanding relief and sounded the beginning of the end for freedom of choice in the process. The New Kent school board had attempted to argue that its freedom of choice plan was acceptable because the Fourteenth Amendment did not support “compulsory integration.” The Court held, “That argument ignores the thrust of *Brown II*.”

⁶⁷ *Birmingham News*, May 20, 1968; Pride, *The Political Use of Racial Narratives*, 62-3.

Justice William Brennan delivered the opinion. As he prepared to read it, the aging and soon to be retired Justice Earl Warren slipped him a note which read, "When this opinion is handed down, the traffic light will have changed from *Brown* to *Green*. Amen!" Brennan read:

In the light of the command of [*Brown II*], what is involved here is the question whether the Board has achieved the "racially nondiscriminatory school system" *Brown II* held must be effectuated in order to remedy the established unconstitutional deficiencies of its segregated system. In the context of the state-imposed segregated pattern of long standing, the fact that, in 1965, the Board opened the doors of the former "white" school to Negro children and of the "Negro" school to white children merely begins, not ends, our inquiry whether the Board has taken steps adequate to abolish its dual, segregated system.⁶⁸

Freedom of choice was, then, "not an end in itself," only one means to an end. It was incumbent on school boards to demonstrate that freedom of choice was the most preferable method for disestablishing the dual system. If "other more promising courses of action" were available and a school board continued to cling to its freedom of choice plan, this constituted a lack of good faith. "We do not hold that a 'freedom of choice' plan might of itself be unconstitutional," Brennan wrote, "although that argument has been urged upon us. . . . Where it offers real promise of aiding a desegregation program to effectuate conversion of a state-imposed dual system to a unitary, nonracial system there might be no objection to allowing such a device to prove itself in operation." However, the Court acknowledged that the "general experience under 'freedom of choice'" had been "such as to indicate its ineffectiveness." Brennan emphasized that a school board's "burden" was to "*come forward with a plan that promises realistically to work, and promises realistically to work now.*" Thus, the fundamental message: "If there are reasonably available other ways, such for illustration as zoning,

⁶⁸ *Green v. County School Board of New Kent County*, 391 U.S. 430, 437.

promising speedier and more effective conversion to a unitary, nonracial school system, 'freedom of choice' must be held unacceptable."⁶⁹

Green has been described as "a major milestone in the history of judicial steps towards desegregation of public schools" and as a "watershed case." It was important, as one scholar has written, "not because of what was said but because the Supreme Court said it." The Court adopted Judge Wisdom's position, and that of the *en banc* Fifth Circuit, in *U.S. v. Jefferson*. But *Green* was much more than simply a validation of the appellate court's decision, for the Court had already done that, in essence, in its affirmation of *Lee v. Macon* and its denial of *certiorari* in *Jefferson*. The importance of *Green* lie in the standards for judging free choice plans. The Court found that New Kent's freedom of choice plan was failing because no white children had chosen black schools and fewer than 15 percent of black children had chosen white schools. The schools were still racially identifiable as judged by these numerical criteria. If this was the new standard for the efficacy of freedom of choice, then there were school systems across the South which were about to find that their freedom of choice plans would not withstand renewed scrutiny. Mobile had discovered this about its own plan a few months earlier. Were the rest of Alabama's 119 school systems about to realize the same?⁷⁰

As the summer of 1968 began, the spate of recent decisions, especially *Green*, ensured that the issue of school desegregation would be once again at the center of the state electioneering. Former Lieutenant Governor Jim Allen went to Mobile two days after the Supreme Court handed down *Green* to stimulate his campaign to replace Lister Hill in the U.S. Senate. Allen, Governor Albert Brewer, and others proved little different from George Wallace or John Patterson in fanning the flames of racial resentment, antipathy towards federal government 'meddling,' and resistance to any and all efforts to further effectuate school desegregation. Allen told a crowd of supporters at a headquarters reception

⁶⁹ *Green v. County School Board of New Kent County*, 391 U.S. 430, 437-41; Belknap, *Administrative History of the Civil Rights Division of the Department of Justice During the Johnson Administration*, 77-81; Wilkinson, *From Brown to Bakke*, pp. 115-16.

⁷⁰ Wilkinson, *From Brown to Bakke*, pp. 117; Patterson, *Brown v. Board of Education*, pp. 145-6.

that the recent *Davis* and *Green* decisions were condemnable. “These two decisions,” Allen announced, “show the length to which the Washington crowd is going to take over our schools, our children, and the daily lives of our young people.” Allen added that there was hope in defiance, though. “Even the federal judiciary,” he said, would “move in the face of aroused public opinion.” He cited developments in *Carr*: “We saw a recent example of this in Montgomery where the federal district judge modified a school desegregation decree when public opinion was aroused and the people acted.” Allen concluded that such “action” could “do wonders when the federal judges realize the people are not going to submit.” This was a near total mischaracterization of what had actually occurred in the *Carr* proceedings. In reality, Johnson had made a small semantic change in his decree and had temporarily stayed portions of his order pending appeal, all in response to a properly filed motion. But Allen and others continued to encourage white community resistance, nonetheless. He praised the efforts of whites in Mobile, saying, “I stand with STAND . . . 100 percent.”⁷¹

Brewer matched Allen’s rhetoric. He asked the state congressional delegation “to propose legislation which would overturn the decisions made by the courts,” meaning *Davis*, *Carr*, and *Green*. Brewer channeled his mentor, Wallace, complete with paranoiac (and ironic) exaggeration: “Because of this innovation by judicial decree, the courts are now declaring that a person in this republic no longer can exercise a choice. Logically extended, this rule can be applied to determine where a person lives and how he can make a living.” The governor continued, “There is a serious question as to how long we can continue to operate our public schools if the federal courts abandon all restraint and continue to encroach upon local control of our schools.” Alabamians were “satisfied with the operation of the freedom of choice plan.” It was a “very small, but vocal and suit-conscious minority” which was responsible for frustrating the will of “people of all races.” Resistance had reached the point at which segregationist leaders were championing that which they had previously spent a decade trying to avoid.

⁷¹ *Birmingham News*, May 30, 1968;

Freedom of choice had to be salvaged. Brewer thus praised the Alabama Education Association for speaking out against the recent decisions, and he applauded a petition for intervention in *Davis* filed by white students who had been “denied their freedom of choice.”⁷²

Segregationist outrage in Mobile reached a high point that summer. The ruling in *Green* made a reversal of *Davis* seem impossible. Groups like STAND grappled for some way to avoid what appeared to everyone else to be inevitable, as many in the city’s black communities saw for the first time some measure of real victory in sight in their fight for their constitutional rights. With white expressions of frustration and exasperation – along with black insistence on immediate implementation – came a sharp and dangerous increase in racial tension. Attorney Vernon Crawford spoke to reporters about the atmospheric change, saying it was “pretty bad” and that certain whites and blacks could “resort to violence immediately.” Mobile Superintendent Crawford Burns expressed “deep concern about the sort of problems that will come unless we can soften the decree or convince people to accept it.” STAND’s attorney Pierre Pelham argued that there was no question about the immediate white response. “Parents are going to resist,” he said, “When you had token integration there was resistance, but now you’re way beyond that. You’re getting home. It’s a more personal thing.” Crawford, Burns, and Pelham represented three distinct groups with competing desires. Crawford represented blacks in the courtroom, which they had begun to realize was the only place where they might secure access to a non-discriminatory education. Burns represented the school officials who begrudgingly had come to accept that some sort of acquiescence to black demands was necessary if they were to avoid jail or the “destruction” of the very school systems which they administrated. Pelham represented a newly militant group of whites which was determined to avoid school desegregation at nearly any cost, if

⁷² *Birmingham News*, June 1, 3, 1968.

desegregation were to mean anything more than tokenism. On one point, however, the three were in complete agreement – the demise of freedom of choice would have a profound impact on desegregation in Mobile and across the state.⁷³

On June 9, 2,600 whites gathered again at the National Guard armory to hear STAND leaders discuss possible courses of action. Pelham assured the crowd that Governor Brewer was behind them and was prepared to provide “the full resources of the governor’s office” if they were needed to “protect the public school system of [the] state.” The organization was already seriously considering setting up private schools if necessary. Pelham assured them of the righteousness of their resistance, saying, “It is not you who are tearing down buildings and burning up cities.” Black neighborhoods, he suggested, were violent and unsafe because black people were violent. And “no man, nowhere,” he added, “would tell me to send my child to an unsafe school.”⁷⁴

STAND leader William Westbrook also spoke at the rally. He described STAND’s plan to hold mass demonstrations, in the belief that such events could influence some sort of retrenchment from the courts. The distorted view of what had recently happened in the *Carr* case, articulated by Jim Allen, provided them with a false sense of hope in this. Westbrook said that they could show the federal judges that they would not let their children “go into an environment that [would] make bums, loafers, hoodlums, and criminals out of them.” Westbrook envisioned a throng of STAND members marching on the federal courthouse, “clean shaven and neatly dressed.” He asked the attendees to “imagine 50,000 people heading to the courthouse to attend court in behalf of our children” and to “consider the impact on the courts and the nation.” He reiterated STAND’s charge to the members of the Mobile school board, insisting that they had been “put on notice to get their bags packed and, if need be, to get ready to go to jail in defiance of the court orders.” Westbrook then closed by evoking the recently slain Martin Luther King. “We have had a dream too,” he declared, which “no power on Earth” could change. “Our

⁷³ *Birmingham News*, June 8, 1968; *New York Times*, June 10, 1968.

⁷⁴ *Birmingham News*, June 8, 1968; *New York Times*, June 10, 1968.

dream," he told them, "is we are not going to surrender our schools and our homes to the social-minded reformers and Constitution wrecking judges. We are not going to send our children to Negro schools, and that is a fact and not a fantasy."⁷⁵

⁷⁵ *Birmingham News*, June 8, 1968; *New York Times*, June 10, 1968.

CHAPTER 14: THE TRAFFIC LIGHT CHANGES: THE *GREEN V. COUNTY SCHOOL BOARD* EFFECT, 1968

The Supreme Court's May, 1968 decision in *Green v. County School Board of New Kent County* promised to immediately accelerate school desegregation in the South. Within a month, southern congressmen were doing everything they could to effectively nullify it. Mississippi's Jamie Whitten introduced a proposed amendment to the annual HEW appropriations bill which Georgia's John Flynt described as a "congressional sanction to 'freedom of choice.'" It read, "No part of the funds contained in this Act may be used to force busing of students, abolishment of any school, or to force any student attending any school to attend a particular school against the choice of his or her parent." Representative Emmanuel Celler of New York and other congressional opponents of the move were obliged to identify the effort for what it was. Celler said, "What is sought here is to overturn the Supreme Court's decision," meaning *Green*. The amendment had originally been offered by a North Carolina congressman in 1966, but Whitten had taken it upon himself to reintroduce it annually thereafter, thus it became known as "the Whitten Amendment." In the wake of *Green*, Whitten and others were able to secure the cooperation of some non-southern colleagues by warning that the NAACP Legal Defense Fund, HEW, and the Civil Rights Division of the Justice Department might one day seek the desegregation of their school systems, too.¹

Until that time, many fears outside the South had been assuaged by language in the Civil Rights Act of 1964, and supportive federal court rulings, which seemed to exempt so-called *de facto* segregation in northern, Midwestern, and western cities from federal scrutiny. According to the dominant narrative, *de facto* segregation was residential segregation which was free from officially mandated, that is *de jure*, segregation. *Green* allowed southerners to exploit outside fears that *de facto* segregation might soon be targeted, too. Whitten warned, "What has been visited upon certain areas of

¹ *Lawlessness and Disorder*, Southern Regional Council, pp. 19-22; Gary Orfield, *Must We Bus: Segregated Schools and National Policy* (Washington, D.C.: Brookings Institution, 1978), pp. 239, 243.

the country is about to spread throughout the nation.” The measure passed 139-109 but was assailed in the Senate Appropriations Committee, where liberal northern Senators were able to force a change in the language. The Senate product simply precluded the use of funds to achieve “racial balance.” This was the same as the language in the Civil Rights Act and was similarly intended to keep southern style *de jure* segregation in the crosshairs of enforcement while protecting northern style *de facto* segregation. Wrangling in a House-Senate conference committee restored the Whitten language, but it then failed to pass the House by a 175-169 margin.²

The near passage of the Whitten Amendment, with its new language aimed directly at the standards set forth in *Green*, was a sign of the times. Not only did it underscore the importance of the *de jure – de facto* divide, as it was understood by civil rights activists, bureaucrats, and politicians alike, it also demonstrated that the path of evasion had, ironically, become more clear after *Green*. Most southern congressmen had been above the school desegregation fray for years. Alabama Senators John Sparkman and Lister Hill, for example, had remained aloof from much state-level defiance. There had not been a concerted effort on Capitol Hill to derail school desegregation efforts since the fight against the Civil Rights Bill. Having lost that battle, most southern congressmen had begrudgingly accepted token desegregation as inevitable. The vitriolic and visceral reaction against the kind of compulsory assignment of students and teachers portended by *Green*, however, forced them to make some kind of stand, and supporting the Whitten Amendment seemed timely enough. But it was more than timing and constituent pressure. The rhetoric had changed. Defending freedom of choice offered whites the opportunity to employ the logical defense beget by the marriage of law and order. It need not be about states’ rights and white supremacy anymore. Support for freedom of choice against compulsory

² *Lawlessness and Disorder*, Southern Regional Council, pp. 19-22; Orfield, *Must We Bus*, pp. 239, 243.

assignment was support for the constitutional freedom to associate with those of one's own choosing. Who in a liberal society could fail to support this?³

As southern congressmen were fighting to save freedom of choice in Washington, whites in Alabama were doing so in the courts, in meeting halls, and in the streets. Sensing that, as Earl Warren had suggested, the "traffic light" was changing "from *Brown* to *Green*," the LDF and the CRD filed motions in all of Alabama's desegregation suits seeking further relief along the lines suggested in *Green*. This forced segregationists across the state to cling desperately to that which they had only recently fought bitterly to avoid. They demonstrated that while many whites might reluctantly accept tokenism, they would resume the fight in order to avoid anything more. Having recently made sense of their acceptance of freedom of choice by way of deference to law and order, they sought solutions within the realm of the law. First, they fought each desegregation case at every turn and made use of any opportunity for delay which federal judges would grant. Second, they began to articulate a defense of the white right to choose – a process which necessarily assumed blacks were attacking the Constitution. Having successfully assaulted states' rights, blacks supposedly had turned their ranks towards individual freedoms. Whites rallied around the issue, and the prospect for the genuine eradication of the dual school system based on race remained dim, despite a relentless drive in the states' federal courts.⁴ By the end of the school year in 1969, the Southern Regional Council was lamenting the failure of *U.S. v. Jefferson*, *Davis v. Board of School Commissioners of Mobile*, *Carr v. Montgomery*, and *Lee v. Macon* to yet live up to the promise of what had only recently seemed like the dawning of a "new judicial era":

We teach our children, all children, that the United States of America is dedicated to law and order. We lie. We have shown a generation of American children, in the public institution closest to their lives, the schools, that this nation's fundamental law need not be obeyed; we have clearly demonstrated to them that what we expect is their conformity to lipservice to the

³ "Lawlessness and Disorder," Southern Regional Council, p. 15; Orfield, *Must We Bus*, p. 243; Crespino, *In Search of Another Country*, pp. 186-9; *Birmingham News*, Feb. 1, 1970; *Modesto Bee*, Dec. 19, 1969.

⁴ See Warren quotation at Patterson, *Brown v. Board of Education*, p. 146.

shibboleth. What will be the awful effects of this lie upon children, black and white alike? What depths of disillusionment when they hear us say “law” and observe only “order.”

After a generation has beheld successful evasion, rationalized vacillation, [and] outright flaunting of the law, only a country absolutely wedded to the totalitarian concept of order without law could turn on the victims of lawlessness and accuse them of destroying the fabric of society.⁵

Freedom of Choice Temporarily Spared in *Lee v. Macon*

Green v. County School Board provided the Justice Department’s Civil Rights Division and the NAACP’s Legal Defense Fund with the grounds on which to seek further relief in the many cases already in litigation across the South. The decision itself had been, in essence, a reaffirmation of *U.S. v. Jefferson*, and therefore an endorsement of the CRD’s own policy. In late June the head of the CRD, Stephen Pollack, outlined for Attorney General Ramsey Clark his plan to capitalize on *Green*. The Court had found New Kent’s freedom of choice desegregation plan, and those of the companion case districts, to be deficient based on the percentage of black and white pupils in desegregated schools in each system. In each case no whites had chosen to attend black schools, and less than 15 percent of blacks had chosen white schools. As soon as the decision was handed down, the CRD conducted a review of the 190 school districts in which it was involved in litigation. Pollack told Clark that, “with few exceptions,” those districts fell within the *Green* criteria for further relief. He felt that the Justice Department had a “responsibility” to seek compliance along the lines set out in *Green*, meaning that the CRD ought to file motions to get those districts to utilize some other, more effective method of desegregation. The HEW Office for Civil Rights had already applied similar criteria in its Title VI enforcement program, so there would be a uniformity in the federal government’s approach.⁶

⁵ “Lawlessness and Disorder,” Southern Regional Council, p. 15.

⁶ Memorandum from Assistant Attorney General Stephen Pollack to Attorney General, School Desegregation –

Pollack noted some limitations. First, the CRD only had so many attorneys, and it also had other commitments. Pollack told Clark that the enforcement program would require a “considerable commitment of manpower and resources moving forward.” This was particularly true in places like Mississippi and Louisiana, where the CRD was involved in dozens of cases. It was certainly true in Alabama, where the CRD’s involvement in *Lee v. Macon County Board of Education* meant that it was involved with 99 systems, 76 of which were ripe for further relief per the *Green* standard. The Division would have to prioritize certain districts and proceed in as many as possible. Pollack also acknowledged that there would be “threats of forcible interference” from state officials and resistance from local whites in places like Alabama. There was likely to be “a concerted effort . . . directed towards undermining the public school system, such as [had] occurred in Prince Edward County, Virginia, and Plaquemines Parish, Louisiana.” Finally, Pollack admitted that the Civil Rights Division did “not have complete control over developments.” There were private litigants who would file their own motions for further relief in a number of cases, based on *Green*. In fact, he wrote, “such a motion has already been filed in *Lee v. Macon County*.”⁷

Fred Gray had indeed filed a motion in *Lee v. Macon* on June 7, 1969 on behalf of the plaintiff class and as associated counsel for the LDF. In his brief in support of the motion, Gray noted that the Supreme Court’s directive in *Green* was nearly identical to the one already set out in *Lee v. Macon* in March, 1967. The Supreme Court in *Green* had directed trial courts to ascertain whether or not freedom of choice plans actually worked, and if not, to order the implementation of “reasonably available other ways, such as for illustration zoning, promising speedier and more effective conversion to a unitary

Program to Implement the Supreme Court Decision in *Green v. County School Board of New Kent*, June 28, 1968, in Belknap, *Administrative History of the Civil Rights Division of the Department of Justice During the Johnson Administration*, pp. 16-20, pp. 16-18; Landsberg, *Enforcing Civil Rights*, pp. 140-1.

⁷ Memorandum from Assistant Attorney General Stephen Pollack to Attorney General, School Desegregation – Program to Implement the Supreme Court Decision in *Green v. County School Board of New Kent*, June 28, 1968, in Belknap, *Administrative History of the Civil Rights Division of the Department of Justice During the Johnson Administration*, pp. 16-20, pp. 18-20.

nonracial school system.” Judge Frank Johnson had already written in the March, 1967 *Lee* opinion, “In short, the measure of a freedom of choice plan . . . is whether it is effective. If the plan does not work, than this Court, as well as the State of Alabama school officials – both state and local – is under a constitutional obligation to find some other method to ensure that the dual school system based upon race is eliminated.” Johnson had added, “we stress again that [freedom of choice] may only be an interim plan.” Fred Gray argued that, with the decision in *Green*, this “interim period of tolerance for freedom of choice plans [had thus] come to an end.” He asked the court to require state Superintendent Ernest Stone to prove that each of the 99 systems was “employing the method of pupil assignment which promises the speediest and most effective conversion to a unitary, nonracial school system.”⁸

The CRD filed its own motion for further relief in *Lee v. Macon* on June 15. It asked the court to order Stone to require school systems to adopt and implement plans “for the assignment of students on some basis other than freedom of choice” in order to “insure the immediate and effective eradication of the vestiges of the dual system of schools based upon race.” The CRD’s brief in support of the motion included a massive appendix in which it set out specific recommendations for the 76 school systems which fell under the *Green* criteria. A systems-by-system analysis included each district’s pupil and faculty integration numbers, by school. These figures were accompanied by district maps, transportation plans as reported to Stone, and a listing of what steps, if any, systems had taken beyond freedom of choice, for example, closing substandard black schools. In each system, there were still all-black schools within blocks of token desegregated, predominantly white schools; faculties were only desegregated to the most minimal standard possible; the percentage of black students in formerly white schools was generally well below 15 percent of the system’s total black enrollment; and the number of white students choosing to attend black schools was always zero. A number of systems had closed

⁸ Plaintiffs’ Pre-Trial Memorandum in Support of Motion for Further Relief, Aug. 22, 1968, *Lee v. Macon County Board of Education*, Frank Johnson Papers: *Lee v. Macon* Case File, Container 22, Folder 5.

black schools – or certain grades at some black schools – but the number of black students integrated as a result was rarely enough to constitute significant progress towards eliminating the dual system.⁹

The CRD recommendations were specific. For example, for the Auburn city system, the division recommended the closure of grades 5-9 at two black schools, the assignment of those students to others (white) schools in the system, and the assignment of all students in the entire system in grades 10-12 to Auburn High. Or for the Washington County system, the CRD recommended the closure of two black elementary schools entirely and the assignment of those students to white schools, as well as the closure of grades 7-12 at the all-black K-12 Prestwick School and the assignment of those students to Leroy High, the formerly all-white county high school. In some cases, the CRD recommended “pairing,” or the use of formerly-black and formerly-white schools in tandem. Under this arrangement, one school would enroll all black and white students in a combined, two-school zone for a certain grade set (for example, 6-7), and the other would then take those same students for the remaining grades (8-9). Judge Johnson set a hearing on the two motions for August 22.¹⁰

Meanwhile, the CRD began contacting the 76 systems – through Superintendent Stone – regarding what it felt were their obligations. The response of the school officials in Autauga County is typical of the responses from many systems to these notifications. The CRD recommended that Autauga transfer certain groups of black students in the vicinity of predominantly white schools to those schools, just as it had for Auburn, Washington County, and most of the others. The Autauga superintendent replied that this was “virtually an imposition of a district line desegregation plan,” which the 1967 court order in *Lee v. Macon* did not “require or authorize.” The superintendent added, “If this board were

⁹ United States Motion for Further Relief, July 15, 1968, *Lee v. Macon County Board of Education*, Frank Johnson Papers: *Lee v. Macon* Case File, Container 30, Folder 6; Appendix A, Brief of the United States in Support of Motion for Further Relief, Aug. 15, 1968, *Lee v. Macon County Board of Education*, Frank Johnson Papers: *Lee v. Macon* Case File (1993 Addition, District Court File), Container 162, Folders 7-8.

¹⁰ United States Motion for Further Relief, July 15, 1968, *Lee v. Macon County Board of Education*, Frank Johnson Papers: *Lee v. Macon* Case File, Container 30, Folder 6; Appendix A, Brief of the United States in Support of Motion for Further Relief, Aug. 15, 1968, *Lee v. Macon County Board of Education*, Frank Johnson Papers: *Lee v. Macon* Case File (1993 Addition, District Court File), Container 162, Folders 7-8.

forced to have a compulsory attendance district, the [schools] that you mentioned . . . would become . . . totally Negro school[s].” He argued that this would be “repugnant to the purpose as set forth by you in your letter.” Bibb County’s superintendent was more direct: “It will be impossible for the Bibb County School System to take the suggested step[s] as outlined in your letter to Dr. Stone” Many school officials simply assumed that whites would not tolerate anything remotely close to minority status in an integrated school. They assume – with good reason – that a Tuskegee-like exodus for private schools or for nearby districts would take place, and they used this as a rationale for avoiding anything beyond token desegregation. This was certainly possible, especially given that there was not likely to be any moral leadership from white communities in support of working within such a situation. Even law-and-order style community compliance efforts would begin to breakdown once desegregation proceeded beyond tokenism. But the courts had already spoken on the matter, both in *Cooper v. Aaron* (1957) and more recently. Fred Gray addressed the issue in his August brief: “The speculation that white students will flee an over-integrated public school system cannot support rejection of the government’s proposals. Such speculation was strenuously urged in *Monroe v. Board of School Commissioners of the City of Jackson, Tennessee* [1968] and summarily brushed aside by the Supreme Court of the United States.” In addition to hiding behind the threat of white flight, school boards complained of potential overcrowding, of a “total disruption” of their plans for the upcoming year, and of students’ “lack of choice.” As before, their concerns resonated with the outcry from Montgomery.¹¹

The state-level reaction to the motions in *Lee v. Macon* might have been different with the Wallaces’ successor, Albert Brewer, at the helm of the state government. Only, it was not. The former legislator from the north Alabama city of Decatur picked up the politics of legal and rhetorical defiance

¹¹ Stephen Pollack to Richard Rives, Aug. 28, 1968, Correspondence with School Officials Attached; Plaintiffs’ Pre-Trial Memorandum in Support of Motion for Further Relief, Aug. 22, 1968, *Lee v. Macon County Board of Education*, p. 2; both in Frank Johnson Papers: *Lee v. Macon* Case File, Container 22, Folder 5; *Cooper v. Aaron*, 358 U.S. 1 (1958); *Monroe v. Board of School Commissioners of the City of Jackson, Tennessee*, 391 U.S. 450 (1968).

right where the late Governor Wallace and her husband had left it. Brewer quickly announced a defiant resolution issued by the state board of education, which he said would put the state “on the offensive rather than the defensive.” The governor was “gravely concerned,” he said, by these “arbitrary, mandatory court orders.” He wanted to increase spending on education during his term, in order to bring teachers’ salaries up to competitive levels, among other initiatives. But he argued that this would be difficult if public support for education eroded as a result of compulsory assignment. The governor’s response and the state board’s resolution were intended to support the state’s position at the *Lee v. Macon* August 22 hearing, and to bolster its response to the recent zoning order in *Davis v. Mobile*. The state board contended, “The freedom of choice plan, though involuntarily accepted by each board, has been implemented in good faith by each board, and each school system has adjusted in part to the requirements which the court has imposed.” The state board authorized Brewer to support the Mobile school board in any way necessary, and it authorized the retention of state counsel “to defend the right of each local school board to determine for itself the question of whether the freedom of choice plan will be retained.” Brewer made sure the Mobile board knew that he had made his own legal advisor available to supplement its legal team “if it would help.” The state’s attorneys were already working on behalf of the 99 school systems in *Lee*.¹²

State officials – and most local officials – felt that freedom of choice was “working,” at least in the way that they had assumed it would be allowed to work. Supposedly, no students had been denied the right to choose. While this was shockingly untrue in a number of school systems, it was not the most damning indictment of freedom of choice’s tenure in Alabama. Few school officials had understood – or accepted – that freedom of choice was actually supposed to bring about the elimination of the dual system. They assumed it was a permanent compromise. This was a fundamental misunderstanding of the plaintiffs’ goals, the Justice Department’s goals, and of course, the law as most

¹² *Birmingham News*, June 13, 16, 21, 1968.

federal judges understood it. The fate of freedom of choice was to be decided by the results it had wrought. And they were not promising. As of that summer, HEW reported that 13,000 of the state's 233,000 black students were in formerly white schools: 5.4 percent, and lower than any other state save Mississippi. In some Black Belt systems, the number was still a fraction of a percent. In the 76 systems which were the target of the new motions, 91 percent of black students were set to attend all-black schools.¹³

At the August hearing, the defendant state officials argued that freedom of choice had “unquestionably worked.” Its abandonment would render the allocation of increased funding for Alabama’s cash-starved schools “unquestionably . . . impossible.” Like many others at the local and state level, the defendant officials subscribed to the “tipping point” theory, according to which, increasing integration past a voluntary, token black presence would result in “totally Negro school systems.” The defense also, predictably, pointed the finger north: “While it is true that 89.9 percent of the Negro pupils in the affected areas chose for the coming year to attend formerly Negro schools, there is nevertheless more integration in the state of Alabama than in the elementary schools of Washington, Chicago, Atlanta, St. Louis, or Gary, Ind.” Brewer took the stand and argued, “The people are simply not going to be willing to pay the taxes to finance the education system properly.” They would refuse to send their children to formerly black schools, and they would refuse to finance majority black schools through tax increases. They would, he maintained, send their children to private schools. Indeed, the exodus had already begun. He accused the LDF of “emphasizing statistics and social objectives” and of “missing the whole point of why we operate a school system . . . to educate young people.” Alabama’s whites had “reluctantly” accepted desegregation, and as a result, Brewer claimed that there was “no deep-seated bitterness between the races in Alabama as there is in a great many sections of country.”¹⁴

¹³ *Birmingham News*, June 13, 16, 21, 1968; *Lee v. Macon County Board of Education*, Order and Opinion of Aug. 28, 1968, 292 F.Supp 363, 365.

¹⁴ *Birmingham News*, Aug. 22, 1968.

The “tipping point” theory was self-fulfilling prophesy. The notion of “no deep-seated bitterness” was, on the other hand, pure fantasy. This and other misconceptions and mischaracterizations allowed Brewer to pitch himself – and one biographer to describe him as – “New South”: as a progressive reformer unbound by the crass, racist demagoguery which characterized his predecessors; as representative of modernizing, industrial and business interests in the cities poised to replace the old planter aristocracy of the Black Belt; and as part of an emerging class of booster-leaders with a vision of a Sun Belt rising. In reality, Brewer proved little different from Wallace when it came to racial politics and the preservation of white privilege. Wallace’s and John Patterson’s brands of defiance had given birth to the law-and-order style of minimal compliance, when litigation had forced the issue. Brewer embodied such a style: reluctant and begrudged acceptance of the bare minimum required by law and under the threat of sanction; denunciation of federal courts, judges, and decisions; criticism of black plaintiffs and their demands; the unquestioned and unchallenged acceptance of white flight as an inevitable outcome of further efforts to eradicate a discriminatory system; dogged contestation of all litigation; and by way of all of this, the encouragement of defiance and evasion across the state. If Brewer was different from Wallace, it was because Wallace had exhausted all avenues of high-profile, direct defiance and interference.¹⁵

State Superintendent Stone – though he did everything the court asked of him – had embraced the style himself and had echoed the governor’s remarks at the August hearing. Stone argued that if the percentage of black students in desegregated schools increased beyond 15 percent (conveniently, the yardstick for *Green* compliance) that whites would then flee the system. Forty local superintendents

¹⁵ *Birmingham News*, Aug. 22, 1968; *Washington Post*, Aug. 23, 1968; see characterization of Brewer as “New South” in Gordon Harvey, *A Question of Justice: New South Governors and Education, 1968-1976* (Tuscaloosa: University of Alabama Press, 2002), pp. 17-66.

and other school officials testified to substantially the same. “If the federal government is going to run the schools,” Brewer’s education chief said on the stand, “let them finance the schools.”¹⁶

Two rulings by Judge Johnson presaged the ruling of the three-judge court on the *Green-* motions in *Lee v. Macon*. Johnson had heard similar motions in the cases against Crenshaw and Barbour Counties. In the Crenshaw County case, Johnson acknowledged, “It is one of the facts of life that white students will not elect to attend and will not, if any other choice is available, attend a predominantly Negro school.” He had earlier admonished the Autauga County school board for constructing new classrooms at a black school, saying it would be “naïve to the point of ridiculousness” to believe that such construction was undertaken to attract white students. But he still believed that freedom of choice could work if school boards were diligent about removing choice-influencing factors. “I have found,” he wrote, “that school boards, with some prodding – and I use that word advisedly – are inclined to go ahead and do what the judge requires even though what the judge requires is already what the law requires the school board to do.” To that end, he ordered Crenshaw to close two black schools, to eliminate certain grades at another black school, and to reassign those students to formerly all-white schools. In a separate case, Johnson enjoined the Crenshaw County Unit of the United Klans of America from harassing black children and their families. The Crenshaw Klan’s birth had been a “remarkable coincidence with the birth of desegregation” of the County’s schools in 1965. Since that time it had directly threatened black families, burned crosses and discharged firearms outside their homes, painted KKK in the street at bus stops, and coerced white business owners into participating in a Citizens’ Council-style campaign of economic reprisal. The number of black students exercising and making good on desegregation choices had steadily declined in the last two years as a result, Johnson found. He enjoined the Klan and its members in order to “dispel the fears of Negro parents which are likely to be the continuing effect of defendants’ practices.” He wanted to give freedom of choice “another chance.”

¹⁶ *Birmingham News*, Aug. 22, 1968; *Washington Post*, Aug. 23, 1968.

In the Barbour County case, he ordered the closure of three black schools and the acceleration of faculty desegregation, writing, "Freedom of choice is at the present time the most feasible plan for the school board to pursue for the 1968-69 school year." During the hearing in the Barbour case, the county superintendent had told Johnson that two new private schools in the county were "disrupting" the local system. Some whites were already choosing the new segregationist academies, but none had chosen the county's black schools. "And I assure you," the superintendent said, "they will not."¹⁷

On August 28, the *Lee* court issued its ruling on the post-*Green* motions. Johnson acknowledged the continued existence of all-black schools and the high percentage of black students in the *Lee* systems which continued to attend them. But he otherwise began by describing the progress which freedom of choice had made: every *Lee* system had adopted and implemented a plan which conformed to the *U.S. v. Jefferson* standards; 151 substandard black schools had been closed, along with a number of specific grades at others; faculty desegregation had begun, with 740 black and 400 white teachers set to teach in desegregated assignments; the state had started a teacher placement service to assist in faculty desegregation and had held desegregated in-service teacher training programs and teacher institutes. Johnson even noted that Stone and Brewer were "approaching the problem of public school desegregation in good faith." Accordingly, the court determined that while freedom of choice had "not yet completely disestablished the dual school systems based upon race," it remained "the most feasible method to pursue." That meant no establishment of attendance zones, no consolidation, and no pairing. The situation in Alabama and the situation in New Kent County, the court felt, were "vastly

¹⁷ Harris v. Crenshaw County Board of Education, Order of Aug. 8, 1968, Civil Action No. 2455-N (MD, AL); United States v. Crenshaw County Unit of the United Klans of America, Order and Opinion of Aug. 13, 1968, 290 F.Supp. 181 (MD, AL); Franklin v. Barbour County Board of Education, Order of Aug. 13, Civil Action No. 2458-N (MD, AL); *Birmingham News*, July 22, Aug. 8, 11, 13, 1968; *National Observer*, July 22, 1968.

different,” and the Supreme Court had allowed for freedom of choice to work where there was a “real prospect” of success.¹⁸

On the basic and immediate question, then, the defense had prevailed. But there was more. Johnson stressed that this was only the court’s determination “*at this time.*” Furthermore, the court noted that it had given “no consideration” to the threat of white flight, and that this had no bearing on the constitutional obligations of school officials. Finally, and most crucially of all, the court ruled that further faculty desegregation and the closure of certain black schools had to be implemented over the next two years to facilitate genuinely free choice. The court – in this case, Johnson himself – had “painstakingly” reviewed the CRD’s appendix to its brief and determined what steps each system should take. Using the CRD’s analysis, Johnson determined specific faculty desegregation requirements for all 76 systems. The Fifth Circuit had recently upheld Johnson’s order in *Carr v. Montgomery*, albeit in softened form. According, he used a faculty desegregation ration of 1-6 – less stringent than he had originally ordered in *Carr* – as a measuring stick for adequate compliance. He also listed specific black schools, and in some cases certain grades at schools, which needed to be closed. These were schools which had fewer than the minimum student standard as set out by the state department of education, or the operation of which otherwise had “the inevitable effect of thwarting the success of the freedom of choice plans.” The specific orders were to be considered “the minimum necessary . . . in order to justify the continued use of the freedom of choice method for disestablishing the dual school system.”¹⁹

The defendant state officials did not celebrate freedom of choice’s survival, nor did local officials. The faculty desegregation and school closure requirements stung too badly. Governor Brewer expressed “despair of providing quality education.” He reiterated his intention to introduce an

¹⁸ Lee v. Macon County Board of Education, Order and Opinion of Aug. 28, 1968, 292 F.Supp 363, 363-7; see also at Frank Johnson Papers: Lee v. Macon Case File, Container 163; *Birmingham News*, Aug. 29, 1968.

¹⁹ Lee v. Macon County Board of Education, Order and Opinion of Aug. 28, 1968, 292 F.Supp 363, 367-8; see also at Frank Johnson Papers: Lee v. Macon Case File, Container 163; *Carr v. Montgomery County Board of Education*, 400 F.2d 1 (5th CCA, 1968).

education appropriations bill but complained that the court had made the “task that much more difficult.” The three-judge panel, he argued, was “trying to achieve social objectives” while he and the legislature were simply “trying to educate our young people.” This became the preferred Brewer spin on the law-and-order line. His policies, he claimed, were colorblind; he simply wanted to improve education for all Alabama’s children by raising revenue and increasing funding. Concomitantly, he claimed to oppose further desegregation solely on the grounds that whites would flee public schools and subsequently oppose measures to increased funding. Certainly, Brewer wanted to more adequately fund education. But he was a segregationist, and his earnest desire to improve the quality of education in Alabama could not erase this fact. Like the vast majority of white Alabamians, he assumed that education reform could only work if it came within the bounds of what had already been begrudgingly accepted. They clung to the notion that an *ex post facto* equalization of black school facilities would relieve them of their obligation to eliminate segregation entirely. So, when Brewer spoke of equalized, increased spending on black and white education, he meant it in the sense that he wanted to resurrect *Plessy* and continue offering select blacks access to the white railcars-cum-schools, and everyone understood exactly what he meant. So, after the August *Lee v. Macon* order, he chided federal judges for paying “lip service” to freedom of choice while at the same time utilizing “devious and roundabout means to effect social aims without regard to the educational system of this state.” Alabama’s whites had complied in good faith with distasteful orders from the courts, he claimed, “Now these people want to come along and want to tear down all we have done and all we want to do for public education.”²⁰

Brewer and Stone joined together in a petition to modify the August 28 order. They argued that “to appreciate the magnitude of the burden imposed on these school systems,” one had to understand that the school year had already commenced and that “virtually all teaching positions” had already been filled. Therefore, for every teacher reassigned to one classroom, another had to be moved from that

²⁰ *Birmingham News*, Aug. 29, 1968.

classroom to another. So, the number of teachers to be transferred was significantly higher than the actual number the court and the plaintiffs wanted reassigned. According to the motion, this had “proven to be an impossible task.” The defendants listed over 20 reasons why this was so, from legitimate administrative difficulties to the threat of “mass teacher resignations” to the contravention of the state teacher tenure law. They also argued that the school closures ordered by the court would cause widespread overcrowding, which would itself “place in jeopardy the whole process of public education.” They offered the example of Crenshaw County, where “an overcrowded condition in some schools” had led directly to the organization of a private school and the flight of whites from the system. The motion failed to mention the activities of the Crenshaw Klan or the combative attitude of the school board and its counsel. It did complain of the closure of recently built facilities, which it argued were in some cases nicer than formerly all-white facilities. One particular case Brewer himself liked to publically mention was that of a \$1 million black school facility in Chambers County. Why close a facility that had a brand new swimming pool? Most people, particularly in the Black Belt, understood that city and county officials had built pools at black schools in the aftermath of *Brown* and *Browder* in order to keep blacks from trying to desegregate white community pools.²¹

The Civil Rights Division filed its own motion, this one for “clarification” of the August 28 order. The Justice Department attorneys were concerned that the specific requirements enumerated in the order would be “construed by the defendants and the school systems involved as the sum total of their constitutional and legal obligations for the coming year.” The CRD planned to continue in its role as supervisor and advisor to school boards throughout the fall. It perhaps anticipated that Brewer would take to the stump – as he did a week later at a statewide school board conference – and begin telling

²¹ Petition to Modify, Albert Brewer and Ernest Stone, Defendants, Sept. 25, 1968, Lee v. Macon County Board of Education, Frank Johnson Papers: Lee v. Macon Case File, Container 30, Folder 4; Harvey, *A Question of Justice*, pp. 25-6. On the segregation and desegregation of public swimming pools, see Jeff Willtse, *Contested Waters: A Social History of Swimming Pools in America* (Chapel Hill: University of North Carolina Press, 2009), pp. 121-180.

local officials that they were not “under any obligation to obey any orders . . . from the Justice Department.” The CRD wanted school boards to understand that the structural injunction entered in the March, 1967 *Lee v. Macon* order still applied: they were still required to submit regular reports to Stone, which were then subject to analysis by the court, which would determine if they had made good faith progress towards eliminating the dual system. Most local systems had hoped, of course, that freedom of choice would be spared in the subsequent August, 1968 order. Within days of the court’s ruling to that effect, it was becoming clear to some that their situation might have become much more difficult despite their hope’s fulfillment.²²

Thomas Delays Again in *Davis v. Mobile*

Whites in Mobile, meanwhile, had spent the entire summer in a panic about the pending implementation of the Fifth Circuit-mandated, city-wide zoning plan. By June the school board had formulated its plan in response to the appellate court’s ruling and was prepared to seek District Judge Daniel Thomas’ approval of it at a hearing on July 17. Local attorney Vernon Crawford and the LDF, as well as the CRD, had prepared their own plans prior to the hearing. Mobile Assistant Superintendent James McPherson complained ahead of the hearing that the plaintiffs’ plans would require “massive transportation” among the zones, which were themselves the product of “obvious gerrymandering . . . to achieve some sort of racial balance.” The LDF and CRD plans were, McPherson said, “the most ridiculous I have ever seen.” The word *busing* soon entered the Mobilian lexicon. It was becoming a way for whites in cities across the country to condemn any sort of system-wide compulsory assignment which required theretofore unnecessary transportation. It quickly picked up the connotation of the racial apocalypse, and the nascent white protest organization Stand Together and Never Divide (STAND) prepared for as much. STAND’s leaders planned a mass protest to coincide with the hearing, calling on

²² United States’ Motion for Clarification, Sept. 10, 1968, *Lee v. Macon County Board of Education*, Frank Johnson Papers: *Lee v. Macon* Case File, Container 30, Folder 4.

whites to inundate downtown Mobile and surround the federal courthouse. Of course, STAND leader William Westbrook insisted that this be a peaceful and lawful protest – in fact, he refused to even characterize it as a protest. The purpose, though, was clearly to influence Judge Thomas, in the way that STAND organizers felt that Judge Johnson had been influenced in staying the recent *Carr* order. At an outdoor rally before 6,000 whites citizens the day before the hearing, Westbrook said, “Law abiding citizens of Mobile are going to court by the thousands,” adding paradoxically, “and we are not going to abide by any boundary lines that take away freedom of choice plans.” He assured the crowd, “We will not allow our children to attend a predominantly Negro school, whether the Justice Department, the Department of Health, Education, and Welfare, or the NAACP believe or not.” As he had done before, he mocked the late Martin Luther King, Jr. to a chorus of cheers: “I have not seen a mountaintop,” he bellowed, “but I have seen the light.”²³

The courtroom was integrated and overflowing on July 17 when Thomas convened the hearing. U.S. Marshals and FBI agents lined the building in anticipation of a throng, and Mobile police kept the sidewalks clear. Riot police remained on standby blocks away. The local NAACP had held its own mass meeting the night before and had urged followers to arrive at the courthouse early to fill up the 200 seats in the courtroom itself. The turnout for STAND was around 600: a large enough contingent to create a scene outside, but not anywhere close to the bold call for 50,000 that its leaders had made. Acting on the advice of STAND attorney Pierre Pelham, STAND founder Lamar Payne had advised at the last minute against the mob gathering. Pelham wanted to convince Judge Thomas of the wrongheadedness of the proposed desegregation plans, not anger him by creating a circus outside. Attempting to influence a court through demonstrations was a violation of federal law, in any case, which carried the possibility of a \$3,000 fine and a year in jail.²⁴

²³ *Birmingham News*, June 25, 26, July 16, 1968.

²⁴ *Birmingham News*, July 24, 25, 1968; *Los Angeles Times*, July 18, 1968; Pride, *The Political Use of Racial Narratives*, pp. 64-6.

As the hundreds of STAND demonstrators who showed up anyway stared down the federal agents outside, testimony inside the hearing was predictable. The school board's attorneys called Mobile Superintendent Crawford Burns to the stand, along with Assistant Superintendent McPherson and an administrative assistant. The witnesses argued that compulsory assignment would ruin the school system and that myriad administrative problems were being compounded each day that the school board had to wait to begin preparing for the impending start of fall semester. The school officials also argued that the school board's attendance zones in its plan had not been drawn with racial considerations. Legal Defense Fund attorney Charles Jones and Civil Rights Division attorney Frank Dunbaugh challenged the three witnesses on the latter assertion. The school board's plan had, indeed, been carefully constructed to limit interracial assignments, just as the LDF and CRD plans had been constructed to maximize them. Mobile officials would not admit this, of course. The school board's attorneys also called a number of parents, all of whom decried "outsiders telling us where our children must go to school." The parents all expressed their clear preference for a freedom of choice plan, as opposed to an attendance zone plan.²⁵

Both the CRD and the LDF called expert witnesses – educationists who testified to the construction of the competing plans and the efficacy of attendance zone plans in general. The school board attorneys and STAND's Pelham successfully elicited that neither expert had been particularly well informed about the Mobile school system before formulating these plans. Neither knew much about the system's budget or existing school plants, and neither had visited more than a few school facilities. Nor had they talked to any of the local school officials. In presenting STAND's case, Pelham called the city's police chief and tried to establish that black schools like Williamson High and Blount High were hubs of criminal activity and that black neighborhoods in general were festering with violent animosity. How could the school board send whites into these schools and neighborhoods? Judge Thomas swiftly

²⁵ *Birmingham News*, July 24, 25, 1968; *Los Angeles Times*, July 18, 1968; Pride, *The Political Use of Racial Narratives*, pp. 64-6.

sustained plaintiffs' objections to this testimony, prompting an angry outburst from a frustrated Pelham. He was limited to grilling the LDF and CRD's experts. But even this backfired. Pelham at one point asked LDF witness Dr. Myron Lieberman, "Do you believe white children should be forced to go to an unsafe school?" Lieberman provided a poignant lesson in genuinely colorblind school policy when he replied, "If the school is unsafe, no children, including Negroes, should be allowed to attend it."²⁶

On July 29, Thomas ordered the implementation of his own desegregation plan. It was a compromise, in which the judge tried to balance the demands of the appellate court, the plaintiffs, the school board, and the mass of angry white parents. Predictably, it pleased no one. Thomas had always believed that as much delay as possible was warranted in desegregation cases, and in drafting his plan, he was certainly motivated by providing for it. He called for the operation of attendance zones for the metropolitan area's elementary and junior high schools. Freedom of choice would be retained for the rural parts of the county as well as the metro area's high schools. Thomas had drawn the metro area zones with an eye towards the Fifth Circuit court's call for non-racial, natural, or "built" environmental boundaries, though he did this at the expense of the other part of the appellate court's mandate – to bring about the swift eradication of racially identifiable schools. The court estimated that there would be around 3,000 black students in formerly all-white elementary and junior high schools as a result of the plan. This was more than quadruple the roughly 700 blacks in white schools the previous fall, but it was still only 10 percent of the 30,000 black students enrolled in the system. There would continue to be a number of all-white and all-black schools. Furthermore, the retention of freedom of choice in the metro area's high schools very likely meant that the number of blacks in white high schools would remain roughly the same. Thomas determined, "No one at this time, however well versed or experienced, could draw sound attendance area zoning plans for the high schools in the system. On the contrary," he argued, "the court finds that imposition of attendance zones for high schools at this time

²⁶ *Birmingham News*, July 24, 25, 1968; Pride, *The Political Use of Racial Narratives*, pp. 66-8.

would result in locked-in segregation to a substantially greater degree than will be the case under the freedom of choice system.” Thomas noted the provision in the recent Fifth Circuit opinion in the case, that “compelling, non-racial reasons” might be taken into account in considering zoning. “This court is compelled,” Thomas wrote, “to find under the evidence that such reasons exist for deferring the attempt to devise rigid attendance zones for Mobile’s high schools for the time being.” Tying the two parts of the metropolitan plan together, Thomas declared that the high school plan would “operate on an interim annual basis,” with its continuance contingent “upon the speed of desegregation in the secondary schools.”²⁷

Displeasure with Thomas’ plan manifest itself quickly and continued into the fall of 1968. Crawford and the LDF, the Justice Department, the school board, and STAND all appealed the decision. The Mobile *Press* actually praised Thomas’ “solid, practical approach” and willingness to seek out a compromise. At the same time, the *Press* condemned the NAACP and the Justice Department for “applying dictatorial means to achieve school desegregation more rapidly” and accused the Fifth Circuit appellate court and the Supreme Court of “judicial despotism.” The Birmingham *News* argued that the federal government was using Mobile as a “guinea pig” and attempting to “abolish all semblance of freedom of choice” through “judicial fiat.” Despite the widespread displeasure, Thomas’ delay had been effective in at least aspect: it was far too late in the year to attempt to appeal and alter the order before school began.²⁸

Disturbances marred the opening of schools in September. White parents assaulted the vehicles of two black teachers as they arrived at Tanner-Williams Elementary School in the rural part of the county. One woman who threw a soda bottle at one of the cars was arrested, along with another who had to be subdued by sheriff’s deputies with mace. Four white parents in all were arrested, as the black

²⁷ *Birmingham News*, July 30, 1968; Davis v. Board of School Commissioners of Mobile County, Order and Opinion of July 29, 1968, C.A. No. 3003-63.

²⁸ *Birmingham News*, July 28; Pride, *Political Use of Racial Narratives*, pp. 73-4.

teachers had to be escorted inside by deputies. Interracial fights were commonplace in the schools themselves. One incident at Vigor High School in the working class Mobile suburb of Prichard resulted in suspensions for two black students and one white student. Upon hearing that a white student was suspended, 125 students and adults gathered in front of the school to protest the suspension and the presence of around 100 black students and 3 black teachers. When police invoked an anti-demonstration ordinance, the group moved across the street and continued to picket and to lament the suspension of the white student, who happened to be a starter on the school's football team. The students also complained that teachers supposedly showed favoritism towards the school's black students, and that certain of the 100 or so black students were trying to intimidate the school's 1,550 white students.²⁹

STAND leaders vowed to continue their fight for freedom of choice. Along with the private school movement, the organization was the most visible manifestation in the state of the law-and-order doctrine of freedom of association for whites. The battle for states' rights in the war on desegregation had been lost. It was being redefined as a battle for individual rights within the liberal tradition. White parents could disavow violence and hatred, avoid any mention of black inferiority or white supremacy, and still claim they had a right to choose their associates. Lamar Payne revealed as much in an interview with the associated press. "The federal government," he said "told the American people in 1964 that freedom of choice desegregation plans are to be implemented in the public school system whether we liked it or not. We accepted it. But now," he added, "the government says that's not enough [and] wants to bus or to create zones so that white children will be transferred across town to Negro schools." Payne elaborated on the organization's philosophy: "I'm not anti-anything except Communists . . . I don't hate Negroes, and STAND will not tolerate haters in the organization." But above all, STAND's 13,000 members and 20,000 petition-signing sympathizers would not tolerate compulsory assignment.

²⁹ *Birmingham News*, Sept. 7, 17, 18, 1968; Pride, *Political Use of Racial Narratives*, pp. 73-4.

They were prepared to “build [their] own private school system throughout the nation” if the courts did not relent. Building such a system, Payne admitted, would be difficult, but it “could through necessity become a spontaneous reality.” He added, “I realize Negroes and other minorities have their rights, but white Americans have their rights under the Constitution, too.”³⁰

“Freedom from Involvement” in Metropolitan Birmingham

Green v. County School Board had brought motions that summer for further relief in each of the Birmingham metropolitan area desegregation cases, just as it had in *Davis v. Mobile*, in *Carr v. Montgomery*, and in *Lee v. Macon*. Longtime Birmingham civil rights attorney Oscar Adams was handling the *Armstrong v. Birmingham*, *Brown v. Bessemer*, and *Stout v. Jefferson County* cases. By this time, Adams had started the first interracial law practice in Alabama since Reconstruction with a young Jewish lawyer from New York named Harvey Burg. Burg had begun practicing in Alabama in 1964 while still in law school and had moved to Birmingham to join Adams in 1966. It was Burg who filed the post-*Green* motions in the Birmingham area cases in July. The CRD followed with motions of its own in these and the Fairfield case, in which Birmingham attorney Harvey Newton had also filed a motion. Each system met the criteria set forth in *Green*. In Birmingham itself, only 8 percent of black students were attending formerly all-white schools; no whites had elected to attend formerly all-black schools; and teacher desegregation was negligible. Adams and Burg and the CRD sought some plan which moved beyond freedom of choice and promised to increase faculty desegregation. Judge Seybourn Lynne, however, was more like Daniel Thomas than he was Frank Johnson. If delay were permissible, he would grant it. With much the same rationale employed by Thomas, Lynne denied the motion to accelerate faculty desegregation and postponed ruling on the motion to move beyond freedom of choice pupil

³⁰ *Birmingham News*, July 14, 1968; on freedom association and white flight, see Kruse, “The Fight for Freedom of Association,” in Webb, *Massive Resistance*, pp. 99-116, and Kruse, *White Flight*, pp. 1-15, 161-79, 234-58.

assignment until the following year. He acknowledged that the systems “[did] not pretend” to be in “full compliance” with their desegregation plans, but he argued that it was “obvious that substantial progress [was] being made.” Lynne approved the Bessemer and Jefferson County faculty desegregation plans and ordered Birmingham to augment its own by adding 33 teachers to the 165 already in desegregated assignments.³¹

Despite Lynne’s grant of a reprieve to the metropolitan area’s school systems, whites in the Birmingham suburbs began to seek innovative solutions to their desegregation problem. Whites had been fleeing residential encroachment and the mere threat of desegregated schools for decades. The affluent suburban cities south of Red Mountain on Birmingham’s southern border had particularly profited from the last 20 years of white flight. The menace of widespread integration had contributed heavily to the refusal of Mountain Brook and Homewood to accept a 1964 merger plan with the city of Birmingham. These cities’ refusals had doomed any merger which would have involved other small suburban cities, like Tarrant to the north and Irondale to the east. Whites in the meantime had fled black encroachment in the city’s industrial western suburbs – Midfield, Fairfield, and Bessemer – and had established the small, working-class city of Hueytown in 1960. Black neighborhoods had been drawn out of Hueytown’s limits at its inception, and in the summer of 1968, the city’s leaders moved to keep blacks out of its schools.³²

Although nearly 4,000 students attended Jefferson County schools in Hueytown, only around 2,000 of those resided within the city, all of them white. A group of parents formed a “Citizens Committee” that summer and prepared a 15 page report on the virtues of separating from the Jefferson County school system and establishing the city’s own school system for those 2,000 white students, just as wealthy Mountain Brook had done. The committee distributed letters, pamphlets, and candidate

³¹ *Birmingham News*, July 16, 19, Aug. 3, 1968, Jan. 22, 1969; “On Being a Civil Rights Lawyer in the 1960s,” Interview with Harvey Burg, <http://shanaburg.com>, accessed March 12, 2013.

³² *Birmingham News*, Aug. 11, 1968; Thornton, *Dividing Lines*, pp. 365-8.

cards supporting selected candidates in upcoming city elections. The literature assured residents that the new school system would save money and be able to spend more per pupil than the county system. Opponents disputed this and pointed out that the city would have to purchase its schools, equipment, and transportation from the county. Hueytown residents were not nearly so well off as those in Mountain Brook. Still many whites who had only recently fled to the city were attracted by the virtues of an independent system extolled in the committee's report: "control of . . . local schools vested in local citizens, not officials elected by all voters in Jefferson County . . . freedom from involvement in federal court cases concerning the Jefferson County Board of Education, and freedom from rulings resulting from such cases." It was too late to break away before school opened that fall, but the impetus remained. It began to spread in other municipalities, in fact, and more and more parents started to consider the independent school system in the lily white suburban city the preferred way to avoid integration.³³

Beyond Freedom of Choice in *Lee v. Macon*

Freedom of choice's reprieve in *Lee v. Macon* proved to be fleeting. On October 14, the three-judge court granted the United States' motion for clarification and denied Stone and Brewer's petition for modification. It was obvious from both motions that the court had "failed to make its [August, 1968] opinion and order sufficiently clear." The state officials' motion, in particular, evidenced "a misconception" of the order. Furthermore, a number of school systems which had complained of their inability to meet the court's requirements had themselves misconstrued the order. Nothing in the order was intended to relieve the state or the many local systems of their constitutional obligation to take affirmative and *effective* action to eradicate the dual systems based on race. This obligation, and the failure of school boards to meet it, was the reasoning behind the faculty transfer and school closure

³³ *Birmingham News*, Aug. 11, 1968.

provisions of the order. A number of school boards had argued since the order that teacher transfers were impossible and that closing expensive and new black facilities was a waste and caused overcrowding. The court clarified: the black school plants were not to be forever closed; they simply could no longer be operated as black schools. The court acknowledged that teachers could not be assigned where they did not exist and that students could not be assigned over the capacity of certain schools. But the effort had to be there, and in many cases, it was not.³⁴

In some cases, the court determined that school boards had legitimate concerns. A total of 57 systems had “completely or substantially” complied with the August order. The court concluded that in 19 others systems, school officials’ concerns were illegitimate and their good faith lacking.³⁵ It added those systems and their individual board members as parties defendant and ordered them to show cause why they should not be ordered to use some method other than freedom of choice to further desegregate. Johnson, Rives, and Grooms continued “to be dedicated to ‘freedom of choice’ as the most feasible method to be used in [the] state” for systems to convert to unitary status. But the court could not “make freedom of choice work without good faith and effective efforts on the part of the school authorities.” Johnson and Rives followed this order up with another, ordering the 19 school boards to show cause why the court should not lift the injunction against HEW funds deferral in relation to their school systems.³⁶

Brewer and Stone were beside themselves. Brewer also misguidedly felt that the court was testing him, trying to see if he was really as defiant as Wallace or if his law-and-orderly demeanor was a sign of weakness. The governor and state superintendent filed a motion, arguing that the teacher transfer and school closure issues had not been properly raised by the pleadings, and asked that they be

³⁴ Lee v. Macon County Board of Education, Order of Oct. 14, 1968, Frank Johnson Papers: Lee v. Macon Case File, Container 30, Folder 4; *New York Times*, Oct. 15, 1968.

³⁵ Baldwin, Calhoun, Chilton, Clarke, Clay, Geneva, Henry, Limestone, Marengo, Monroe, Morgan, Pickens, Shelby, Sumter, and Walker Counties, and Decatur, Demopolis, Florence, and Piedmont Cities.

³⁶ Lee v. Macon County Board of Education, Orders of Oct. 14 and 23, 1968, Frank Johnson Papers: Lee v. Macon Case File, Container 30, Folder 4; *New York Times*, Oct. 15, 1968; *Birmingham News*, Oct. 25, 1968.

heard on the issue. They maintained that due process should have afforded the two an opportunity to present oral evidence on these issues before the court summarily dismissed their petition for modification. Johnson, in turn, was dumbfounded. In an order of denial he wrote, "This court is at a loss to understand the basis for these contestations." Brewer and Stone were "apparently . . . either unwilling or unable to grasp the nature of [the] lawsuit." Faculty desegregation had been before the court since the March, 1967 order, at least, and school closure had been a part of the alternative desegregation plan proposed by the United States prior to that. Johnson also noted that the state's attorneys had very recently represented the Crenshaw County and Barbour County school boards in proceedings in which similar orders to the August *Lee* order had been entered. Stone himself had spoken to both issues in his deposition in *Lee*. Maury Smith had also, in his plea for maintaining freedom of choice at the August hearing, suggested that the court "prod" the state officials when necessary. The court understood that it was now doing precisely that, since the state officials had not submitted any desegregation plans as an alternative to the CRD's or the school systems'. Johnson argued that the court was doing the defendants a favor in formulating its own plans as "prods" as opposed to adopting the CRD's plan wholesale. Finally, Johnson called the assertion that Brewer and Stone were entitled to a hearing on the motion for modification "simply preposterous," and when based on *Brown*, "border[ing] on the ridiculous."³⁷

The October orders ushered in the final phase of the *Lee v. Macon* litigation as far as individual school systems before the three-judge court were concerned. Recalcitrant systems would be added as parties defendant, ordered to show cause, and threatened with HEW action. The court's dealing with the initial 19 further established a pattern. School board members, superintendents, and their counsel came to the courthouse to negotiate with Judge Johnson in chambers. The judge handled such conferences on a weekly basis, and they began to take up a considerable portion of his time. Johnson's

³⁷ *Lee v. Macon County Board of Education*, Order of Oct. 18, 1968, Frank Johnson Papers: *Lee v. Macon* Case File, Container 30, Folder 4; *Birmingham News*, Oct. 15, 19, 20, 30, 1968.

clerks began calling these conference days “school board Saturdays.” The judge was sympathetic to legitimate administrative difficulties and generally awarded good faith efforts with allowances until at least the following semester. For example, Decatur city and Morgan County – the first of the 19 to be removed as parties defendant – were afforded until January, 1969 to make some teacher transfers and until the fall of 1969 to close certain schools. These sorts of delays were about as far as Johnson was prepared to go, though. And all of this was contingent upon continuing review of the progress of freedom of choice. Stone, the CRD, and HEW all maintained obligations to monitor the progress of systems towards unitary status. By November, all of these initial 19 except Marengo County – which attorney Solomon Seay called the most recalcitrant school system in Alabama – had negotiated acceptable plans and had been removed from the order.³⁸

Post-*Green* orders in Alabama had thus forced freedom of choice closer to the edge, but delaying actions by local school boards and the courts themselves kept it from teetering over. Local whites continued to try and save it from its fate, encouraged in their resistance by the governor and the state government in general. At a specially-called press conference, a visibly angry Albert Brewer called the *Lee* court judges “devious,” and “callous” and called the denial of his motion a “shocking disregard for due process of law” and a “subterfuge.” But what could he do? At a late October rally for Wallace’s presidential campaign in Anniston, the governor again lamented the order and the “scapegoating” of the 19 systems. He assured school boards that they would not lose state funds, but he stopped short of saying he would call a special session of the legislature to appropriate emergency funds to replace lost federal dollars. The Brewer way was to denounce court orders and fight them in court, but to avoid the

³⁸ Docket Report, *Lee v. Macon County Board of Education*, *Lee v. Trial Record*, Federal District Courthouse, Montgomery, Alabama; *Birmingham News*, Nov. 8 22, 1968; Bass, *Taming the Storm*, pp. 230-1.

kind of reckless defiance that had characterized his political mentor, Wallace. Wallace's policies had failed, after all, to prevent desegregation.³⁹

Meanwhile that fall, Southern congressional leaders responded to the Whitten Amendment's failure to pass the Senate by claiming that they "had the votes," if only everyone had been there. The fact that the measure had garnered significant support outside the South was dubbed "a sobering commentary on the national commitment to desegregation," by the Southern Regional Council. Whitten prepared to reintroduce it the following year, by which time southern Senators would be rallying around two amendments to the extension of the Elementary and Secondary Education Act (ESEA) proposed by Mississippi Senator John Stennis. The first "Stennis Amendment," not unlike Whitten's, declared that freedom of choice was "an inviolate right" and sought to make it an established national policy. The second sought to erase the *de jure - de facto* distinction which had protected northern districts for so long. Stennis and others felt that uniform national enforcement of school desegregation policy would be so distasteful to northern, Midwestern, and western whites that it would force them to back off the South.⁴⁰

Alabama Senator Jim Allen would support both measures, arguing that freedom of choice was "the only solution for the chaos and confusion in the operation of schools in Alabama and across the nation." For this reason, Allen said, he and other southern Senators would "make an additional and concerted effort" to add the Stennis language to the act in order to end the "HEW-Supreme Court policy of requiring desegregation in the South while not requiring it in Northern schools." The two efforts were, of course, intertwined. Forcing a northern retreat on desegregation would hopefully mean limiting it to freedom of choice in the South and elsewhere.⁴¹

³⁹ Lee v. Macon County Board of Education, Order of Oct. 18, 1968, Frank Johnson Papers: Lee v. Macon Case File, Container 30, Folder 4; *Birmingham News*, Oct. 15, 19, 20, 30, 1968.

⁴⁰ *Lawlessness and Disorder*, Southern Regional Council, pp. 21-4; Crespino, *In Search of Another Country*, pp. 186-9.

⁴¹ *Birmingham News*, Feb. 1, 1970; Crespino, *In Search of Another Country*, pp. 186-9.

Richard Nixon defeated Hubert Humphrey and entered the White House in 1969 with a desire to play to whites' newfound preference for freedom of choice. But Nixon had to contend with not only the established policies of previous administrations, but also the trajectory of 15 years of federal school desegregation jurisprudence. Despite the efforts of ubiquitous white resistance and its political courtiers, the circuit courts and the Supreme Court would continue in 1969 to push freedom of choice over the ledge, along with "deliberate speed." White tolerance for desegregation in general looked to fall right along with them.

CHAPTER 15: THE “FINAL RESTING PLACE” OF ‘ALL DELIBERATE SPEED’ AND THE SPREAD OF
COMPULSORY ASSIGNMENT, 1969

When the Nixon Administration took office in January, 1969 it inherited an executive which had been committed to pressing school desegregation litigation over two administrations and for half a decade. As one Civil Rights Division attorney remembered, the administration was faced with a choice between what would have been its own policy preference and that which was already in place. Another recalled having heard that Nixon was “left holding the remedial *Brown* bag.” Nixon had been swept into office thanks in part to the votes of southern whites who immediately recognized his coded appeals to maintaining the racial status quo. Nixon had adopted an entirely non-racial language supporting free choice and law and order, while at the same time condemning busing, urban rioting, crime, and judicial leniency towards criminals. It was a “colorblind” language which whites in the South knew quite well, as they were the ones who had created and honed it over the preceding 20 years or so. As school desegregation threatened other parts of the country beyond the South, and as riots rocked cities nationwide, it was a language which resonated with many whites. At the same time, many blacks also recognized the language for what it was. An educationist writing for the NAACP’s national publication, *The Crisis*, understood that “law and order” meant “that Afro-Americans should get back in their place.” She argued that “a few outstanding American leaders” recognized that “there must be justice to go along with law and order,” as well as “respect for the Supreme law of this land.” These concepts, she wrote, “are inseparable in a democratic society.”¹

¹ Landsberg, *Enforcing Civil Rights*, pp. 141-2 (first CRD attorney reference); David Norman, “The Strange Career of the Civil Rights Division’s Commitment to Brown,” *Yale Law Journal* 93 (May, 1984): pp. 983-91, p. 986 (second CRD attorney reference – Norman replaced Jerris Leonard as Assistant Attorney General in charge of the CRD under Nixon); Crespino, *In Search of Another Country*, pp. 234-5; Kruse, *White Flight*, pp.253-8; Carter, *Politics of Rage*, pp. 323-49; Dean Kotlowski, *Nixon’s Civil Rights: Politics, Principle, and Policy* (Cambridge: Harvard University Press, 2009), pp. 15-16, 30-3; see also Leon Panetta, *Bring Us Together: The Nixon Team and the Civil*

Per its commitment to its “silent majority” constituency, the Nixon Administration would have liked to have adopted a policy which stopped desegregation in its tracks. But in winning over disillusioned southern Democrats – at least those not fully committed to third party candidate Wallace – Nixon had not forsaken his Republican base. Many Republicans outside the South still felt that the Civil Rights Act, the HEW Guidelines, and the court decisions which upheld and reinforced them were warranted enforcement mechanisms aimed at an unconstitutional, southern, white supremacist order. So, initially at least, the Nixon Administration improvised and committed itself to the Johnson administration’s policy on school desegregation: *de jure* segregation in schools needed eradicating, while *de facto* segregation was still off limits. Pursuant to that commitment, HEW continued in its Title VI enforcement program, while the CRD lent its support to an appeal of the Fifth Circuit court’s partial reversal of Judge Johnson’s order in *Carr v. Montgomery*. The course of certain other appeals, including the *Davis v. Mobile* case, would soon force the administration to reconsider its policy, though.²

Indeed, by the end of 1969, school desegregation cases in Alabama and elsewhere were not only bringing an end to the freedom of choice method of desegregation but were finally forcing school districts into immediate and significant action towards eradicating their dual systems. The 99 *Lee v. Macon* systems were taken to task one-by-one and were placed under “terminal-type” desegregation orders by the three-judge court. The state’s junior colleges and trade schools were also placed under closer scrutiny. District Judge Daniel Thomas continued to try and delay the implementation of district-wide desegregation in Mobile. Judge Seybourn Lynne in Birmingham did the same with the Jefferson County cases. Both *Davis v. Mobile* and *Stout v. Jefferson* ended up before the Fifth Circuit Court of Appeals yet again that fall. Despite the approval of compromise plans, whites in both counties

Rights Retreat (New York: Lippincott, 1971); Faustine Jones, “On Respect for the Law: Law and Order,” *The Crisis* 78, No. 3 (April-May, 1971), pp. 91-3.

² Landsberg, *Enforcing Civil Rights*, pp. 141-2; Crespino, *In Search of Another Country*, pp. 234-5; Kruse, *White Flight*, pp.253-8; Carter, *Politics of Rage*, pp. 323-49; Dean Kotlowski, *Nixon’s Civil Rights*, pp. 15-16, 30-3; see also Leon Panetta, *Bring Us Together*, and John Ehrlichman, *Witness to Power: The Nixon Years* (New York: Simon and Schuster, 1982).

vigorously protested more stringent desegregation requirements as the two cases awaited a consolidated appellate court ruling. Meanwhile, the caution of the Nixon Administration forced the Justice Department's Civil Rights Division to oppose the NAACP-LDF in appellate courts for the first time ever in a school desegregation case. Ultimately, the Supreme Court decided that it must follow up its *Green v. County School Board* decision with three more decisions which sent shockwaves through the South, particularly through the Fifth Circuit. None of these rulings was more important than the Mississippi case, *Alexander v. Holmes*. While the Nixon Administration and Southern congressmen worried about northern-style segregated education, the Court forced the South into the final phase of eradication of its own dual systems. Of course, white parents and state and local officials did not let deliberate speed – which had characterized the first 15 years of school desegregation – die without a fight.

Johnson Vindicated in *Carr v. Montgomery*

Frank Johnson's 1968 order in *Carr* had been appealed by the school board, which objected to the provisions for granting free choice to black students wishing to attend the new Jefferson Davis High School, and which "strenuously" objected to the fixed mathematical ratios Johnson provided for faculty desegregation. Later that year, a Fifth Circuit panel including Judges Gewin and Thornberry, along with District Judge J. Robert Elliott, upheld most of the order but reversed that portion requiring the fixed ratios. The court relied on other Fifth Circuit court rulings – in *Davis, Brown v. Bessemer*, and *Stell v. Savannah* – in which the court had "declined 'to enhance *Jefferson's* demands'" and had opted not to "tinker with the model decree." In the *Bessemer* case, the appellate court had in fact explicitly rejected mathematical ratios. Accordingly, the court held in the *Carr* appeal that "the standards fixed by courts with respect to faculty desegregation cannot be totally inflexible." It modified Johnson's order to include the words "substantially" and "approximately" in regards to the ratio prescribed for the

upcoming year and determined that 3-2 need not be held up as a final benchmark simply because it mirrored the ratio of blacks to whites in the system.³

Thornberry dissented, arguing that while novel, the decision to affix numerical ratios was “the considered judgment of a district judge who was familiar with the Montgomery schools, had heard testimony, and was making an honest effort to advance the conversion to a unitary racially nondiscriminatory system.” He further characterized Johnson’s decision as “experimentation within the spirit of *Jefferson County*.” The full appellate court denied a petition for an *en banc* rehearing by a 6-6 vote. Judge John Brown – then Chief Judge – wrote a dissent of this denial, in which he argued that Judges Gewin and Elliott had made an “unfortunate” mistake. Brown wrote, “In the name of uniformity [the decision] begets disparity, not just Circuit-wide, but within the single state of Alabama.” Brown argued that the judges had misread the *Bessemer* decision, in which the court had had in fact left the question of fixed ratios open and in which it had set an explicit deadline for full desegregation for the fall of 1970. Brown wrote, “This is an area where it is not the spirit, but the bodies which count. . . . Within scarcely 90 miles that separates the Birmingham area from Montgomery,” he added, “there are two separate standards and, perhaps, two separate hopes.”⁴

The LDF appealed the panel’s decision, and the Supreme Court granted *certiorari*. The CRD supported the appeal in its first major school desegregation action of the Nixon era. On June 2, 1969, the Court issued what would turn out to be only the first of three major school decisions that year. It reversed the Fifth Circuit panel’s decision, going out of its way in the process to commend Judge Johnson for his initial order. Justice Hugo Black – Johnson’s fellow Alabamian and fellow white pariah – delivered the opinion. Black contextualized the decision by noting that the Montgomery school board had for over a decade “operated . . . as though [the] *Brown* cases had never been decided.” The

³ Carr v. Montgomery County Board of Education, 400 F.2d. 1, *en banc* rehearing denied, 402 F.2d 782 (1968); see discussion of the Carr case as exemplary of structural injunctive relief at Fiss, *Injunctions*, pp. 415-81.

⁴ Carr v. Montgomery County Board of Education, Oct. 21, 1968, 402 F.2d 782; United States v. Board of Education of Bessemer, 396 F.2d 44 (5th CCA, 1968).

subsequent four year process since the initial 1964 trial court order had been characterized, Black wrote, by “an exchange of ideas between judge and school board officials” in which Johnson had “found it possible to compliment the board on its cooperation” while at the same time “constantly urging that no unnecessary delay could be allowed.” The Court felt that the record revealed Johnson’s “patience and wisdom,” in light of which it was clear that the district judge had not intended the ratios to be “absolutely rigid and inflexible.” Johnson had shown a marked willingness to modify orders to provide for more time or leniency, and he understood that “the way must always be left open for experimentation.” His *Carr* order had been entered “in the spirit” of *Green*, and the appellate court’s partial reversal would only serve to remove “some of its capacity to expedite . . . the day when a completely unified, unitary, nondiscriminatory school system becomes a reality, instead of a hope.” The Court affirmed Johnson’s entire order as he had written. Jack Greenberg at the LDF noted the significance beyond Alabama, announcing that HEW would have “to incorporate something similar” in its subsequent guidelines and plans.⁵

System-by-System: *Lee v. Macon*

While the *Carr* case was on appeal to the Supreme Court that spring, administering the *Lee v. Macon* case occupied over half of Judge Johnson and the District Court’s time. The process of negotiation involving the 19 systems which had been added as parties defendant in the fall had to be repeated with the other 80 systems involved in the case. Johnson’s willingness to involve the CRD, Fred Gray, and the local school boards in what amounted to a continuous process of arbitration demonstrated how right Justice Black had been. Nothing was rigid, so long as unnecessary delay did not interfere with good faith. School boards and superintendents came in with their counsel and sat down

⁵ *Carr v. Montgomery County Board of Education, sub nom United States v. Montgomery County Board of Education*, 395 U.S. 225 (1969), 225-35; see also at *Race Relations Law Survey* 1, No. 3 (Sept., 1969), p. 104; *New York Times*, June 3, 1969.

in chambers. If necessary, they petitioned the court formally for a hearing and for modification of the August, 1968 order as it applied to their system. In many cases, Johnson entered orders granting such modifications.⁶

The case of Decatur City Schools is illustrative of the process, and it reveals the court's expanding use of percentage benchmarks. In February, the Decatur school board's attorney requested a conference before Judge Johnson. Johnson invited Fred Gray, attorneys from the CRD, and Judge Rives, who all sat in conference with the members of the Decatur school board and the superintendent. The August order had directed Decatur to close grades 9-12 at the all-black Lakeside High by September. The local officials argued that this would cause formerly all-white Decatur and Austin High Schools to become hopelessly overcrowded and requested that they only be required to close grades 11 and 12. Gray and the CRD attorney objected because this would not bring the percentage of blacks in formerly all-white schools to at least 30 percent. The school board later suggested that it be allowed to close only grades 10-12, to which Johnson and Rives agreed.⁷

Some systems felt they would have a better chance of favorable negotiations and adjudication with one of the state's other federal trial court judges, namely Thomas in the Southern District or Lynne in the Northern District, and several tried to get their particular cases severed and transferred to their respective districts. Calhoun, Piedmont, and Shelby each tried to get their case – or supplementary proceedings involving their systems, rather – transferred to the Northern District. In their combined brief in support of these motions, Calhoun and Piedmont argued that having a case in the Middle District was a hardship, as it required the school board to travel to Montgomery to file or to appear before the court. Fred Gray objected, arguing that the motions were really “another device to impead [sic] and

⁶ Lee v. Macon County Board of Education, Docket Report, Lee v. Macon Trial Record, Federal District Courthouse, Montgomery, Alabama.

⁷ Lee v. Macon County Board of Education, Docket Report, Lee v. Macon Trial Record, Federal District Courthouse, Montgomery, Alabama. On Decatur, specifically, see Lee v. Macon County Board of Education, Order of March 11, 1969; Lee v. Macon, Petition of City Board of Education of Decatur, Feb. 26, 1968; Memorandum of Conference, February 28, 1969; all in Frank Johnson Papers: Lee v. Macon Case File, Container 25, Folder 2.

delay the implementation of the rights of the plaintiffs” Gray argued that fragmentation would “create confusion, would cause a multiplicity of additional proceedings and would be inconvenient to most of the parties.” The key parties were the state officials anyway, who were located in Montgomery. The CRD also objected, pointing out that the school systems in question were not actually at that time parties to the suit. It also noted that severance would cause undue delay, as judges assigned to the many cases would have to familiarize themselves with each case. The controlling federal procedural rule turned on the “interest of justice,” which Gray and the CRD argued would be frustrated if the statewide suit were splintered. The court agreed and denied the motions. The three-judge court would continue to supervise statewide desegregation for the foreseeable future.⁸

Meanwhile, Fred Gray and Solomon Seay filed a motion for further relief on behalf of the Alabama State Teachers Association (ASTA), seeking protection for black teachers and administrators. Per the March, 1967 and August, 1968 decrees, black teachers and administrators were supposed to be absorbed into other schools in a system in the event of school closures. They were not to be discriminated against under any circumstance. Yet in reality, school boards were dismissing, demoting, and arbitrarily reassigning blacks. Black principals were routinely assigned to white schools as assistant principals, often with a reduced salary and sometimes with additional teaching duties. Black assistant principals were reassigned as teachers. Black teachers, particularly vocational and agricultural teachers, were reassigned to positions for which they had not been trained, or they were simply dismissed. In cases where dismissals were necessary, blacks were almost always the ones to be let go while whites were retained. Blacks were often passed over for promotion, retention, or rehiring without a genuine evaluation of their qualifications vis-à-vis white candidates. Gray and Seay sought an order which would force state Superintendent Stone to compile and submit to the court a list of all black teachers and

⁸ Lee v. Macon County Board of Education: Defendants’ Brief on the Law in Support of Motion to Transfer, Dec. 28, 1968; Plaintiff and Plaintiff-Intervenor’s Memorandum in Opposition to Motions to Transfer, Jan. 3, 1969; Memorandum of the United States in Opposition to Motions for Transfer Under 28 U.S.C. 1404(a); Orders of Jan. 15, 20, 1969; all in Frank Johnson Papers: Lee v. Macon Case File, Container 22, Folder 4.

administrators who had been dismissed, reassigned, or otherwise affected by the August, 1968 decree. They wanted Stone to determine which people had been discriminatorily dealt with and to “correct” those situations.⁹

Stone filed a motion to dismiss the ASTA motion. The state superintendent claimed that he did not have the authority to make the “corrections” which ASTA sought and that the administrative work necessary for compiling the requested information would be “unduly onerous.” The court proved sympathetic to the first claim and advised Seay at a hearing that the court could not require Stone to rectify all cases of discrimination as such. The court granted the request for information, however, which it regarded as “basically a motion for discovery and production.” This would allow Seay to analyze the information and move the court for further relief against any individual systems as necessary. Seay would eventually spend a considerable amount of time in the coming months, traveling the state and negotiating with local school boards, trying to protect particular teachers and administrators from discriminatory handling. It was the kind of leg work that the CRD had conducted in the case up to that point. But Gray and Seay, not the CDR, represented ASTA, and so it fell to them to shepherd this phase of the litigation. With Gray handling other cases, this meant, in effect, Seay alone.¹⁰

Trade Schools and Junior Colleges

That spring, 1969, the attorneys from the Civil Rights Division filed a motion for further relief in *Lee v. Macon* which sought the disestablishment of the state’s dual system of trade schools and junior colleges. The March, 1967 decree had provided for the desegregation of such schools, but the state had done nothing to achieve this and, of course, would not do so without some judicial “prodding.” The statewide order had been wholly appropriate in the case of these institutions, as they were directly

⁹ Lee v. Macon County Board of Education, Plaintiff-Intervenor’s Motion for Further Relief, Feb. 19, 1969, Frank Johnson Papers: Lee v. Macon Case File, Container 19, Folder 3.

¹⁰ Lee v. Macon County Board of Education: Defendant’s Motion to Dismiss, March 20, 1969; Order of May 28, 1969; both in Frank Johnson Papers: Lee v. Macon Case File, 19, Folder 3; Seay Interview.

under the control of the state board of education. The state board operated 27 trade schools, 21 of which had been created and maintained for whites, and 6 for blacks. It operated 15 junior colleges, 13 white and 2 black. Each school had an attendance area which it served, thus the white and black schools had overlapping zones. Some of the faculties had been token desegregated, most with only one teacher of the minority race. There were significant disparities in funding between the black and white institutions, and the white institutions generally offered a much more diverse selection of courses. The CRD asked the court to require the state board to formulate and execute a desegregation plan for these schools.¹¹

The *Lee* court determined that it should treat the trade schools and junior colleges differently than the K-12 schools. The judges decided that the principles established in the recent case against Auburn University-Montgomery ought to apply. The state Public School and College Authority had recently sought to issue bonds to finance the building of a new four year college in Montgomery, an extension of formerly all-white Auburn University in nearby east Alabama. Blacks protested, arguing that the purpose of this was to keep the city's only other four year institution – Alabama State – all black, and to provide another institution which would remain mostly white. Fred Gray filed suit for ASTA in an attempt to block the bond issue. In the resulting decision, Judge Johnson spoke for the three-judge court and elucidated the particular challenges inherent in desegregating higher education. Public elementary and secondary schools were “traditionally free and compulsory,” and students could theoretically be assigned equitably to schools which were substantially the same “in terms of goals, facilities, course offerings, teacher training and salaries, and so forth.” Higher education, on the other hand, was “neither free nor compulsory.” Students chose which institution, if any, to attend, and they faced “the full range of diversity” in terms of those same things. In determining when and where to open a new institution, then, state officials had considerations which did not factor into such decisions

¹¹ Lee v. Macon County Board of Education, United States' Motion for Further Relief, April 30, 1969, Frank Johnson Papers: Lee v. Macon Case File, Container 23, Folder 2.

for K-12 schools. The court concluded that reviewing such decisions would necessarily involve the judges “in a wide range of educational policy decisions in which courts should not become involved.”¹²

Auburn University had been ordered five years prior to desegregate and to maintain a nondiscriminatory admissions policy. The court felt that Auburn-Montgomery ought to be given the chance to prove that it would do the same. Johnson wrote, “nondiscriminatory admissions in higher education are analogous to a freedom-of-choice plan in the elementary and secondary public schools. . . . Freedom to choose where one will attend college, unlike choosing one's elementary or secondary public school,” he argued, “has a long tradition and helps to perform an important function, viz., fitting the right school to the right student.” *Green* had “cast doubt on freedom-of-choice’s continued viability,” but the court felt that *Green* did not apply to higher education. Neither the federal courts, nor the Congress, nor HEW had gone beyond recommending or requiring nondiscriminatory admissions in higher education, and the court was, therefore, “reluctant” to “go much beyond” that itself.¹³

According to those principles, the *Lee v. Macon* court ordered the state board of education to formulate a plan which would eliminate racial identifiability and provide for free choice in the state’s trade schools and junior colleges. The plan the state initially submitted was hopelessly deficient, and the court was forced to specifically instruct the state officials to provide for the elimination of choice-influencing factors: overlapping attendance areas and transportation areas, racially identifiable faculties, and dual programs and curricula in institutions in the same geographical area. When the state had submitted no such plan by the end of the summer, the court ordered the HEW Office of Education to

¹² Alabama State Teachers Association v. Alabama Public School and College Authority, 289 F.Supp. 784 (MD, AL, 1969), affirmed 393 U.S. 400 (1969).

¹³ Alabama State Teachers Association v. Alabama Public School and College Authority, 289 F.Supp. 784 (MD, AL, 1969), affirmed 393 U.S. 400 (1969); Jim Leeson, “Colleges and Choice,” *Southern Education Report*, Oct., 1968, pp. 3-6.

formulate one. The court had to afford the USOE time to survey the system and formulate the plan, and so this phase of the litigation was effectively put on hold until the following year.¹⁴

Approaching “Terminal Orders” in *Lee v. Macon*

Meanwhile, the systematic desegregation of the 99 *Lee v. Macon* districts continued to require further court action. In mid-June Ernest Stone reported to the court on the results of the March freedom of choice period. Judge Johnson reviewed the report and advised Judges Rives and Grooms that the overall percentage of black students in scheduled to attend formerly all-white schools that fall seemed to indicate “excellent progress”: 33 percent in the county systems and 39 percent in the city systems. But these overall statistical figures were deceiving. Johnson felt that the court should “take some further action prior to the commencement of the 1969-1970 school year,” because freedom of choice seemed to be making that “excellent progress” in only some of the 99 systems. Johnson wrote:

I do not believe that we can sit by without initiating some show cause order to school systems like Sumter, 1%; Russell, 5-1/2%; Monroe, 12%; Marengo, 3%; Lee, 8%; Henry, 6%; Greene, 6%; Baldwin, 9%; Demopolis, 2%; Dothan, 8%; Linden, 3%; Opelika, 9%; and Thomasville, 1%. It is quite obvious that freedom of choice has not worked in these systems. I see no reasonable probability that it will work. I believe we should enter a show cause order as to these school systems, and any others you think appropriate, giving them approximately 15 days to show cause why they should not file with this Court some desegregation plan other than a freedom of choice plan.¹⁵

Johnson listed 10 other systems which he felt the court ought to move against.¹⁶ Judge Rives “heartily” concurred, adding that the results in most of the systems were “much better” than he had anticipated. He suggested that Johnson attach something to the show cause order, or issue some special order,

¹⁴ Lee v. Macon County Board of Education: Memorandum Transcript of Hearing, May 27, 1969, and Order of Sept. 17, 1969, Frank Johnson Papers: Lee v. Macon Case File, Container 22, Folders 7-8.

¹⁵ Frank Johnson to Richard Rives and Hobart Grooms, June 17, 1969, in Frank Johnson Papers: Lee v. Macon Case File, Container 30, Folder 7.

¹⁶ Chambers, 16 percent; Chilton, 10.5 percent; Pickens, 14; Anniston, 11; Dothan, 8, Elba, 13; Eufaula, 11; Phenix City, 11; Tuscaloosa County, 9.5; and Tuscaloosa City, 18.

“according credit” to the systems which had demonstrated good faith, in the hopes that this would “have a good effect on the laggards.”¹⁷

Johnson soon spoke to Frank Allen, the lead attorney from the Civil Rights Division, and learned that the CRD had also been reviewing the reports and was preparing to enter motions of its own, pending approval from Attorney General Clarke. The court determined that it should wait until the CRD had entered its own motions, so Johnson settled for writing a letter to each of the recalcitrant systems. The judge alerted each system’s attorney and superintendent to the fact that no white students had elected to attend black schools and that only a small percentage of black students had chosen to attend formerly all-white schools. He requested that each system notify the court as to whether “any further desegregation” was to be “accomplished . . . without further Court action prior to the commencement of the 1969-70 school year.” Johnson ‘called their attention’ to *Green v. County School Board* and the several Fifth Circuit decisions rendered subsequent to it. Linden and Thomasville responded and developed, in conference with Johnson, further steps which would bring their respective numbers to at least 17 and 30 percent that fall. Others did not, and the CRD prepared a motion to add those systems as parties defendant.¹⁸

On June 14 the CRD entered its motion. Surprisingly, it determined that 32 of the 99 school boards were in the process of implementing plans which would eliminate their dual school systems for the upcoming 1969-70 school year. However, 25 systems had failed to carry out the provisions of the August, 1968 order directing certain school closures or grade closures and were not poised to achieve

¹⁷ Frank Johnson to Richard Rives and Hobart Grooms, June 17, 1969; Richard Rives to Frank Johnson, June 21, 1969; both in Frank Johnson Papers: Lee v. Macon Case File, Container 30, Folder 7.

¹⁸ Frank Johnson to Richard Rives and Hobart Grooms, June 27, 1969, Frank Johnson Papers: Lee v. Macon Case File, Container 30, Folder 7; Frank Johnson to Superintendents and Counsel for Certain School Systems, June 27, 1969, re *Green v. County School Board, etc.*, Frank Johnson Papers: Lee v. Macon Case File, Containers 23-7, Multiple Folders.

any meaningful progress.¹⁹ Most of these systems were planning to continue operating “subminimal” all-black schools – those with fewer than the state-approved minimum number of students. The next day, Johnson approved the motion and added all of the 25 systems as parties defendant, ordering them to show cause. Following a hearing, the court, in an August 6 order, dismissed two systems as parties defendant and issued specific orders for each of the remaining 23. It ordered each system to achieve a faculty desegregation rate of 1-in-4 for the upcoming year and an equalized system-wide ratio for 1970-71. Certain systems were ordered to stop busing black students past white schools closer to their homes. Others were ordered to stop operating certain black schools that fall, and to stop operating any and all black schools by the fall of 1970. Some were ordered to grant choices which they had denied. Some were ordered to pair white and black schools. All were to report to the their court on their progress. Finally, the court ordered the USOE to formulate its own plans for each system for total disestablishment for 1970-71, in case continuing recalcitrance prevented the formulation or implementation of an acceptable plan by the board themselves.²⁰

The opening of schools that fall revealed substantially increased desegregation in all of the 99 systems. Notably, among those systems added as parties defendant at the end of the summer, several had greatly increased their percentages of black students in formerly all-white schools: Baldwin County, 43 percent; Chilton County, 51 percent; Covington County, 89 percent; Dothan City, 26 percent; Opelika City, 31 percent; and Phenix City, 26 percent. Five systems had failed to achieve what the court ordered. Conecuh and Limestone Counties had not achieved reasonable faculty desegregation, and Demopolis City, Russell County, and Pickens County had not achieved more than 16 percent black pupil

¹⁹ The CRD list of systems in need of further action was similar, though not identical, to Judge Johnson’s: Baldwin, Chilton, Coffee, Conecuh, Covington, Dale, Henry, Lamar, Limestone, Marengo, Marion, Monroe, Pickens, Russell, Sumter, Washington, Tuscaloosa, Attalla, Demopolis, Eufaula, Marion, Opelika, Phenix City, Anniston, and Dothan.

²⁰ Lee v. Macon County Board of Education: United States Motion for Order to Show Cause, July 14, 1969; Order of July 15; both in Frank Johnson Papers: Lee v. Macon Case File, Container 30, Folder 8. Frank Johnson’s Handwritten Notes from July 29, 1969 Hearing, Frank Johnson Papers: Lee v. Macon Case File, Container 23, Folder 6; Order of Aug. 6, 1969, *Race Relations Law Survey* 1, No. 4 (Nov., 1969), pp.

desegregation. Johnson asked Rives and Grooms in October if the court ought to issue further orders against the five, but the two judges balked. Johnson had wondered if they ought to “let [the systems] ride” in light of the fact that it was already mid-fall and each was required to fully desegregate the following year anyway. Rives agreed, arguing that teachers would be hard to find in mid-year for the first two, and that the other three were “so predominantly black in student population and [faced] such a difficult problem, that they probably ought to be “left alone” at the time. Grooms agreed and added that the three needed time “to ‘season.’” The judges were thus not insensitive to the threat of catastrophic white flight in majority-black systems, nor to individual systems’ circumstances. But it was clear that all of the *Lee* systems would, nonetheless, be required to take all conceivable steps to fully desegregate by the fall of 1970.²¹

As the court was entering the order against the newly added 25 systems, Solomon Seay was filing a motion on behalf of ASTA asking the court to add 33 more systems as parties defendant.²² In reviewing Stone’s court-ordered report, Seay had determined that these systems continued to discriminate against black teachers and administrators in a litany of ways: denying blacks administrative positions; maintaining disproportionate pay scales for blacks and whites; requiring black coaches and athletic directors to work as full-time classroom teachers and paying them a smaller athletic supplement than whites; transferring their top black teachers to white schools while at the same time transferring their least experienced and qualified white teachers to black schools; reassigning black principals to classroom positions, with a loss in salary and in some cases under white principals with less experience and training; replacing black principals at black schools with white principals, while refusing to consider

²¹ Frank Johnson to Richard Rives and Hobart Grooms, Oct. 6, 1969; Richard Rives to Frank Johnson and Hobart Grooms, Oct. 9, 1969; Hobart Grooms to Richard Rives and Frank Johnson; all in Frank Johnson Papers: *Lee v. Macon* Case File, Container 30, Folder 7.

²² Autauga, Cherokee, Chambers, Chilton, Colbert, Coosa, Dale, DeKalb, Elmore, Fayette, Geneva, Houston, Jackson, Lauderdale, Randolph, St. Claire, Cleburne, Shelby, Baldwin, Clay, Covington, Henry, Marion, Monroe, Talladega, Tallapoosa, Tuscaloosa County, Tarrant, Tuscumbia, Oneonta, Thomasville, Scottsboro, and Sheffield.

blacks for principalships at white schools; and demoting or terminating black Title I program teachers and replacing them with white teachers. This was the last official act undertaken by the ASTA prior to its merger into the NEA, which Seay and Fred Gray were also overseeing.²³ The court allowed NEA to intervene and denied the ASTA motion, feeling that the newly integrated NEA should not be bound by an eleventh-hour order. Johnson noted the court was not prejudiced to hearing a similar motion from NEA.²⁴

At that point, in the fall of 1969, 28 of the 99 *Lee v. Macon* school boards were held to have completely disestablished their dual systems. Of the remaining systems, 36 had been recently made parties defendant and put under direct court order to do so by beginning of the 1970-71 school year. This left 37 school boards under the *Lee v. Macon* umbrella which were not under court order to totally disestablish their dual systems by 1970-71.²⁵ Judge Johnson felt that it was “extremely important” to issue an order against the remaining systems “right away.” Some of them had “not yet taken any realistic approach designed to end their segregated public school operations.” Accordingly, on October 23, the court acknowledged “considerable progress,” but it ordered the remaining 37 districts to file new plans with the court to achieve total disestablishment the following year. It then ordered the USOE to file plans as well, in the very likely event that school boards’ own plan were inadequate. Johnson

²³ The NEA was applying for leave to intervene in the *Lee* litigation in ASTA’s stead, and was prepared to retain Seay and Gray to represent the rights of black teachers and administrators in Alabama. Nonetheless, Seay wanted to file the motion before the merger, in ASTA’s name. NEA had its own national lawyers and might choose to proceed differently. ASTA Executive Director Joe Reed and Seay wanted to bind NEA to what they felt was the appropriate course of action.

²⁴ *Lee v. Macon County Board of Education: Plaintiff-Intervenor’s Motion for Order to Show Cause*, Aug. 1, 1969; *NEA Complaint in Intervention*, Aug. 21, 1969; *Order of Aug. 21, 1969*; all in Frank Johnson Papers: *Lee v. Macon* Case File, Container 30, Folder 8; Frank Johnson to Richard Rives, Aug. 19, 1969, Frank Johnson Papers: *Lee v. Macon* Case File, Container 30, Folder 7.

²⁵ Bibb, Butler, Calhoun, Chambers, Clarke, Colbert, Coosa, Dallas, Escambia, Geneva, Greene, Houston, Lee, Macon, Morgan, Pike, St. Claire, Shelby, Talladega, Tallapoosa, Alexander City, Andalusia, Brewton, Decatur, Elba, Enterprise, Floral, Lanett, Ozark, Selma, Sheffield, Sylacauga, Talladega, Troy, Tuscaloosa City, and Tuscumbia.

entered similar orders as the sole district judge overseeing the Barbour County and Crenshaw County cases.²⁶

Johnson was prepared to rely on the USOE's Division of Equal Educational Opportunity (EEO) to formulate realistic plans, which the court could then order these certain systems to implement. This was an important task, as these were to be "terminal-type" orders, or those that would set each system on a final, court-sanctioned path to elimination of its dual system. The Director of the EEO Division subsequently wrote the superintendents of the 37 school systems named in the order and "call[ed] [their] attention to the technical assistance available . . . under the Civil Rights Act of 1964." HEW personnel were "ready to help," he wrote. When Johnson received a copy of one of these letters, he immediately contacted Montgomery-based U.S. Attorney Ira DeMent and informed him that "the casual approach evidenced by the letters" would "not in any way comply with the orders entered in these cases," referring to *Lee* and the independent cases. Johnson reminded DeMent that the United States was a party to the cases and had been "specifically ordered, through the use of HEW, to study operation in each of the school systems concerned – whether invited or not – and to assist the officials of the several school systems in preparing a terminal-type plan for presentation to the Court on or before January 15, 1970." The court had learned the hard way that the initiative simply could "not be left up to the local school systems." Johnson was thus forced to assert the court's administrative authority and advise DeMent to "call [the] matter to the attention of the proper authorities" through "whatever channels" he considered appropriate.²⁷

²⁶ Order of Oct. 23, 1969, *Lee v. Macon County Board of Education*, *Race Relations Law Survey* 1, No. 5 (Jan., 1970), pp. 204-5 (see also for Barbour and Crenshaw orders); see *Lee v. Macon* order also at Frank Johnson Papers: *Lee v. Macon* Case File, Container 30, Folder 8. Frank Johnson to Richard Rives, Aug. 19, 1969, Frank Johnson Papers: *Lee v. Macon* Case File, Container 30, Folder 7.

²⁷ Frank Johnson to Ira DeMent, Nov. 5, 1969, Frank Johnson Papers: *Lee v. Macon* Case File, Container 30, Folder 7.

Appeals in *Davis and Jefferson*

The reluctance of HEW to take a proactive role in the final enforcement of the *Lee* litigation was indicative of a general retreat from strict enforcement of school desegregation policy and law under the Nixon Administration. While more desegregation occurred during Nixon's first term than under any other presidential administration, this was the result of timing and resignation more than administrative initiative. Nixon's White House was ultimately not unlike southern school districts themselves, begrudgingly resigned to accept the inevitable but not prepared to go any further than necessary. Some have offered a more generous assessment, arguing that Nixon was improvising, or that he could have done more to appease his southern constituency than he did. The marginalization of those in the administration who would have been more proactive is perhaps more illustrative of the overall thrust of administration policy than anything. Leon Panetta, for example, replaced Ruby Martin as the head of the Office of Civil Rights but was forced to resign a year later because of his aggressive stance on school desegregation policy. Those who remained were torn between the expectations of southerners who had been awaiting a softening of enforcement since the election, liberals who expected a final push towards meaningful desegregation, and the White House itself. Incoming HEW secretary Robert Finch exemplified the often confused Nixon policy. He initially buoyed southern hopes by suggesting that the HEW Guidelines would be rewritten to be "clearer" and bent more towards national, as opposed to strictly southern, enforcement. But after an April policy meeting at the White House, Finch indicated that there would be "no change" in the Guidelines. HEW subsequently began moving on certain northern school districts to cut off funds.²⁸

²⁸ *New York Times*, April 16, 17, 18, Sept. 13, 1969; *Washington Post*, Aug. 25, 1969; *Birmingham News*, June 20, 1969; Panetta, *Bring Us Together*, passim; Landsberg, *Enforcing Civil Rights*, pp. 141-2; Crespino, *In Search of Another Country*, pp. 174, 185-9; Wilkinson, *From Brown to Bakke*, pp. 118-20; Greenberg, *Crusaders in the Courts*, p. 384; Carter, *Politics of Rage*, pp. 396-9. For more sympathetic treatments of the Nixon Administration, see Joan Hoff, *Nixon Reconsidered* (New York: Basic, 1994), pp. 77-114; Raymond Wolters, *Race and Education, 1954-2007* (Columbia: University of Missouri Press, 2009), pp. 145-50; and Kotlowski, *Nixon's Civil Rights*, pp. 15-16, 30-3.

At the same time, however, administrative actions indicated a clear stand down. HEW had been insisting that school districts fully desegregate by that fall, 1969, but that summer it allowed 20 South Carolina school systems to wait until the following year. Then the White House forced a delay in the Mississippi school case, *Alexander v. Holmes*. A number of Mississippi school cases had come before the Fifth Circuit on consolidated appeal, and the appellate court had initially ordered each to submit plans for full desegregation that fall. Urged on by the influential Mississippi Senator John Stennis, the White House pressured Secretary Finch to write Fifth Circuit Chief Judge John Brown and tell him that HEW was “gravely concerned that the time allowed for the development of these terminal plans has been much too short.” Finch – who would ultimately join Panetta in exiting the administration – dutifully informed Judge Brown that widespread compliance with *Green* would result in “chaos, confusion, and a catastrophic educational setback.”²⁹ When the CRD petitioned the court for a delay in implementation of the Mississippi plans until the following year, the appellate court granted the request. This had the effect of pitting the Civil Rights Division against the NAACP-LDF in a school desegregation case for the first time. It also set off what has been called a “revolt” at the Justice Department, in which a number of attorneys, particularly within the CRD, openly questioned the administration. In some cases CRD attorneys began quietly assisting local civil rights attorneys, and at least one resigned. The LDF ran a full page ad in the *New York Times* accusing the federal government of “breaking its promise to the children of Mississippi.” The U.S. Civil Rights Commission issued a statement, of its own, observing, “Those who have placed their faith in the processes of law cannot be encouraged.”³⁰

When Civil Rights Division Chief Jerris Leonard went before the Supreme Court during oral arguments in *Alexander v. Holmes* and insisted that ordering the immediate enforcement of *Green* in

²⁹ Finch also argued that damage incurred in recent Hurricane Camille constituted an additional hardship to Mississippi officials, even though the districts in question were well inland from the area of coastal devastation.

³⁰ *New York Times*, April 16, 17, 18, Sept. 13, 1969; *Washington Post*, Aug. 25, 1969; *Birmingham News*, June 20, 1969; Panetta, *Bring Us Together*, passim; Landsberg, *Enforcing Civil Rights*, pp. 141-2; Crespino, *In Search of Another Country*, pp. 174, 185-6; Wilkinson, *From Brown to Bakke*, pp. 118-20; Greenberg, *Crusaders in the Courts*, p. 384; Carter, *Politics of Rage*, pp. 396-9.

these cases was a waste of time, many other civil rights supporters called the administration out on its self-proclaimed “law and order” policy. The *New York Times* called such a position on *Green* “astonishing as the declared stance of an Administration that, in its rhetoric, has so consistently vowed to uphold law and order.” It continued:

With every new corkscrew turn of policy, the Nixon Administration demonstrates that its approach to school desegregation is more responsive to the prejudices of Southern politicians than to the legitimate demands to put an end to the illegally maintained dual school systems. . . . Such contradictions can only reinforce Negro suspicions of separate justice for black and white, thus inviting resort to mass disruption as a substitute for the essential faith in justice under a government of law.³¹

The *Baltimore Afro-American* proffered a similar interpretation. The administration had “exposed its own ‘law and order’ hypocrisy in an unprincipled declaration of the Justice Department’s inability,” or more accurately “unwillingness, to enforce school desegregation.” Its “double-talk, pussy-footing delays, [and] appeals for court slowdowns” were just the “type of encouragement for Dixiecrats to defy court rulings that one would expect from George Wallace and other segregationists from Deep South areas.” Leonard called the *Times* editorial “picayunish and pusillanimous” and claimed that the Civil Rights Commission and others were “running off at the mouth” without all the facts.” Meanwhile, Nixon was trying to reign in others in the administration, telling aids, “We have to quit bragging about school desegregation. We do what the law requires,” he said, “nothing more.” One Nixon scholar has aptly summarized the president’s political application of this standard: Nixon wanted to “sell the story that the Supreme Court was responsible for desegregation and that there was little the administration could do about it.” He would continue to “advance integration without taking much credit for it,” while at the same time “rolling his eyes for all southern white voters to see”³²

³¹ *New York Times*, Oct. 1, 1969.

³² *New York Times*, Oct. 1, 1969; *Baltimore Afro-American*, Oct. 7, 1969; *Milwaukee Journal*, Oct. 3, 1969; see, for Nixon scholar, Kevin J. McMahon, *Nixon’s Court: His Challenge to Judicial Liberalism and Its Political*

The Nixon Justice Department thus continued to enforce school desegregation law while simultaneously engaging in a cautious retrenchment. This included its handling of the *Davis v. Mobile* case, though this was difficult to ascertain amid continuing rulings for delay issued by District Judge Daniel Thomas. In April of 1969, Thomas had insisted that Mobile continue to operate that fall under its existing hybrid desegregation plan – which he had developed himself, and the Mobile authorities had implemented the previous year. The plan called for maintenance of freedom of choice in the rural part of the county and in the metropolitan area’s high schools. The city’s elementary and junior high schools would continue to operate under an attendance zoning plan, with zones drawn by Thomas himself, along nonracial lines. The plan had resulted in a seemingly large increase in black students in formerly white schools the previous year: from 692 in the fall of 1967 to 3,484 in the fall of 1968. But nearly 90 percent of the system’s 31,130 black students still attended either all-black schools or those which had been token desegregated by a total of 253 white students, mostly from families poor enough to bear the burden which wealthier whites refused to bear.³³

Initially, the Justice Department litigated this aspect of the case as it always had. Both the LDF and the CRD appealed Thomas’s decision to continue with his hybrid plan. The Fifth Circuit reversed the decision on June 3, 1969. The appellate court argued that Judge Thomas had obviously “relied wholly upon and [given] literal interpretation to” its March, 1968 declaration that new attendance zones “be drawn on a non-racial basis.” According to the court, Thomas had also “ignored the unequivocal directive to make a conscious effort in locating attendance zones to desegregate and eliminate past segregation.” The district court’s attendance zones were “constitutionally insufficient and unacceptable.” Furthermore, the freedom of choice plan for the city’s high school students had been approved in direct defiance of the circuit court’s directive that no distinction be drawn between

Consequences (Chicago: University of Chicago Press, 2011), and for Nixon quotation, Ehrlichman, *Witness to Power*, p. 227.

³³ Pride, *Political Use of Racial Narratives*, p. 81.

elementary and secondary schools. The freedom of choice plan for the rural part of the county, meanwhile, had “singularly failed,” as only about 6 percent of blacks in the rural areas had chosen white schools, and no whites had chosen black schools. A majority-to-minority transfer provision was proper, the court held, but Thomas had also included a minority-to-majority provision which the court said was “tantamount to an authorization to white students to resegregate.” The court also reversed Thomas’ decision to allow for construction at two black school sites, arguing that such construction should be enjoined pending rezoning. Finally, it ordered Thomas to direct HEW to come to Mobile and attempt to work out a plan with the school board. HEW was to devise its own plan for implementation in the likely event that no agreement could be reached with the board.³⁴

The Mobile school board did not bother developing its own plan or working with HEW on one. The plan that HEW formulated on its own called for a total elimination of freedom of choice and included non-contiguous zoning and pairing of schools. It would have required the busing of around 2,000 of the system’s nearly 80,000 students; most of these 2,000 would have been students from the inner core of the metropolitan area, east of Interstate 65, bused out to other parts of the metropolitan area. The proposed HEW plan unsurprisingly met with outrage and indignation in white Mobile. A letter from Mobile’s congressional representative Jack Edwards to Robert Finch reflected the conflicting pressures the HEW Secretary was under. Edwards called the HEW plan “the wild notion of [Finch’s] stable of dreamers” and stated that he “could not believe” that Finch would “condone such a flagrant violation of the law,” especially since it was “contrary to [Edward’s] understanding of [Finch’s] position.” The Mobile school board estimated that implementing the plan would cost \$13 million. Edwards asked, “Where do you think [they] will get the money?” Finch had never seen the plan himself, but he agreed to review it, in any case. The review was rendered moot when the ever-sympathetic Judge Thomas on August 1, 1969 again softened the blow for white Mobile. He approved the HEW attendance zones for

³⁴ Davis v. Board of School Commissioners of Mobile County, 414 F.2d 609 (5th CCA, June 3, 1969); see also at *Race Relations Law Survey* 1, No. 3 (Sept., 1969), pp. 107-8.

the rural county and that part of the metropolitan area west of Interstate 65. But Thomas would not approve the HEW zoning plan for the area east of I-65, which included most of the city of Mobile, as well as the cities of Prichard and Chickasaw. He ordered the school board to devise its own plan for this part of the metro area and again ordered it to continue under the previous year's hybrid plan – with freedom of choice for the high schools and Thomas' own zones for the rest.³⁵

Once again Thomas' attempts at moderation were met with displeasure from all sides. The LDF immediately appealed the part of the ruling allowing a continuation of the status quo in the area east of I-65. William Westbrook and STAND descended upon the next meeting of the Mobile school board in an attempt to brow beat the officials into maintaining freedom of choice county-wide. Westbrook announced that freedom of choice was "what America was founded upon. . . . We as citizens will accept nothing less. We want no pairing of schools, no closing of schools, no busing of children, no rigid boundary lines, no black history, no sex sensitivity courses, and no social welfare within our schools." Westbrook argued, "This is still America, we are still free, and we intend to remain free." As the opening of schools approached that September, STAND's Pierre Pelham introduced a resolution into the Alabama State Legislature, on behalf of former Governor George Wallace, declaring that freedom of choice was "the lawful and least disruptive system of pupil assignment in the public schools of Alabama." The resolution called on parents to "take their children to the school of their original choice and insist upon the enrollment of such children and peace remain at such schools until enrollment has taken place." It further called upon school officials to "take whatever action is required to accommodate parents in their exercises of freedom of choice, including the opening of closed schools,

³⁵ *Birmingham News*, June 12, 26, 1969; *Race Relations Law Survey* 1, No. 4 (Nov., 1969), p. 158; Pride, *Political Use of Racial Narratives*, pp. 83-4.

elimination of busing to achieve racial balance, and prompt enrollment.” The resolution passed the House 85 to 5 and the Senate 23 to 11.³⁶

Wallace told a group of white parents in Prichard days before school opened, “Any parent whose child is not being allowed to go to the school of your choice, I hope you will carry that child to that school anyway – and let’s see what they do about it.” STAND subsequently put an ad in the *Mobile Register* calling for a boycott of classes at formerly all-black or highly integrated schools. Thousands of white students heeded the call on the first day of school, particularly in the newly zoned parts of the county, where they either stayed home or simply showed up at the school of their choice. STAND conducted a march that day to the school board offices to commemorate the “death of freedom of choice” and held a rally later that night at which protestors burned an effigy of Robert Finch.³⁷

The Nixon effect then manifest itself in the *Davis* case as the CRD chose to support Thomas’ plan on appeal, putting it on the opposite side of the courtroom from the LDF for just the second time. Assistant Attorney General Leonard submitted a memorandum in support, arguing that Thomas’s plan was “consistent” with the most recent directive of the Fifth Circuit in *Davis*. The LDF meanwhile, was petitioning Thomas for a contempt citation against the Mobile school officials for their failure to report on fall enrollments and teacher assignments. The school board was also supposed to be formulating its own plan for further desegregation east of I-65 to be filed by December 1, but it seemed to be hiding behind the pending appeal. The Nixon Administration was particularly cautious in the Mobile case, because any plan to substantially desegregate the city-county system looked to involve a good deal of compulsory assignment and “busing.” This frightened whites outside the South, whom Nixon began to promise he would protect. The president had begun appealing to both these whites outside the South and the law-and-order types within it, signaling his intention to limit school desegregation by using the

³⁶ *Birmingham News*, Sept. 2, 5, 25, 1969; *Race Relations Law Survey* 1, No. 4 (Nov., 1969), p. 159; Pride, *Political Use of Racial Narratives*, pp. 86-9.

³⁷ *Birmingham News*, Sept. 2, 5, 25, 1969; *Race Relations Law Survey* 1, No. 4 (Nov., 1969), p. 159; Pride, *Political Use of Racial Narratives*, pp. 86-9.

same coded language so familiar to southerners. By the spring of 1970, he was calling school desegregation a “very difficult problem,” emphasizing “a fundamental distinction in so-called *de jure* segregation and *de facto* segregation,” and arguing that there were “limits to the amount of coercion that can reasonably be used” in “a free society.” He adopted the argument used by Alabama state officials in *NAACP v. Wallace*: that federal officials should not “go beyond the requirements of the law” in enforcing school desegregation. And he charted what he called a middle course between “two extreme groups,” those who wanted “instant integration” and those who wanted “segregation forever.”³⁸

Meanwhile, the LDF was also appealing the district court’s approval of the Jefferson County school board’s plan, along with the independent Bessemer City plan. After its ruling in *Davis v. Mobile* that summer, the Fifth Circuit had, on June 26, 1969, reversed and remanded Judge Seybourn Lynne’s approval of a county-wide freedom of choice plan which left the question of significant pupil desegregation unresolved. The previous year, there had been 48 all-white, 28 all-black, and 29 desegregated schools in the Jefferson County system. The appellate court held that it was, therefore, “clear that freedom of choice [had] not disestablished the dual school systems in Bessemer [city] or Jefferson County.” Thus, the plan the district court had approved would “not meet the test of *Green*.” It ordered Judge Lynne to consider a zoning plan which might achieve disestablishment – in accordance with *Green*, *Carr v. Montgomery*, and now *Davis v. Mobile*.³⁹

Lynne ordered Jefferson County and Bessemer City school boards to formulate such a plans, to be put into operation that September. He wrote, “All recent decisions of the federal courts have declared that ‘freedom of choice’ is unacceptable, in that, according to these courts, it does not tend to end segregated schools.” But he added, “Within the framework of the federal court order,” school boards “must continue” to operate schools and educate children “under existing conditions.” Despite

³⁸ *Birmingham News*, Oct. 27, 1969; Wolters, *Race and Education*, pp. 145-6.

³⁹

Lynne's seeming acknowledgment that "existing conditions" might give the school boards some leeway, the Jefferson County officials issued a statement lamenting the decision and indicating to white parents that they had fought against desegregation as hard as they possibly could. The board stressed that its members had "consistently opposed the decrees of the federal court" and that they "did not feel that the [recent] federal court decree [would] in any way help or benefit the educational system" of the county. "However," they continued, "despite our personal feeling relative to the unfair interference and interruption of our educational program by the rulings of the Federal Court of Appeals, our nation is based on a system of law and order." Thus it was the "unfortunate duty and responsibility" of the board to carry out the court's orders.⁴⁰

The Jefferson County and Bessemer school boards each then developed and adopted geographic zoning plans. HEW had developed a plan which would have fully desegregated the Jefferson County system in two years, but the county school board had declined to work with HEW and had submitted its own. The school board's plan was to be implemented over a three year period and called for certain all-black schools to be "phased out," "closed gradually," or closed "as soon as possible." Bessemer officials worked with HEW and submitted an "interim plan" which called for the implementation of limited zoning while a long-range plan was being worked out. The long-range plan would, according to the board, potentially require "a complete reorganization of the entire school system." In most areas, the interim Bessemer plan and the first phase of the Jefferson County plan simply called for filling white schools to capacity with nearby black students. Not unlike in Mobile, compromise and gradualism did not appease white parents, however, who flooded courtroom hearings in protest, as well as the offices of the Jefferson County school board. Jefferson County Superintendent Revis Hall was perpetually besieged by angry white parents who felt that their children had been "kicked out of their school because of those niggers," and who advocated burning down schools rather than

⁴⁰ *Birmingham News*, Aug. 1, Sept. 7, Oct. 30, 1969.

desegregating them. Outside a hearing at which plaintiffs voiced their opposition to the plans because they did not go far enough, a Pleasant Grove man told reporters, “I will not send my kids to a Negro neighborhood under any circumstances. I will go to a federal penitentiary before I do it.” A Midfield woman added, “I don’t think it’s right for them to bus white children to Negro schools. That’s something that white people aren’t going to stand for.”⁴¹

The plaintiffs in each case also vigorously protested a number of issues: the maintenance of various all-black schools; the renaming of black schools in all instances where they were to become desegregated; the token desegregation of a number of schools in wealthier white areas; the creation of at least one zone which looked to remain perpetually all-black; and the planned construction of new high schools in all-white areas of the county, like Midfield, where they were sure to remain mostly white. The Justice Department protested the lack of a majority-to-minority transfer clause and the prioritization of certain proposed construction projects – like the high school in Midfield – over those which would tend to facilitate desegregation. Despite the objections, Judge Clarence Allgood – then sitting for Judge Lynne – approved both plans on August 6, 1969. From the bench, Judge Allgood made his disapproval of compulsory assignment clear. “Most of us may disagree,” he said, with the *Alexander* decision and the recent *Davis* and *Jefferson* decisions. He explained, “In my opinion, the Jefferson County freedom of choice plan . . . was and is doing the job in a feasible manner and has been accepted by the general public in this area, both black and white.” But now, he lamented, the Fifth Circuit had “changed its mind.” Allgood was obliged to order the implementation of the new plans, but not before congratulating the Jefferson County school board on having already performed a “Herculean task.” Oscar Adams and the LDF felt the plans did not go far enough and appealed the ruling. These appeals – in *Stout and U.S. v. Jefferson*, *Brown v. Bessemer*, and *Davis v. Mobile* – brought the number of pending

⁴¹ *Birmingham News*, Aug. 4, 1969

LDF appeals pending in Fifth Circuit that fall to 13. The appellate court ordered the 13 cases consolidated for an *en banc* hearing that fall.⁴²

Meanwhile, schools opened in Jefferson County with much the same effect as in Mobile, as everyone from parents and students to state officials decried what they understood to be increasingly demanding orders. White parents from west Jefferson County formed a group they called Concerned Parents for Public Education and sought to intervene in the *Jefferson* case. Pending a ruling on the motion seeking intervention, the group began holding mass meetings to determine an alternative course of action, should their attempt to litigate their way out of compulsory assignment fail. At one such meeting in late August, Jefferson County Schools' attorney Maurice Bishop fanned the flames of defiance. Bishop told the group to support white teachers who refused to teach integrated classes and to remember that the ballot box was their "most powerful arsenal in the repertoire of war." Likening black activists to Nazis, he added, "Ten percent of the Negro population has been calling the shots," because they were "well organized and well financed." Whites needed to respond in kind in order to "stop them from doing what they're doing to the fine white people of Greene County," where whites were fleeing the overwhelmingly black system *en masse*. Bishop asked how many of the parents would "not object" to a ratio of 15 to 20 percent blacks in white schools in the fall. Two parents raised their hands. Bishop then asked who would not object if all Alabama schools were closed in lieu of integration. The crowd then roared in approval. The group's president told Bishop and Jefferson County Superintendent Revis Hall that they were not necessarily interested in leaving the public schools, but that the "present situation" would "not be tolerated."⁴³

Concerned Parents subsequently tried to spread its message of defiance across the county. It took out an ad in the *Birmingham News* days later in which it accused the Fifth Circuit panel which had

⁴² *Birmingham News*, Aug. 2, 4, 5, 6, 9, Oct. 30, 1969; *Race Relations Law Survey* 1, No. 4 (Nov., 1969), pp. 158-9.

⁴³ *Birmingham News*, Aug. 15, 31, Sept. 1, Oct. 30, 1969.

ruled in the *Jefferson* case that summer of “completely destroy[ing]” the county school system. The ad posed a series of rhetorical questions for the judges, none of which involved race. Would the judges “accept the responsibility for educating [their] children,” since the court would obviously “not allow the Jefferson County Board of Education to do so?” When economic support for the county system dried up, would the court reimburse it? Would the judges house thousands of students for which their assigned schools would have no room?⁴⁴

Governor Albert Brewer reiterated his support for groups like Concerned Parents and Mobile’s STAND when he called for a southern governor’s conference with the U.S. Attorney General to discuss what had become “an intolerable situation.” The governor blamed federal desegregation orders for a recent spate of dropouts in the state and wondered if “people at the federal level” would ever “be reasonable enough to see what they are doing to our schools.” He added, “Maybe it’s time Alabama went into court and asked for equal protection of the laws.” The children themselves took their cues from their parents, who were being reinforced by state officials like Brewer and Wallace. As an editor at the Auburn University student newspaper, the *Plainsman*, noted, “Many of the children, black and white, have gone to their new schools with an attitude of apprehension and distrust. These feelings were “not based on contact with another race because they have had little such contact.” It was, he argued, “founded on the emotions and prejudices of their parents.”⁴⁵

Many students did not go their new schools at all, however. White parents in Jefferson County were not mollified by the renaming of formerly black schools. They were instead encouraged by the state legislature’s “freedom of choice resolution” and kept their children home or sent them to their previously assigned schools. One thousand white students consequently began the school year in a school other than the one to which they had been assigned per the new Jefferson County plan. For example, 59 white students out of a projected 428 showed up to the newly named Graysville High – the

⁴⁴ *Birmingham News*, Aug. 15, 31, Sept. 1, Oct. 30, 1969.

⁴⁵ *Birmingham News*, Aug. 31, Sept. 1, Oct. 30, 1969; *Auburn Plainsman*, Sept. 25, 1969.

formerly all-black Alden High. No white students showed up to the newly named McNeil High. At some formerly all-black schools, parents complained of outdoor toilets, broken windows, and no lunchrooms, although Jefferson County Superintendent Revis Hall was quick to argue that such complaints were exaggerated and not indicative of actual conditions. An Irondale father whose child had been assigned to a formerly black school said his family had “paid [its] taxes” and would therefore take its children to the school of its choice. Hundreds of parents signed a petition which they submitted to the district court asking that it modify the plan. Meanwhile, most schools allowed students attending “out of zone” to remain where they were, just like the state legislature had told them to do. They were dubbed “visiting” students and in some cases issued books and allowed to participate in classes. A month later, hundreds of these students were still operating on their own personal freedom of choice plan in Jefferson County, in addition to more than 400 students, mostly white, who had actually been granted school board special permission to transfer to a school outside their zone. The disregard for assignments prompted a CRD investigation and an LDF complaint to the court, where the record on appeal would reflect the “visiting” phenomenon.⁴⁶

Alexander v. Holmes and Singleton v. Jackson III

While the 13 consolidated LDF appeals were pending the *en banc* hearing of the Fifth Circuit Court of Appeals, the Supreme Court issued its second of three landmark school decisions of that year. On October 29, the Court nullified the Nixon stand-down in the omnibus Mississippi case of *Alexander v. Holmes County Board of Education*. *Alexander* was, ironically, the first major decision of the chief justiceship of Warren Burger – whom Nixon had himself appointed after having failed in his first two appointments. The new Burger Court reversed the Fifth Circuit’s approval of delay and announced that time had “run out on deliberate speed.” It ordered the originally approved desegregation plans for the

⁴⁶ *Birmingham News*, Sept. 3, 4, 19, 26, Oct. 21, 30, 31, 1969.

33 Mississippi districts implemented immediately, holding that “every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools.” With the Court to blame, the administration subsequently backed off and allowed implementation to proceed apace – in the South at least. The Justice Department subsequently set about enforcing *Alexander* in Mississippi, including seeking a statewide decree along the lines of the decree in *Lee v. Macon*. Meanwhile, the *Alexander* ruling put the Fifth Circuit in the unusual position of having to modify its own rulings to effectuate a High Court-mandated speed-up.⁴⁷

On December 1, 1969, the Fifth Circuit issued its ruling in the 13 consolidated LDF appeals – including *Davis, Jefferson, and Bessemer* – under the styling *Singleton v. Jackson Municipal Separate School District* (the third notable ruling under the style of that case). In a *per curiam* opinion, the court acknowledged that *Alexander* “supervened all existing authority to the contrary” and “sent the doctrine of deliberate speed to its final resting place.” The burden had shifted “from a status of litigation to one of unitary operation pending litigation.” All school systems had to convert to unitary systems immediately; then and only then they could litigate the details of their respective plans. In applying these principles, the court chose to apply an HEW-developed policy which it had already adopted in the case of *U.S. v. Hinds County Board of Education* that summer. In that case, the court had approved the implementation of a two-step plan for “immediate” conversion to unitary systems: complete desegregation of faculty, staff, transportation, services, and extra-curricular activities immediately and the full desegregation of pupils with the start of the next full semester. The court felt that *Alexander* necessitated the rehearing of all of the 13 cases at the trial court level to reformulate plans. “Despite the absence of plans,” the court held, it would “be possible to merge faculties and staff, transportation, services, athletics and other extra-curricular activities during the present school term.” But it would be “difficult to arrange the merger of student bodies into unitary systems prior to the fall 1970 term in the

⁴⁷ *Alexander v. Holmes County Board of Education*, 396 U.S. 19; Landsberg, *Enforcing Civil Rights*, pp. 141-3.

absence of merger plans.” Accordingly, it ordered that everything but student bodies be desegregated by Feb. 1, 1970 with full pupil desegregation to follow in the fall.⁴⁸

The court included some specific instructions for the trial courts in the individual cases. In the combined Jefferson County and Bessemer cases, there had been no substantial change in the systems’ plans since the appellate court had reversed and remanded them that summer. So, the court simply reversed Judge Lynne’s most recent judgments and remanded them for compliance with *Alexander*. In *Davis*, the court affirmed Judge Thomas’s approval of the modified HEW plan. It directed the court to ensure the desegregation of the eastern part of the metropolitan area in accordance with *Alexander* “and in accordance with the other provisions and conditions of this order.” In effect this meant that all three cases would have to be reconsidered in light of *Alexander*, but with relief to follow in accordance with *Hinds County*. All three systems, along with the rest of the 13, would be afforded until the fall of 1970 to arrange full, unitary pupil desegregation. The LDF – through the three Louisiana cases and the *Davis* case – appealed this delaying portion of the December 1 decision, and the Supreme Court granted *certiorari* and quickly heard the case.⁴⁹

In a terse *per curiam* opinion styled *Carter v. West Feliciana Parish School Board*, the Court held on January 14, 1970, “Insofar as the [Fifth Circuit] Court of Appeals authorized deferral of student desegregation beyond February 1, 1970, that court misconstrued our holding in *Alexander v. Holmes County Board of Education*.” In its third and final major school decision of the year, the Court reversed and remanded *Singleton v. Jackson III* and instructed the appellate court to issue judgments in the affected cases “forthwith.” The opinion was so brief that four justices – Burger, Harlan, White, and Stewart – felt compelled to include some further explanation for the court’s decision. The Fifth Circuit had led the way in desegregation jurisprudence for nearly a decade, and here the Supreme Court

⁴⁸ *Singleton v. Jackson*, 419 F.2d 1211; *United States v. Hinds County School Board*, 417 F.2d 852; *Race Relations Law Survey* 1, No. 5 (Jan., 1970), pp. 203-4.

⁴⁹ *Singleton v. Jackson*, 419 F.2d 1211; *Race Relations Law Survey* 1, No. 5 (Jan., 1970), pp. 203-4.

seemed to be issuing an almost peremptory rebuke. The four concurring justices sought to dispel any notion that the appellate court had erred entirely in its interpretation of *Alexander*. Regardless, the bottom line was clear, and on this the justices were in unanimous agreement: graduated relief was no longer acceptable. School systems had to become unitary immediately. Nearly twenty years of defiance, evasion, and foot-dragging had left no room for any further delay. The Fifth Circuit Court got the message. From the time of *Carter v. West Feliciana*, it embarked on what legal scholars have called a “judicial blitz” which had a “stunning impact” on the South.⁵⁰

⁵⁰ *Carter v. West Feliciana Parish School Board*, 396 U.S. 290; *Race Relations Law Survey* 1, No. 5 (Jan., 1970), pp. 203-4; Wilkinson, *From Brown to Bakke*, p. 119-21.

CHAPTER 16: THE COMPULSORY ASSIGNMENT REVOLT IN MOBILE AND JEFFERSON COUNTIES, 1970-71

The death of freedom of choice had been protracted. For some it had been predictable. But its final demise nonetheless hit many Alabama whites like a blow. By 1970 litigation had brought some form of compulsory assignment to each of the state's school systems. Dazed segregationists responded with a wave of protest and resistance which was unparalleled in the history of school desegregation in the state. The reaction was most virulent in the state's major metropolitan areas, particularly Birmingham-Jefferson County and Mobile. Students continued to defy court-ordered plans by attending the school of their choice or by simply staying home. Parents protested and even accompanied students to class in "sit-ins" and occupations. Violence erupted in some areas, further fueling resistance. More and more whites chose to flee Birmingham for racially exclusive suburbs. In turn, more of these suburbs considered breaking away from the Jefferson County school system. Increasing numbers of blacks recoiled when the often inequitable terms of compulsory desegregation became clear. In Mobile, disillusioned, frustrated, and angry blacks even began to support calls for black separatism and resegregation.

As ever, white resistance was buoyed by state-level resistance, this time in the form of the Albert Brewer approach. Brewer applied the fully matured law and order creed to his efforts and continued to try and distance himself from George Wallace, whom he opposed in the 1970 gubernatorial race. . Brewer emphasized Wallace's consistent failures to stop desegregation in the past and argued that his solutions offered the most realistic chance to halt the steady march. The goal for both by that point was a return to freedom of choice. But it was not to be. Former Alabama State Teachers Association president Joe Reed understood the position in which the state's white officials had placed themselves; the newly installed president of the black Alabama Democratic Conference said, "The concept of freedom of choice is good, but in practice it has sometimes proved false. If it had been

adopted 15 years ago, it might now be the law of the land.” Reed was right. It was too late for that. Two decades of defiance and resistance and foot-dragging and disingenuousness and duplicity had finally caught up with the southern leaders.¹

Birmingham attorney for the NAACP-LDF, U.W. Clemon, echoed these sentiments while speaking at the annual meeting of the Birmingham League of Women Voters in March, 1970. Clemon cast aside whites’ misrepresentation of black activist-litigants’ goals and at the same time called into question whites’ own rationale for resisting compulsory assignment. “There are those who think the efforts to desegregate schools are efforts to mix, physically, black and white students,” he said, “but intelligence knows no color or class lines. The true aim of desegregation,” he argued, “is to provide equal educational opportunity. It really doesn’t matter whether black kids go to school with white kids, [but] as long as there are all-black schools, there will be an opportunity to discriminate” In an obvious reference to Governor Brewer, Clemon added that “quality education” was being tossed about in the state’s political arena, because it had “an irresistible appeal” not unlike “religion, motherhood, [or] apple pie.” But, he concluded, “it strikes me as strange that the governor and the legislators have up until now neglected public education to the point that we’re last in providing quality education.”²

Carter v. West Feliciana’s Impact

The Supreme Court’s January, 1970 decision in *Carter v. West Feliciana Parish* was a direct order for immediate system-wide desegregation, and at first it seemed as if its effect would be felt as such in Alabama. In *Singleton v. Jackson*, the Fifth Circuit had interpreted the Supreme Court’s *Alexander v. Holmes* ruling to mean school systems must take all feasible and immediate steps to complete pupil desegregation by the fall of that year. In *Carter*, the High Court rebuked the appellate court, insisting that school boards implement pupil desegregation plans which unified their districts not by the fall, but

¹ *Birmingham News*, Feb. 22, 24, 26, 28, 1970.

² *Birmingham News*, March 27, 1970.

by February 1, through compulsory pupil assignment if necessary. Governor Brewer accused the Supreme Court of “singling out” his state. He argued that the Court had “completely ignored the effect [Carter] would have on the education of the children.” Brewer added, “All I can do is express my wholehearted contempt for this action,” and he promised, “We shall leave no stone unturned in our determination to fight this order with everything in our power.” And fight it the state would, along with local school officials, white parents, and students themselves.³

One immediate effect of *Carter* was that the appellate court’s approval of a two-step desegregation plan in *Davis v. Board of School Commissioners of Mobile* had to be thrown out. The case was remanded on January 21, 1970 for the entry of an order which would effect the complete desegregation of the city-county system by February 1. District Judge Daniel Thomas quickly requested revised plans from the Mobile school board and HEW, to be submitted within four days. Despite a second order, the Mobile school board refused to develop a plan. HEW submitted a revised plan, which the Justice Department supported, and a more radical alternative plan, which attorney Vernon Crawford supported on behalf of the parent-plaintiffs and the LDF. Thomas had only a few days to consider each plan alongside the Supreme Court’s mandate, the logistical feasibility afforded by immediate implementation, and the racial climate of the county.⁴

In a January 31 order, Thomas concluded that the HEW alternative plan was far too radical, insofar as it required significant “busing” and paring of schools as far away as 15 miles. The revised HEW plan supported by the Civil Rights Division did not call for busing, but it did require pairing and the closure or restructuring of a number of all-black high schools. Thomas was “not willing” to order this, he argued, out of respect for the wishes of many in the black communities. In rejecting both HEW plans, Thomas also claimed that he was, generally, “unwilling to disregard all common sense and all thoughts

³ *Birmingham News*, Jan. 17, 1970.

⁴ *Race Relations Law Survey* 2, No. 1 (May, 1970), p. 11; Pride, *The Political Use of Racial Narratives*, pp. 91-3.

to sound education, simply to achieve racial balance in all schools. . . . I do not believe the law requires it," he wrote. Thomas added that he would not be swayed by the demands of those who would "stir" litigation "for the sake of litigation, without regard to the rights of children and parents involved." He therefore ordered the implementation of yet another court-devised plan which stopped short of granting the relief sought by the plaintiffs and the United States, in the hopes that white Mobilians might be more apt to accept it without violence or massive white flight. In this case, Thomas tried to prepare the city for what he called necessary "drastic measures" which he hoped would, nonetheless, make it "humanely and educationally possible to operate the schools." The plan finally did away with freedom of choice in the nine high schools east of Interstate Highway 65 in the City of Mobile. This fact alone was sure to make the plan anathema to a growing group of furious and fearful white parent-activists. Additionally, the plan utilized the geographical zones which the school board had proposed in December, with significant modification, and it called for certain grade realignments and a few school closures.⁵

As Thomas himself acknowledged, the plan satisfied no one, again. The LDF and the CRD appealed, the school board bristled and stalled, and black and white parents alike protested. Mobile Superintendent Crawford Burns announced the school board's understanding of the order: "We interpret this to mean that we should move ahead without any delaying tactics, but not disregarding all practical concerns." The plan was supposed to be implemented "forthwith." Thomas had insisted that this did not mean "instantly," but he set a deadline for the publication of zone maps, which the school officials ignored. The day the maps were to be published, February 3, Burns described the school board as being in the "preliminary planning stages" of implementing the plan, adding that the school officials were "not deliberately dragging [their] feet or trying to thwart the implementation of the decree." Burns claimed he could not say when the plan might be implemented or how many students would be

⁵ *Race Relations Law Survey* 2, No. 1 (May, 1970), p. 11; *Birmingham News*, Feb. 3, 1970; Pride, *The Political Use of Racial Narratives*, pp. 91-3.

transferred from schools at which they had started the year.” White parents not only supported the board’s continuing delay but petitioned for more. One white father beseeched the board members at a February meeting to delay any action until the end of the year. The man warned the officials, “Our children are sacred to us; they are inviolable. Believe it. But if they can come in here and tell us our children must go to this particular school,” he said, then “the next thing they are going to tell us is, ‘Alright, now you’ve got to go to a particular church.’ And then they are going to eliminate our church.”

On the other side of the racial divide, blacks protested for a variety of reasons. Plaintiffs’ counsel Vernon Crawford argued, “It’s far from being a desegregation plan. It just creates a little more tokenism,” he claimed. At the same time, some blacks became increasingly apprehensive about the fate of certain cherished black schools. This was particularly true of parents of students at Toulminville High – which was slated to be rebuilt – and Blount High – which parents hoped would be renovated or rebuilt. Other blacks committed to eradicating the dual system were more concerned with what seemed like yet another round of foot-dragging. The local director of the American Friends Service Committee claimed, “The black community is disgusted with the delays.” He called the court-approved desegregation plan “a sham” which did “not come close to being a unitary one,” especially insofar as it left four all-black high schools all-black. A local Catholic school teacher confided to a *New York Times* reporter that the plan looked to be “designed to create chaos so the blacks would be so upset with it they would say to hell with it.”⁶

One segment of Mobile’s black community was, in fact, so disgusted with the entire desegregation process that it began to support a plan to fully *re*segregate the school system. Roy Innes, the president of the Congress of Racial Equality (CORE), brought his message of black separatism to Alabama’s port city in March. CORE had been responsible for the initiation of the famous “Freedom Rides” in the early 1960s, but under Innes the organization had rejected integration for integration’s

⁶ *Washington Post*, Feb. 3, 1970; *Birmingham News*, Feb. 3, 1970; *New York Times*, March 21, 1970.

sake and had embraced the idea of autonomous black school districts as an alternative to compulsory desegregation. Innes argued that this was what many local black people wanted. He accused the NAACP of ignoring these “little people’s” wishes, and he even claimed to anticipate “an all-out war with the NAACP, HEW activist-bureaucrats, and possibly the old-line, die-hard, failure-prone civil rights aristocracy.” Innes chose Mobile as a testing ground for his plan partly because of its size and partly in the hope that a substantial portion of the city’s proudly independent black population would be disillusioned enough to favor a legal bifurcation of the public school system along racial lines. Innes was not disappointed in this regard. Local blacks told representatives of the Southern Regional Council, “In Mobile integration just won’t work because when we go to a white school they treat us like some dog. We never get to be the officers of the class, so we’d rather just stay in our own schools.” Others wondered, “How [could] you have integration” when “the white man” was “on top of the pole,” owned “the power structure,” and “controlled the dollar.” Freedom of choice, they argued, was “something the judge came up with to avoid integration.”⁷

The black activist group Neighborhood Organized Workers (NOW) threw its support behind the Innes measure, and CORE helped organize a new group in Mobile which called itself Steps Towards Educational Progress (STEPS). STEPS leadership announced that the plan “seemed to be a very practicable and sensible solution to providing meaningful quality education for all our children in their own neighborhoods where they relate to their neighbors and where their neighbors relate to them.” Black parents concerned about Toulminville and Blount were particularly receptive to the notion. Other black parents responded favorably when STEPS leaders claimed, “What we’re trying to get away from is the notion that the only way a black kid can get a quality education is to sit beside a white kid in school.” Innes’ plan called for the utilization of a law, passed by the Alabama state legislature to circumvent

⁷ Betsy Fancher, *Voices from the South: Black Students Talk about Their Experiences in Desegregated Schools* (Atlanta: Southern Regional Council, 1970); “Schools: What Blacks Think Depends on Where,” *South Today* 2, pp. 7-8.

Brown, which allowed communities to separate themselves from a school system in the event that enough voters in a district – and crucially, the existing board of education – approved. Unfortunately for Innes, members of the Mobile school board publically dismissed his plan as “straight communist doctrine.” And there was little hope that the courts would be receptive to such a plan either, given that the plaintiffs in *Davis* were sure to oppose it.⁸

Meanwhile, *Carter v. West Feliciana* had resulted in a reversal and remand of the *Stout v. Jefferson County* case as well. The district court had ordered the Jefferson County school board to submit a plan which would comply with the Supreme Court’s directive to fully desegregate by February 1. The board submitted a plan on January 30 which essentially accelerated its previously approved three-year plan into immediate-implementation mode. The district court approved the plan, which called for the restructuring and renaming of a number of formerly all-black schools and the pairing of certain white and black schools. Under the previously approved plan, this had been postponed pending construction to enlarge capacities. Shortly after submitting its plan, the county school board entered a motion requesting “emergency relief” in the form of certain “temporary modifications” to alleviate a “most unbelievable situation.” District Judge Seybourn Lynne also granted this relief, arguing that there was “overwhelming evidence of overcrowding,” and that some such relief was needed to “avoid double sessions, prevent overcrowded conditions, prevent the threatened development of extreme health hazards, avoid busing students many miles from their homes to attend overcrowded sessions, to protect accreditation of the schools and enable the School Board to restore some degree of normal administration.” Specifically, Lynne allowed all students in the system to return to the schools they had been attending as of January 1 and allowed for the reopening of certain closed schools. Most of the 18 schools closed in September, 1969 had, in fact, been reopened by then. The integrity of zone lines had not been rigidly maintained either. Many white students had done what they had done the previous fall

⁸ *Washington Post*, March 27, Sept. 9, 1970; *New York Times*, Sept. 9, 1970; *Birmingham News*, March 13, Sept. 6, 1970; *Pride, Political Use of Racial Narratives*, p. 94.

and had simply shown up to the schools of their choice. So, the effect of Lynne's ruling was, as Superintendent Revis Hall articulated, that "students [would] simply continue to go to school where they are going now." Lynne gave the school board until May 15, after the school year was over, to formulate a new plan for the fall, and he scheduled hearings on that and a new HEW plan for June. In effect, he had changed the Supreme Court's February 1 deadline to September.⁹

The LDF and the Civil Rights Division had a number of grievances with the Jefferson County plan, even before Lynne approved the "emergency" delay, and both chose to appeal. Local plaintiffs' counsel U.W. Clemon called the plan "an insult to the black community" and called attention to the fact that the essentially all-black Wenonah High School zone included a full third of the entire county's black student population. Clemon also claimed that the school board was unnecessarily closing certain black schools in order to create an atmosphere of crisis, which it could then point to as evidence of unfeasibility. At the same time, the LDF was also decrying an order entered by Judge Hobart Grooms in the case of the western Birmingham suburb of Fairfield. Swayed by school board complaints of some 400 white students withdrawing from school rather than attending the city's formerly all-black high school, Grooms allowed the reopening of 2 closed schools and the maintenance of the black high school as a "vocational school." At the same time, Grooms refused to enjoin the transfer of classes from black schools to white schools fully "intact," that is, with the same black teacher and black students. The LDF had also requested a contempt citation from Lynne against the Bessemer school board, but Lynne denied the request, arguing that "any further desegregation of the Bessemer system will seriously disrupt the educational system." The CRD entered motions in the Jefferson and Bessemer cases as well. The CRD argued that not only Woodlawn, but also A.G. Gaston High and 3 other Jefferson County schools were to be all-black, while Midfield High was to remain nearly all-white. The county had also created a new Westfield school zone which would be substantially black. The CRD called for a hearing

⁹ *Race Relations Law Survey* 2, No. 2 (July, 1970), p. 52-3; *Birmingham News*, Feb. 28, March 3, 1970.

on the county plan and asked the court to force Bessemer to immediately implement the HEW plan for its district. These disagreements awaited hearings as the Supreme Court's February 1 deadline for immediate unitary desegregation passed.¹⁰

Despite the rulings issued by Judges Lynne and Grooms which provided for emergency relief and some measure of further delay, defiance and protest of the new compulsory assignment plans in Jefferson County, Bessemer, and Fairfield were widespread. Students again remained at the schools of their choice rather than transfer. Only about 20 white students out of an expected several hundred showed up at formerly all-black Alden High (renamed Graysville), for example, and none of the 90 whites assigned to all-black Wenonah High and A.G. Gaston High appeared. In Fairfield, zero of the 200 or so white students assigned to the formerly all-black Oliver High showed up. A number of transferred white teachers similarly refused to move into black schools as ordered. White students at Gardendale staged a walkout and raised the Confederate battle flag on the school's flagpole, demanding the return of transferred teachers. White students also initiated a walkout at formerly all-white Minor High when a group of black students showed up to enroll. Concerned Parents for Public Education coordinated yet another walkout with students at formerly all-white Warrior High, which was set to receive black students from the closed all-black North Jefferson High. Minor High, McAdory High, Wenonah High, and Pittman Junior High were all evacuated upon receiving bomb threats. In the Center Point community, Concerned Parents organized a parents' "sit-in" at local schools which turned into a "vigil" as parents demanded the reassignment of students and teachers. White parents in the suburban Birmingham communities of Adamsville, Tarrant, Oak Grove, Green Valley, and Cahaba Heights staged similar protests. White parents set up tents at formerly all-white Raimund Elementary, outside Bessemer, where the new county plan called for 100 black students and 36 white students to attend. The parents

¹⁰ *Race Relations Law Survey* 2, No. 2 (July, 1970), p. 52-3; *Birmingham News*, Jan. 18, Feb. 3, 14, 28, 1970.

claimed they were not leaving “until [they] got [their] school back.” One of them offered an apology to local reporters, saying, “We are not a bunch of racists, we just want to keep our school the way it is.”¹¹

As they had the previous fall, white parent delegations descended upon the Jefferson County school board offices and demanded to know “where the board [stood]” and why it did not “stand up” to the federal court. Three hundred parents attended a meeting of the board and fired unrealistic demands, jeers, and insults at its members for three hours. The Jefferson County PTA Council called on the school board to “take every action within its power to obtain a return to educational sanity and to resist compulsory assignments of children to specific schools solely on the basis of their race and in order to enforce a racial balance.” A Vestavia representative from Concerned Parents suggested that the board “give serious consideration to resigning” immediately. Another man argued that the school officials were not answerable to the federal court, only to the electorate of Jefferson County. He urged them to defy the court order and claimed that local parents would pay any subsequent contempt fines or bail bonds. Other parents suggested that the board close down the entire school system temporarily. When one parent asked what exactly would happen if the school board defied the court, the board’s president replied that its members and Superintendent Revis Hall would probably be forced out of office. The crowd of enraged parents cheered wildly at this possibility, while the bewildered officials gazed on in amazement. Concerned Parents subsequently published its second full page ad in the *Birmingham News* wondering why the local school officials could not tell them how the school system had been “taken over for the purpose of achieving social goals.” They demanded to know why schools had to have “a certain racial mix,” why teachers had to be transferred in mid-year, what good would come from using students “like pawns on a bureaucratic chess board,” and where their children would be enrolled in September. The activist-parents even sent thousands of telegrams to the White House

¹¹ *Birmingham News*, Feb. 2, 3, 4, 5, 8, 9, 11, 12, 25, 1970.

urging President Nixon to reconsider the federal government's level of commitment to freedom of choice.¹²

Many black parents forced to abandon black community schools were not happy either. Some black student groups showed up at closed schools in an attempt to force them back open. Others petitioned the school board or the court. Blacks in Fairfield lamented the conversion of Oliver High into a junior high school which fed into formerly all-white Fairfield High. For the same reason, black parents in the eastern suburban city of Leeds called the new Jefferson County plan "a lousy, rotten deal," and argued, "It's not fair to close our school and make our children go to a white school." All-black Moton in Leeds had been initially closed as part of the county desegregation plan and later set to house all of the school system's tenth graders. The *Birmingham News* described Moton as a shell of its former self, where "athletic trophies glimmer[ed] from glass cases in the empty halls" and "class pictures smile[d] out to no one." School tradition there was "deceased." For Moton's former students, "identity with one's alma mater [was] a thing of the past."¹³

Albert Brewer's Law-and-Order Solution

White students and their parents had been, and continued to be, encouraged in their in their protests and defiance by state officials. Chief among them was Albert Brewer. At the same time, Brewer's political mentor, George Wallace, utilized the controversy to drum up support for his next presidential run. Speaking at a Concerned Parents' "freedom of choice rally" in Birmingham, Wallace indicated that he would seek the presidency again if "Nixon [didn't] do something about the mess" the state's schools were in. Like surrounding Jefferson County, Birmingham City Schools had been forced, after *Alexander*, to prepare a geographic zoning desegregation plan. They had done this, as Superintendent Raymond Christian said, "as distasteful as it was," because they feared HEW's plan even

¹² *Birmingham News*, Jan. 26, 31, Feb. 3, 8, 25, March 27, 1970.

¹³ *Birmingham News*, Feb. 3, 4, 5, 8, 11, 12, 25, 1970.

more. Judge Lynne had approved the school board's plan in December, and it was to be implemented in the fall. Wallace told the crowd of 15,000, which included fearful parents from both the city and the county, to ignore court ordered plans which called for either "busing," the closing of schools, compulsory faculty assignment, or any compulsory geographic attendance zones. At the same time, Brewer was hosting a meeting of Deep South governors in Mobile to discuss how to meet the "imperative" of "sav[ing] freedom of choice in our public schools." The Alabama governor had already said flatly, "I call on the local boards to say absolutely 'no' to busing." After the conference, Brewer announced that the group was taking its fight national and was preparing to seek legislation designed to "restrict the authority of the Supreme Court" by declaring "that freedom of choice is the law." Brewer made a telephone report to the same rally at which Wallace had spoken, announcing the governors' plans and assuring Concerned Parents that he would not hesitate to call the state legislature into special session to enact a "freedom of choice law" similar to that being considered in Mississippi.¹⁴ Brewer and the governors then issued a collective statement in which they channeled the language of the annually proposed Whitten Amendment and the soon-to-be-introduced Stennis Amendments to the Elementary and Secondary Education Act:

We reaffirm our determination that no child in any state or any school system shall be mandatorily assigned or bused for the sole purpose of achieving racial balance in our public schools. We believe the same standards for operation of schools applied in other states should be applied in the southern states. We resent the fact that we have been singled out . . . for punitive treatment."¹⁵

The *Birmingham News* lauded the governors' effort, juxtaposing its "workmanlike realism" with the "danger-packed emotionalism" of the "Wallace approach." Wallace's approach, it argued, assumed that "defiance [was] the only answer left," while Brewer's assumed "that defiance, of itself,

¹⁴ *Birmingham News*, Jan. 17, 21, 22, Feb. 9, 12, 1970; *Race Relations Law Survey* 1, No. 6 (Feb., 1970), p. 251; *Richmond Times-Dispatch*, Feb. 9, 1970; for more on the Whitten Amendment and on Mississippi Senator John Stennis' attempt to demand uniform national enforcement of school desegregation law, see CH 14, *supra*.

¹⁵ *Birmingham News*, Feb. 9, 1970.

[could] only be the mother of more chaos.” Wallace wanted to “exploit the emotional impact of the issue,” whereas Brewer wanted to “create an answer to the issue.” The upshot of the governors’ efforts, like those of Whitten and Stennis, was the hope that national enforcement would help northern whites “foresee the handwriting on the wall – the same kind of radical uprooting of educational and sociological processes that [had] beset the South – and see to it that the brakes [were] applied to unreasonable judicial and administrative acts.” The *News* surmised, “When the same thing hits the North that has struck the South, Northerners might become just as aroused and apprehensive as Southerners,” and the “dose of reason the South has been seeking so futilely might then come.” In short, Brewer’s “realist” strategy was more likely to be effective in blunting the effects of school desegregation on Alabama’s whites than Wallace’s self-serving strategy. This, the *News* argued, was “the real significance” of the Brewer approach “with all the rhetoric stripped away.”¹⁶

Brewer – who was facing a reelection campaign against Wallace – took his own personal anti-school desegregation crusade a step further by filing a complaint with the Supreme Court, on behalf of the state, against the U.S. Attorney General and the Secretary of HEW. The complaint sought an injunction against regionally-biased enforcement of school desegregation. Brewer announced the suit in a statewide televised law-and-order style address in which he lamented “teachers and students herded about like cattle to bring about a racial balance in the schools.” He specifically mentioned the “forthwith” orders directed at Jefferson County, Bessemer, Fairfield, and Mobile and decried the closure of what he described as \$15 million worth of school facilities. The governor cautioned Alabamians that they would “not get solutions . . . in the streets, but through legal processes” and he claimed that “the problem [was] not integration or segregation,” but “quality education.” After listing a number of metropolitan school systems in the Northeast, Midwest, and West where schools were still segregated, Brewer quoted Theodore Roosevelt, saying, “We in Alabama know we are not above the law, but

¹⁶ *Birmingham News*, Feb. 9, 15, 1970.

neither are we below it.” He called the U.S. Supreme Court “the place where all our troubles began,” and he insisted that his novel approach was more promising than the efforts of those who had previously given Alabamians “false hope” of avoiding desegregation altogether, i.e. Wallace. Brewer vowed, “I will not use our school children for political purposes. Instead,” he concluded, “I will assert our rights as people to the equal protection clause of the laws – no more, no less – as is our right as citizens of the United States.”¹⁷

The Supreme Court promptly refused to hear the complaint filed by Brewer, along with another filed by Mississippi’s John Bell Williams, but Brewer did not stop there. He quickly filed a similar claim in federal district court in Alabama, alleging that the attorney general and HEW secretary had violated the 1964 Civil Rights Act. He bitterly denounced the dismissal, saying, “It infuriates me that the highest court in the land closes its doors to the people of Alabama who have been law abiding and have stayed out of the streets.” The governor claimed that the court’s action “proved that we have two constitutions – one for the Southern states and another for the rest of the country.” By the end of February, 1970, Brewer had emerged from another meeting of deep southern governors, senators, and congressmen determined to sponsor a state “freedom of choice law.” He called the state legislature into special session on February 24 for “the sole purpose” of passing the law, which he said would provide a “constructive way” to solve desegregation problems. The law was almost identical in wording to a New York state law which other deep southern states were emulating. The first section indicated that no person would be refused admission to a public school on account of race. The second declared, “No student shall be assigned or compelled to attend any school on account of race . . . or for the purpose of achieving equality in attendance, . . . at any school, of persons of any one or more particular races.” It also declared that no school board could establish a “school zone or attendance unit” for any

¹⁷ *Birmingham News*, January 27, Feb. 21, 1970.

such purpose. The Alabama version eliminated an introductory clause to this second section of the New York law, which read, “Except with the express approval of a board of education”¹⁸

In a speech before the legislative special session, Brewer placed the freedom of choice law squarely within the law and order narrative in which he had, himself, become the central figure. “Our problem is not race,” he proclaimed, “as I have said before, the question is not one of integration or segregation. We crossed that bridge several years ago,” he said. “The question is what kind of education are we going to give our children.” The lawmakers responded with a standing ovation and proceeded to interrupt him 15 more times with applause during the 18 minute speech. Brewer recalled the history of desegregation in the state as he and they understood it, noting, “Several years ago, our school systems were put under freedom of choice and our people reluctantly accepted this plan and implemented it in good faith.” But, he continued, “because our people did not choose the way the court thought they should choose, the court said, ‘you can’t have freedom of choice.’” He reminded them of the origins of the law and order creed, saying, “Violence is no answer; the solution must come through the legal processes in the courts and through the Congress.” Of course, the courts had “demoralized” students and teachers alike by ordering arbitrary school closure and compulsory assignment orders, all while ignoring segregation in places like New York and Los Angeles. The governor directly fueled segregationists’ fears that integrated education would be a disaster, saying that he had learned from teachers that they could no longer “do any more than try and keep order in their classes.” And why, he asked: because schools had been closed by the courts, solely because they were black schools. The “sum total” of all of this was that the children of Alabama were “not getting the kind of education [they] ought to be getting.” Thus, with the new freedom of choice act, the state was “for the first time . . . on the offensive, finally. We’re getting something done,” he assured them. Brewer reminded the lawmakers and statewide television audience of the recent passage of the Stennis Amendment in the

¹⁸ *Birmingham News*, Feb. 3, 5, 17, 21, 22, 1970; *Race Relations Law Survey* 2, No. 1 (May, 1970), pp. 11-12.

U.S. Senate and then concluded with an anecdote. During his own recent visit to Washington, Brewer said he had passed by the Supreme Court building and beheld the inscription on the faced” “Equal Justice Under Law.” “We have the opportunity,” he said, “to press the advantage we have gained over the last few weeks to insure that the school children of Alabama shall indeed have and enjoy equal justice under the law.”¹⁹

The state legislature unanimously approved the freedom of choice law on February 27, 1970, and the governor signed it into law several days later. White leaders throughout the state roundly praised Brewer, while some quietly suggested that the law’s impact would probably be minimal. Attorney General MacDonald Gallion called it “the best available [proposal] under adverse circumstances.” Gallion added, “Assignment of students to neighborhood schools is the goal of freedom of choice and that seems to be what is wanted by both black and white parents.” The state’s attorney general had recently joined other southern attorneys general in intervening in a Pasadena, California school desegregation suit in a forlorn attempt to assist the Stennis-style push for national implementation. Gallion said that comments he had heard while travelling across the country had been “almost universally in favor of freedom of choice.” State Superintendent Ernest Stone, being intimately familiar with federal court scrutiny, expressed cautious optimism, saying, “I am thoroughly in agreement with the governor’s attempting to do something, but we will just have to wait and see the final outcome.” One state Senator seemed to hope against hope that the Alabama act would have an effect, telling reporters, “Maybe some of our judges will reverse some of their rulings.” Another added, “I don’t know just how the bill will stand up in court, but the least we can do is try.”²⁰

Brewer himself claimed the law was a reversal of past state actions – in which he had admittedly participated – which were “in tune with the wishes of the majority of the people” but which were “unrealistic in the face of problems and failed to get at the real objective.” Items like the state’s

¹⁹ *Birmingham News*, Feb. 24, 25, March 5, 1970.

²⁰ *Birmingham News*, Feb. 22, 24, 26, 28, 1970.

interposition resolution and its several attempts to pass tuition grant legislation were futile, Brewer said, because “the Fourteenth Amendment, in all candor, will prevent getting back to a dual school system no matter what Congress does.” But he argued that the new freedom of choice law had “a chance to stand up to court tests.” The *Birmingham News* agreed, calling the new law the legislature’s “first constructive effort on the school desegregation problem” after “more than a decade of noisy and hopeless defiance.” It was, the *News* argued, a reversal of a “self-destructive trend in recent years,” during which the state government “repeatedly ground out bills and resolutions that almost seemed destined to invite harsher orders.” Now, the state could potentially “demonstrate once and for all that a policy of segregation no longer exists” therein. But as Alabama’s black Democratic Conference president Joe Reed had recently concluded, Alabama’s whites had missed the boat on freedom of choice. If they had adopted it in genuine good faith 15 years prior, it might have stuck. But the litigation now had a life of its own. And state and local officials had demonstrated beyond a shadow of a doubt that they would not eradicate the dual system unless forced to do so.²¹

Local school boards immediately attempted to hide behind the new state law. The Mobile school authorities passed a resolution stating that the school board would not, and school administrators should not, follow the federal court’s January 31 order and that the system would instead operate under the previously adopted plan. The board’s attorney admitted that there were questions about the new law’s constitutionality but claimed that “until it [was] tested and declared unconstitutional,” the statute was “valid.” At the same time, Vernon Crawford, John LeFlore, and the LDF filed a motion in *Davis* asking the court to rule on the constitutionality of the law and add Governor Brewer and Attorney General Gallion as parties defendant to the suit. The normally cautious and flexible Judge Thomas was unwilling to abide such a direct challenge to the court’s authority as the freedom of choice law seemed to present. On March 16, the day which the board was supposed to have

²¹ *Birmingham News*, Feb. 22, 24, 26, 28, 1970.

implemented the January 31 court-ordered plan, Thomas issued a contempt-of-court order which would go into effect if the board had not complied within three days. He threatened the individual members of the board with a \$1,000-a-day fine, insisting that state legislatures could not pass laws to contravene orders of a federal court, nor could they pass laws which would have the effect of destroying rights which such orders had sought to protect or restore.²²

Thomas stopped short of obliging the plaintiffs' motions for an outright judgment on the state law's constitutionality and for the addition of parties defendant. The case was "not the proper vehicle," according to Thomas, who was surely unenthusiastic about the added burden of fully adjudicating the matter. The threat of contempt was enough, however, to force the school board to act, free as it then was to plead helplessness before the white people of Mobile. The following day it agreed to implement the plan by the end of the week, pending petitions for a stay of the order which were subsequently denied by Thomas and by the Fifth Circuit court. Gallion himself then filed a counterclaim against the United States and the plaintiffs in *Davis*, seeking a declaratory judgment from the district court on the constitutionality of the freedom of choice law. A three judge court was assembled to hear the case, and a summer decision loomed, though few could have genuinely believed the court would uphold the law.²³

Meanwhile, the new Mobile desegregation plan went into effect on March 20, and 8,000 or so of the system's 73,000 students at 42 of its 93 schools were told to switch schools. Around 100 white students at Davidson High protested by gathering outside the school and hanging Judge Thomas in effigy. Beyond this incident and a flood of letters, petitions, and calls to the school board, demonstrations were sparse and the "chaos and confusion" portended by the board was lacking, even as violence and mass protest marred school openings elsewhere in the South. This was partly due to the

²² *Race Relations Law Survey 2*, No. 1 (May, 1970), pp. 11-12; *Birmingham News*, March 5, 13, 18, April 17, 1970; Pride, *Political Use of Racial Narratives*, p. 25.

²³ *Race Relations Law Survey 2*, No. 1 (May, 1970), pp. 11-12; *Birmingham News*, March 5, 13, 18, April 17, 1970; Pride, *Political Use of Racial Narratives*, p. 25; *Alabama v. U.S. and Davis*, Civil Action No. 5935-70-P (SD, AL, 1970).

fact that many white students again refused to transfer from the schools they had been attending. About 80 white students reported to formerly all-black Williamson High, a school which had been the object of much white protest, located as it was in what white considered a dangerous neighborhood. That 80 whites actually showed up at Williamson surprised some, but the number of whites assigned to the school was much higher. The plaintiffs in *Davis* would have liked the board to adopt a robust policy of enforcement which ensured that these students moved to their newly assigned schools, it instead adopted a lenient “irregular student” policy. The non-conformers were allowed to remain in the schools of their choice, attend classes, participate in exercises and extra-curricular activity. The board indicated that these students would, however, receive no academic credit for their work “pending further study” by the board itself. Board members publically indicated that they would take no action to remove the students until forced to do so by the court, demonstrating that such a study was probably not quickly forthcoming. On appeal of Thomas’ order, the Fifth Circuit court at the end of March instructed the board to compile a report of the actual attendance at each school in the system, with the likely next step being some sort of forced implementation policy.²⁴

Pending a hearing that summer in the Jefferson County case, the county system proceeded that spring under Judge Lynne’s emergency relief ruling and the school board’s own lenient “irregular” student policy, which was similar to Mobile’s. Many white students simply continued attending the school they preferred until someone told them to do otherwise, which the school board was not quick to do without court prodding. The county’s schools were, nonetheless, more integrated than they had ever been, by far. A spike in interracial fights surprised no one. Of more concern was an increase in the number of significant vandalism incidents. The school board reported fire damage and glass breakage at five schools in the county between late January and the end of the school term. Most alarming of all

²⁴ *Race Relations Law Survey* 2, No. 1 (May, 1970), pp. 11-13; *Birmingham News*, March 6, 20, 21, 31, 1970; *New York Times*, March 21, 1970; see for bombing and riot in Lamar, South Carolina, *New York Times*, March 5, 6, 8, 11, 1970, and for bombing of Arkansas school board member’s home, *Arkansas Gazette*, Feb. 3, 1970.

was the destruction of a large portion of Graysville High – the formerly all-black Alden High – to which a number of white students had been assigned, with few actually attending. Vandals, thought to be three local white men, broke into the school at night in mid-April and embarked on a rampage that resulted in myriad damage: nearly 100 broken windows, a dozen broken television sets, a destroyed intercom system, multiple telephones and clocks ripped from the wall, swaths of ceiling torn down, library equipment smashed, water fountains crushed, raw food strewn about the lunchroom, and portions of sheetrock destroyed with an axe. By the end of the summer, both the Jefferson and Mobile school boards would organize citizen patrols to keep watch on school facilities, and Jefferson would see its property insurance cancelled. The boards in each case were not shy about publicizing the violence, because like overcrowding it provided proof that desegregation did not work. Sensing this, white students in some cases had already taken advantage. At Bessemer's McAdory High, several white students inflicted superficial razor wounds on themselves and reported that they had been cut by gangs of blacks, only to later recant. Rumor-mongering and actual incidents of interracial violence further eroded whites' floundering confidence in desegregated schools. With positive reinforcement either entirely lacking, or being drowned out by continuing rallying cries to defiance, the white exodus continued.²⁵

Secession Redux: Metropolitan Birmingham

Even before *Carter v. West Feliciana*, suburban Birmingham communities were preparing to sever themselves from the Jefferson County system and form independent school systems which could remain safely white. All-white Mountain Brook, the wealthiest city in the state, had already done so in 1959. Mountain Brook residents had also led a campaign to block a proposed merger of Birmingham and its suburbs in 1964. But it was not just wealthy, "over the mountain" communities to Birmingham's

²⁵ *Birmingham News*, Sept. 10, 1969, April 22, 24, June 29, 1970.

south which were considering secession. The all-white city of Hueytown on the city's western edge had been flirting with the option of severance for over a year. As *Green v. County School Board*, *Alexander v. Holmes*, and then *Carter* made it progressively clearer that the Jefferson County desegregation plan would involve some kind of geographical zoning scheme and perhaps even some level of "busing," other cities initiated the secession process. Like the black leaders in Mobile drawn to the Innes plan, cities planned to use the state's post-*Brown* law allowing municipalities over 2,500 persons to form splinter systems in the event that a majority of the community and the county school board approved.²⁶

In December, 1969, the city of Homewood – just over Red Mountain, south of Birmingham and west of Mountain Brook – adopted a resolution setting up a school system and appointing a board of education. It was followed in April by the city of Vestavia Hills, just south of Homewood and Mountain Brook. Both cities planned to offer jobs to all teachers and staff in the city's existing county schools and to offer to purchase the schools themselves from the county. There were some intricacies involved, particularly in Homewood's case. Shades Valley High School could not be purchased from the county, as it was outside the Homewood city limits. The school board planned to offer the county tuition for its high school students to continue in attendance there until the city could build its own high school. The all-black Rosedale High was within the Homewood city limits, however, and white leaders used this as leverage to obtain support from the city's relatively small, working class black population. Rosedale was to be closed as part of the court-ordered Jefferson County plan, and the new city school board suggested that it could keep the school open and operating for blacks in the event of a successful splinter. After obtaining the blessing of the Rosedale PTA, city school officials touted the support as part of a supposedly race-neutral effort at local control. The Homewood City Council admitted that it had no problems with the way the county had run its schools, but it similarly refused to be totally forthcoming about its flight. The council president announced, "We feel that by setting up a Homewood school

²⁶ See on the initiation of severance by Hueytown and Mountain Brook, CH 14, *supra*.

system to operate on a local basis, we can better concentrate our energies toward providing our children with the best possible education.”²⁷

Over-the-mountain Homewood and Vestavia Hills had been directly preceded in their flight by the all-white, working class city of Pleasant Grove – on Birmingham’s western edge, adjacent to Hueytown. The Concerned Parents movement had begun in this western section of Jefferson County. In fact, many western Jefferson white parents had been so angry about the county’s pending desegregation plan that summer because they felt like the over-the-mountain white schools had been allowed to remain nearly all-white, while – in the words of Concerned Parents president David Borella – “the Western section [had] borne the brunt of all integration in Jefferson County.” Pleasant Grove had thus in August, 1969 moved to set up a school board and had prepared to offer teachers at its schools jobs in its new system. It had also initiated talks with the Jefferson County system about purchasing the schools within its city limits. Pleasant Grove officials had made no mention of race or court orders, as Hueytown had recklessly done some months before. The plaintiffs in the *Stout v. Jefferson* case had quickly filed a motion with the district court seeking an injunction against the Pleasant Grove secessions, however. Judge Lynne delayed any ruling on the motion as the repercussions of the *Alexander* and *Carter* rulings manifest themselves over the course of the fall and winter.²⁸

While no motion to include the over-the-mountain systems had followed the challenge to Pleasant Grove, the plaintiffs in the *Jefferson* case believed that a ruling on one city would successfully bind the others. Attorney U.W. Clemon argued as much and maintained that allowing the overwhelmingly white city systems (or completely white in Pleasant Grove’s case) to break away would be a clear frustration of the county’s effort to convert to a unitary system. “At the present time,” Clemon said in January, 1970, “any community which is a white community, which seeks to withdraw from a school system that is under a desegregation plan, is doing so for racial motives.” The

²⁷ *Birmingham News*, Dec. 23, 1969, Feb. 3, 1970.

²⁸ *Birmingham News*, Aug. 8, 1989, Jan. 11, 13, 26, 1970.

Birmingham *News* was even more clear, declaring it “obvious” that “municipalities with few or no Negroes would stand to preserve their racial characteristics by going independent. Within a larger school system which has a nearly equal ratio of white to black students,” it continued, “such cities could expect to gain more black students.” Each system would also, ostensibly, free itself from faculty desegregation obligations. When the post-*Carter* desegregation plan for the county finally went into effect, Pleasant Grove began operating its own schools, free of county interference. Homewood and Vestavia remained part of the county system, as they planned to activate their independent systems in the fall. But with the challenge from the plaintiffs in *Jefferson* to Pleasant Grove, each system’s status hung in the balance, awaiting the decision of Judge Lynne, who finally set a hearing on the motion for June. In the meantime, county officials remained wary of selling the school facilities to the city systems, prompting Homewood to file a suit in state circuit court seeking to compel them to do so.²⁹

The over-the-mountain suburbs continued to benefit from white anxiety over the implications of compulsory assignment desegregation, and more and more whites gradually escaped the city of Birmingham. The population of the so-called Magic City dwindled, as the populations of Mountain Brook and Vestavia Hills especially swelled. Leading a great trek even farther south than those cities, though, was the segregationist academy pioneer William Hoover. His Hoover Academy project was floundering. Affluent white families were simply leaving the city, and others felt they could not afford the private school option. The fledgling academy was forced to bounce from location to location within and just west of the city of Birmingham in search of a permanent home which would draw an optimal number of families. When its founders acquired public school property from the tiny western Birmingham suburb of Brighton, a court challenge threatened the school’s future, and William Hoover began to more seriously consider other long-term solutions to the school desegregation problem.³⁰

²⁹ *Birmingham News*, Aug. 15, 1969, Jan. 13, 26, 30, 31, Feb. 3, 5, 27, 1970.

³⁰ *1970 Census of Population*, Characteristics of Population (Washington D.C.: Government Printing Office, 1972). The populations of the following cities increased as such from 1960 to 1970: Homewood, 20,289 to 21,245

Hoover's gaze had, in fact, turned south and across Red Mountain years earlier. In 1953, just months before the *Brown* decision was handed down, he had purchased land in a quiet residential enclave south of Vestavia Hills, along the recently improved and expanded U.S. Highway 31. Shortly after the Fifth Circuit ruling in *U.S. v. Jefferson* and the statewide order in *Lee v. Macon* in 1967, the arch-segregationist, anti-Semite, and American States Rights Association financier founded the City of Hoover. Its initial population was only 400, but the city almost immediately began annexing unincorporated neighboring communities, and it grew rapidly. It soon became contiguous with the cities of Pelham (incorporated in 1964) and Alabaster (incorporated in 1953) in neighboring Shelby County, even further south. This created a chain of predominantly white suburbs which snaked south along the route of Interstate Highway 65. Wealthy whites soon flocked to the exclusive neighborhoods surrounding Hoover's two country clubs and buzzed about its planned shopping mall—the Hoover Mall. The scheduled expansion of the Interstate Highway system promised to bring the intersection of I-65 and the I-459 bypass to the center of the city, too. The certainty of a rapid commute by car to downtown Birmingham and the possibility of swift economic development enticed still more wealthy families to move south. In early 1970, the city's population was still modest, and it remained within the Jefferson County school system. However, its timely founding and strategic location placed it in a perfect position to benefit from impending white flight, especially as the promise of independence from the Jefferson County desegregation plan seemed a distinct possibility.³¹

(4.7%); Mountain Brook, 12,680 to 19,474 (53.6%); Vestavia Hills, 4,029 to 12,250 (204.0%). During the same period, the population of the City of Birmingham decreased from 340,887 (1960) to 300,910 (1970), an 11.7 percent loss.

³¹ Faye Doss, "Hoover," *Encyclopedia of Alabama* (Alabama Humanities Foundation, A Service of Auburn University, The University of Alabama, and the Alabama Department of Education: 2010, 2012), <http://www.encyclopediaofalabama.org>, accessed Jan. 15, 2013; *1970 Census of Population*, Characteristics of Population (Washington D.C.: Government Printing Office, 1972); the population of Hoover increased from 400 upon incorporation in 1967 to just 688 in 1970, though it would increase to 19,792 by 1980. On William Hoover and the American States Rights Association, see Chapter CH 9, *supra*; on Hoover Academy, see CHs 7, 10, *supra*.

The Gubernatorial Election and New Court Orders in *Davis and Jefferson*

In early June George Wallace defeated Albert Brewer in the Democratic primary for governor, which in Alabama was still tantamount to winning the election outright. According to Wallace biographer Dan Carter, Brewer had been “one of the most capable chief executives his state had known in the twentieth century.” He was a “man of uncommon decency, integrity, and administrative ability” who had “cared deeply about the details of government and worked hard to recruit first-rate, honest administrators.” Brewer’s own biographer has argued that he brought to the governor’s office “a businessman’s zeal for efficiency, quality, and accountability.” By the end of his term, he had significantly increased education appropriations, spending nearly \$24 million on various reform efforts, including increasing teachers’ salaries. Brewer had indeed been passionate about reforming public education in Alabama, which required that he attempt to save it first.³²

But Brewer’s education policy did not necessarily “[stand] out in stark contrast to the politically motivated actions of the Wallace years,” as one historian has claimed. Brewer was a reformer, but he was not above politics. Sensing that Wallace’s reckless defiance had run its course, he situated himself in the midst of the developing law and order movement. He led resistance to court-ordered desegregation in a way that he felt was politically responsible, choosing to reluctantly accept freedom of choice while bitterly condemning compulsory assignment. He thought this would win over the majority of the white electorate, who mostly felt the same way. Unfortunately for Brewer, the politically astute Wallace also moved towards such a position, understanding that he had *nearly* exhausted the stand-in-the-door approach. Perhaps most tellingly, both men’s central position on school desegregation at the time of the election was that parents should take their children to the schools of their choice despite the adoption of the recent court-ordered plans. With little difference between them on the issue, Wallace

³² Carter, *Politics of Rage*, pp. 385-6.

was free to gain ground by taking the low road, which by then he knew so well, and which Brewer – to his credit – proved unwilling to walk³³

The de facto winner of the previous two gubernatorial elections, Wallace capitalized on his previous defiance – ignoring his obvious failures, of course – and focused almost exclusively on courting the working class. It was a clever approach, since the burden of desegregation often fell disproportionately on poorer whites, who could not afford to move or to pay private school tuition, or whose neighborhood schools were often slated to take the bulk of black students from closed black schools. Wallace advisor Ace Carter began calling Brewer “Alabama’s number one white nigger,” and he and other advisors suggested that Wallace try to “throw the niggers around Brewer’s neck.” In a campaign that Dan Carter has characterized as “a low point even for Deep South race baiting,” Wallace routinely called Brewer a “sissy britches” who was “soft on intergration,” despite the fact that Brewer’s rhetoric and actions proved otherwise. It was especially ironic since Brewer’s own approach held out more hope of successfully blunting integration than Wallace’s old, self-defeating approach. Wallace told voters that Brewer was in the pocket of wealthy Mountain Brook types who talked school intergration and then retreated to the “lily white” Mountain Brook school system and the “Mountain Brook Country Club” where they would “sip on those little martinis with their little fingers high in the air.” He followed with working class and regional appeals like, “The working man is going to see to it that his child is treated that same as the child in the East, the North, and every other section of the country.” Reaching into the political gutter at the same time, Wallace’s campaign also circulated doctored photos of Brewer with the black boxer Cassius Clay and the Nation of Islam leader Elijah Muhammad. Even more damning was a Wallace campaign leaflet featuring a picture of a little white girl on a beach surrounded by black boys, captioned, “This could be Alabama Four Years from Now!”³⁴

³³ Harvey, *A Question of Justice*, pp. 63-4.

³⁴ Carter, *Politics of Rage*, pp. 385-95; *Birmingham News*, Sept. 8, 1970.

Wallace accused Brewer of cavorting with the Justice Department attorneys, whom he also called "sissy britches from Harvard who spend most of their time in the country club drinking tea." He similarly accused Brewer of working with Richard Nixon, which in this case turned out to be more true than Wallace even knew. Nixon feared Wallace's imminent third party run for president and actually funneled nearly half a million dollars, via clandestine hand-offs, to the Brewer campaign, which then laundered the money. The Nixon White House also sent the IRS after Wallace's carelessly corrupt brother, Gerald. It was not enough for Brewer to stave off Wallace, however. Brewer placed first in the May 5 primary but failed to win a majority of the votes. The ensuing runoff became, in Dan Carter's words, "a referendum on Alabama voters' admiration for macho politicians *and* their fear of blacks." As the sensible segregationist, Brewer carried the nascent black vote, as the lesser of two evils, and the upper-middle and upper class white vote in the cities. Wallace dominated the rural districts, the small towns, and the working class precincts in the cities, as the man who would "stand up and fight" like a man for white integrity. Brewer had refused to stoop to Wallace's level and engage in a "smear" campaign. More importantly, Brewer's strategy for preserving the remaining vestiges of segregated education failed to arouse the same kind of passionate zeal in the average white voter that George Wallace's record of direct defiance still did, failure though it had been.³⁵

In the midst and immediate aftermath of the campaign that summer, federal courts entered important orders in the *Stout v. Jefferson* and *Davis v. Mobile* cases which had implications for metropolitan white flight. In July U.S. District Judge Seybourn Lynne issued his ruling in *Jefferson* as to the suburban splinter systems. Lynne allowed the three cities to break away from the Jefferson County system, under specific conditions. Each was ordered to accept black students choosing to attend its schools from a certain geographical zone near its borders. Homewood and Vestavia Hills were ordered to hire black teachers to achieve a 25 percent desegregated faculty ratio by the start of the 1971-72

³⁵ Carter, *Politics of Rage*, pp. 385-95.

school year. Vestavia was ordered to enroll black students, from an area adjacent to its borders, who had formerly attended Vestavia Hills Middle School. Pleasant Grove was ordered admit 50 black students from within a two mile radius of its borders. Lynne rejected an HEW plan which would have paired the new municipal schools with predominantly black schools in other parts of the county. Had these orders been issued to independent school systems five years prior, they might have stung. Coming when and how they did, they amounted to a deal – between Lynne, the increasingly reluctant Nixon Justice Department, and the municipalities – which essentially allowed the formation of the new city systems under freedom of choice. The areas from which each was ordered to accept black students were sparsely populated. In the event black students did elect to attend schools within the new systems, no system faced the sort of black-white ratio which had caused parents to flee the Jefferson County system in the first place. Meanwhile, the county system was left with a depleted tax base and an obligation to pay tuition charges to those systems that did accept black students on transfer. Perhaps most importantly, the racial ratio in the county was to be even more heavily black than it had been before, which itself caused more parents to consider fleeing the system. The LDF appealed the ruling, hopeful that the Fifth Circuit Court of Appeals would reverse Lynne’s order.³⁶

Already that summer, the Fifth Circuit court had reversed Judge Thomas’ most recent approval of the Mobile desegregation plan in *Davis*. The *Davis* case had moved back and forth between the trial court and the appellate court so many times since the original decree of 1963 that the *Birmingham News* characterized the process as “legal ping pong.” On June 8 the appellate court instructed Thomas to order the implementation of a more stringent plan, which it set out in its decree. Closely following the proposals of the Civil Rights Division, the appellate court altered the attendance zones for the city-county system such that only one of the system’s eight high schools and two of its fifteen junior high schools would have racial minorities which constituted less than 10 percent of their total enrollment.

³⁶ *Birmingham News*, July 26, Aug. 2, 1970; *Race Relations Law Survey* 2, No. 4 (Nov., 1970), p. 130.

The plan made use of pairing and grade restructuring but stopped short of utilizing non-contiguous, “split” zones or widespread mandatory transportation to achieve desegregation – the hallmarks of “busing.” The court ordered the implementation of a system-wide faculty desegregation policy which conformed to the *Carr v. Montgomery* ruling, meaning the black-to-white teacher ratio in each school would have to be roughly equivalent to that of the system as a whole (60 percent white and 40 percent black). The court insisted that the desegregation plan include a liberal majority-to-minority transfer policy with mandatory transportation. This was designed to give black students the freedom to transfer from the system’s remaining majority-black schools to predominantly white ones, and it thus provided the possibility of significant busing. Finally, the court ordered Judge Thomas to direct the appointment of a biracial committee, which it argued would have potentially allowed the parties to avoid litigating some the issues lately before it and the trial court.³⁷

Judge Thomas entered the appropriate orders on June 13 and 14, which were themselves appealed. Thomas had been faithful enough to the appellate court’s directive that it upheld his orders in early August, with one change. The court ordered the pairing of two of the system’s seven remaining all-black elementary schools with nearby white elementary schools. This would reduce the number of black students attending all-black elementary schools to 5,310, or 17 percent of the total black elementary school population in the system. White parents were livid. Around 80 of them marched on the federal court building and demanded an audience with Judge Thomas, who shockingly granted the spontaneous request despite its wholly irregular nature. Thomas allowed the parents to fill his courtroom, and he listened patiently for nearly two hours as they begged for redress. One parent told the judge, “You and no court can make us send our children into areas where there is violence, crime, dope, rape, and what-have-you.” Another vowed, “We are not going to accept this situation at all, and

³⁷ *Davis v. Board of School Commissioners of Mobile County*, 430 F.2d 883, 889 (5th CCA, 1970), reversed 402 U.S. 33 (1971); *Race Relations Law Survey* 2, No. 3 (Sept., 1970), pp. 92-3; *Birmingham News*, June 16, Sept. 1, 1970.

there will be thousands of us doing the same.” He added, “We don’t want to get out in the streets or do anything unlawful, but we must have something done. This is beyond tolerance.” Thomas responded plainly and informally, admitting, “For nine years I have fought this thing and tried to slow it down.” But he explained to them what so many whites across the state failed to understand: he was bound by the dictates of the appellate courts. He said he would undertake another review of the system’s plan and provide whatever relief he could, but he added, “Don’t expect any magic wands.” In late August as schools were preparing to open, Thomas approved the alteration of 32 school zones “on the basis of efficient school administration” and in the absence of any “racially discriminatory purpose.” On appeal of this action, the LDF’s protested the trial judge’s impromptu meeting with white parents and flagrantly biased statements, but the Fifth Circuit this time upheld Thomas’s decision. Understanding that, at that point, the parties to the litigation were in the habit of appealing every order entered by the trial court, the appellate court insisted that the plan, thusly altered, be put into effect notwithstanding any further appeals entered by any party.³⁸

Meanwhile, the state’s recently enacted freedom of choice law came before Judge Thomas as part of a separate action. When state officials had sought court sanction for the law earlier via the *Davis* case, Thomas had refused to rule on the issue. So the state filed *Alabama v. U.S. and Davis*. A three-judge court was named to hear the case, as it involved the constitutionality of a state statute. Thomas and fellow Mobile-based Judge Virgil Pittman joined Tuscaloosa’s Circuit Judge Walter Gewin in essentially brushing the law aside with the quick wave of the judicial hand. In late June, the court argued that the effect of the law was “to make school administrators neutral on the question of desegregation and [to limit] their tools for the accomplishment of this constitutional obligation to ‘freedom of choice’ plans.” Of course, “an unwavering line of Supreme Court decisions,” most notably

³⁸ *Davis v. Board of School Commissioners of Mobile County*, 430 F.2d 883, 889 (5th CCA, 1970), reversed 402 U.S. 33 (1971); *Race Relations Law Survey* 2, No. 3 (Sept., 1970), pp. 92-3, and No. 4 (Nov., 1970), p. 129; *Birmingham News*, June 16, July 17, 1970, Aug. 20, 1970.

Green, had established that freedom of choice was an inadequate remedy when other means were reasonably available to allow systems to more quickly and effectively attain unitary status. Also, the Court had firmly established that “more than administrative neutrality” was required of local school officials. Accordingly, the three-judge court held, “The settled state of the law convinces us that there is no substantial federal question presented in this case. Where Section 2 of the subject Act conflicts with an order of a federal court drawing its authority from the Fourteenth Amendment,” it continued, “the Act is unconstitutional and must fail. The supremacy clause of our compact of government will admit to no other result.” Thus was the state’s latest legislative attempt at defiance summarily dismissed. Albert Brewer lamented this and that summer’s other court orders and issued a ludicrous charge for the state’s trial court judges to defy appellate court rulings. The lame duck governor argued that federal court orders were “destroying the public school system” and added, “I would like to see a federal judge stand up on his hind legs and say he wasn’t going to do it, if he felt it violated the law and not what some other judge has said.”³⁹

Fall, 1970 Openings

As school systems prepared to open in the fall of 1970, compulsory assignment orders had again drastically increased the number of black students enrolled in predominantly white schools across the state and the South. The number in Alabama had, in fact, quadrupled since the fall of 1968. Without a freedom-of-choice state law to hide behind, school systems had to face the hard reality that direct defiance of court orders was no longer feasible. Some state and local leaders spoke up in a desperate attempt to avoid the kind of catastrophic school opening that many portended. A recently appointed and, it turned out, short-lived state advisory committee on public education issued a law-and-order-style statement in which it set out two irrefutable facts: “The federal court orders under which Alabama

³⁹ *Race Relations Law Survey* 2, No. 3 (Sept., 1970), p. 91; *Birmingham News*, July 2, 1970.

and other Southern school districts will open this fall are binding and will be enforced, [and] disorder will not cause court-ordered systems to be rescinded or modified” [sic]. The *Birmingham News* counseled the citizens of Alabama, “Rules, however unpalatable some may find them, are essential and will be enforced, and . . . order will prevail.” Some local systems made notable attempts to stave off potential problems. For example, The Birmingham City Board of Education worked with the Greater Birmingham Ministries of the United Methodist Church in organizing informational workshops and a rumor hotline for the dissemination of facts about the impending plan ahead of schools’ opening. But the response from parents was minimal. Concerned Parents groups, as it turned out, were much more effective in mobilizing support.⁴⁰

As with the reshufflings of the previous winter and the fall of 1969, white resistance remained palpable, particularly in Jefferson and Mobile Counties. In Mobile, the county officials again set the tone, reacting incredulously to the disregard for neighborhood boundaries in favor of “racial balance.” The school board’s attorney attacked the appellate court-mandated desegregation plan set to go into effect as “conceived in stupidity in just four days.” School board members objected to its “ridiculously gerrymandered zones.” And Superintendent Crawford Burns argued that the plan was “so fraught with mistake and error” as to be “functionally impossible” to implement. The board appealed the ruling to the Supreme Court, where it awaited adjudication that fall alongside the *Swann v. Charlotte-Mecklenburg* case, but school officials could not stop its implementation in the meantime.⁴¹

Vernon Crawford and the LDF appealed the latest *Davis* rulings as well, though the Justice Department chose to support them. The LDF objected to the fact that, despite the redrawing of zone lines, the section of the city east of I-65 – where nearly 94 percent of the metropolitan area’s black population resided – continued to be treated as distinct from the western section. The effect of this was that schools on the eastern side were 65 percent black and 35 percent white, while schools in the west

⁴⁰ *Birmingham News*, Aug. 13, 23, 1970.

⁴¹ *Birmingham News*, June 28, 1970; *New York Times*, Sept. 13, 1970.

were 12 percent black and 88 percent white. Actual enrollments that fall brought this into starker relief. The numbers did not bear out the projections in the Fifth Circuit and district court plans and orders. This was particularly evident in the city's elementary schools, 9 of which remained over 90 percent black and enrolled 64 percent of the metropolitan area's black elementary school students. Actual enrollments also revealed that 6,746 black junior and senior high school students, or over half of the metro area's total, were attending all-black or nearly all-black schools.⁴²

Contributing to the disparity in projections and actual enrolments were large numbers of "non-conforming" white students, who were again supported by widespread white student and parent protests and encouragement from state officials. The *Washington Post* called it "perhaps the strongest challenge of the fall to the federal desegregation drive in the South." At a Labor Day rally in the working class suburb of Prichard, Governor-nominate Wallace counseled parents among the 6,000 gathered whites to resist compulsory assignment. STAND's Pierre Pelham introduced Wallace and took the opportunity to take a jab at Governor Brewer, thanking the audience for taking the governor's office "out of the hands of the Big Mules and putting it in the hands of the people of Prichard, Alabama." Wallace suggested to all the parents there, "If I were you, on school day, I would exercise your freedom of choice in the peaceful way you always do things, in the hopes that someday [you] are going to get some relief." He added, "Don't give up now . . . 'cause we going to keep on and on and on and on until we get our schools back." Wallace insisted that "the hardball movement, the working man's movement, the average man's movement" was going to "get equity in school matters the same as many years ago." While Wallace spoke, members of Mobile's newly organized chapter of Concerned Parents and Citizens passed out flyers instructing parents to accompany their children to the schools of their choice and greet the administration with, "This is the school of my choice. I will not leave until my demands are met!" The flyers assured parents that it was the school board which was under court order, not them; parents

⁴² *Davis v. Board of School Commissioners of Mobile County*, 402 U.S. 33 (1971).

were “legally within [their] rights to choose the school in which to have [their] child educated.” They were told not to sign “conformist papers” and to remember that “freedom comes first!” Meanwhile, from the capitol in Montgomery, Brewer called the Mobile desegregation plan a “pure case of gerrymandering with no regard for school district or zone lines.” He added that he expected a peaceful opening despite that fact that “most of us are not pleased with the court orders.”⁴³

Over 1,100 of Mobile’s white students showed up on the first day of classes at the schools of their choice rather than the ones to which they had been assigned. In many cases they were accompanied by parents who vowed to remain in these schools until they were satisfied that their children would not be removed. One such woman claimed to reporters, “I am going to stay here every day until my daughter is allowed to attend this school. This ridiculous business of having to go miles across town,” she added, “with a school right around the corner has me just about crazy.” Concerned Parents and Citizens members waited at desks outside formerly all-white schools and passed out information for potential non-conformists. The local chairman of the group, Melvin Himes, accompanied his own daughter to formerly all-white Mae Eanes Junior High in lieu of formerly all-black Booker T. Washington, to which she had been reassigned. Himes sent his son to a nearby segregationist academy recently opened by his church. He argued, “If we can’t enroll [our children] under freedom of choice, we’re not going to enroll them,” adding, “I’m just exercising my constitutional rights.” The *New York Times* likened Himes and the protesting Mobile parents to civil rights activists, compared their movement to the sit-ins, and suggested sardonically that they might soon be singing the unofficial anthem of the classical phase of the civil rights movement, “We Shall Overcome.” Concerned Citizens subsequently organized a 4,000-strong “protest and prayer” march to the federal building in downtown Mobile. Led by Mobile Mayor Joe Bailey, the group dressed in black and carried signs reading, “We Want Our Schools Back” and “Supreme Court Has Outlawed Our Laws.” At the federal courthouse, they prayed that the Supreme

⁴³ *New York Times*, Sept. 13, 1970; *Washington Post*, Sept. 9, 15, 1970; *Birmingham News*, Sept. 1, 8, 23, 28, 1970; Pride, *The Political Use of Racial Narratives*, pp. 101-2.

Court might receive guidance and enlightenment while considering the pending *Davis* appeal and that all federal courts might soon see the error of their ways.⁴⁴

There were immediate problems in Mobile beyond these Concerned Parents protests. In addition to those white students who showed up at their former schools regardless of their assignment, a number of parents hastily moved to other zones where the percentage of black students was lower. Others used the addresses of friends or relatives in these zones or simply falsified their addresses altogether. The most blatant example of this was the Davidson High School zone, wherein a relatively small number of black students were assigned to a new school on the mostly white, western outskirts of the city. Davidson began the year over-enrolled by nearly 1,000 students due to the enrollment of students who had changed their address just prior to the opening of school. Along with the non-conformers and the address-changers were those who simply stayed home. Many of these had either enrolled or were preparing to enroll in one of the Mobile region's nearly 30 segregationist academies. All told, the impact on certain schools was profound. White students continued to boycott, in large numbers, formerly all-black schools like Williamson High, where 786 whites were scheduled to join 323 blacks, but only 219 whites showed up. Fewer than 100 of 725 white students showed up to Booker T. Washington Junior High, where 800 blacks were also enrolled. Fewer than 20 whites appeared at Central Junior High, a formerly all-black high school where 1,200 blacks were enrolled. In neighboring Prichard, around 150 whites out of a scheduled 850 showed up to register at formerly all-black Blount High. Many of the whites assigned to Blount showed up instead at formerly all-white Vigor High. One mother who accompanied her son to Vigor told nearby reporters, "It's not integration [we're upset about], you know [it's] all this mess – this utter chaos and confusion."⁴⁵

⁴⁴ *New York Times*, Sept. 9, 13, 1970; *Birmingham News*, Sept. 1, 8, 23, 28, Oct. 2, 1970; Pride, *The Political Use of Racial Narratives*, pp. 101-2.

⁴⁵ *New York Times*, Sept. 10, 13, 1970; *Birmingham News*, Sept. 10, 11, 23, 28, 1970; Pride, *The Political Use of Racial Narratives*, p. 101-2.

White students also began to boycott certain formerly all-white schools on account of the large number of black students assigned thereto. For example, 1,000 whites were scheduled to enroll and attend Murphy High – the first desegregated school in the Mobile system and one of the first in the state. Murphy’s troubles were compounded by the fact that it became the epicenter of the fall’s most serious outbreak of violence between black and white students. It was slated to become the system’s first majority-black school in the middle of a white neighborhood. The numbers of actual students in its hallways on the first few days of school were augmented, on both sides of the racial divide, by non-students who infiltrated the school, anticipating and encouraging the outbreak of disturbances. The first week of classes at Murphy began with 1,283 black students and 883 white students in attendance, not counting these “outsiders.” Within two days, white students responded to complaints of black students “shaking down” whites for money in bathrooms and began inciting fights with groups of black students. A series of skirmishes led to an all-out brawl by the end of the week, prompting school officials to call in the Mobile police, who responded with a riot squad to contain the “ugly, intolerable” situation. By the beginning of the second week of classes, nine black students had been arrested on charges of disorderly conduct. The continuing presence of the police restored “law and order” by the end of the week, but by then there were fewer than 400 white students attending. White faculty at the school also threatened a walkout if “trouble reoccur[ed].” The teachers and administrators issued a resolution to the school board, declaring, “We shall consider not returning to school until federal marshals are provided for the protection of faculty and students, since we feel the added protection should be federal and not entirely at local expense.”⁴⁶

The notion that restoring order and otherwise enforcing the court-ordered desegregation plan ought to be the concern of federal authorities pervaded the white community in Mobile. The school board took the position, for example, that the Justice Department or the court should take responsibility

⁴⁶ *New York Times*, Sept. 13, 1970; *Birmingham News*, Sept. 11, 12, 13, 15, 23, 28, 1970.

for eradicating the problem of non-conforming students. The chairman of the Mobile school board announced, "It's an asinine law, and its theirs and they can enforce it." The Fifth Circuit appellate court had already entered an order stipulating that "students who refuse[d] to attend the schools to which they [were] assigned by the school board" could "not be permitted to participate in school activities, including the taking of examinations" and receiving grades. Judge Thomas had subsequently taken the unusual step of strengthening this with a declaration that students should not be enrolled in or furnished textbooks by schools other than the ones to which they had been assigned. After the opening of school revealed widespread non-conformity, the school board announced that it "assumed that the court intended that nonconforming students shall be afforded all other privileges not explicitly denied by his order." The Civil Rights Division promptly petitioned Thomas for a further order prohibiting the use of school facilities and equipment by non-conforming students. Thomas granted this motion and entered such an order, but he stopped short of granting the LDF's motion for a contempt citation against the school board for its continuing tolerance of the situation. By the end of the second week of classes, school administrators had begun to insist that the irregular students leave their campuses, and the number of non-conformers dropped from over 1,000 to around 600 at 22 schools throughout the system.⁴⁷

Amid widespread desegregation in the South that fall, the *Los Angeles Times* observed, "No state in the region has had problems as severe as Alabama." The *Times* acknowledged that not only the Mobile school board, but the Jefferson County school board as well, had "done little to enforce pupil assignments under court intergration orders." The enrollment numbers in Jefferson County schools revealed a non-conformist movement and white flight movement similar to that underway in Mobile. Around 6,000 students were attending the newly created Pleasant Grove, Homewood, and Vestavia Hills school systems, whose existence had been recently sanctioned by Judge Lynne. No black students were

⁴⁷ *Race Relations Law Survey* 2, No. 4 (Nov., 1970), p. 129; *Birmingham News*, Sept. 14, 15, 17, 1970.

attending Pleasant Grove schools, while fewer than 100 were attending Vestavia and Homewood schools. In the county schools, white students and their parents followed the Concerned Parents paradigm: they avoided formerly all-black schools and instead showed up at the schools of their choice and refused to leave. One white student out of a scheduled 450 showed up at Graysville High, where most of the 400 blacks scheduled to attend did arrive. It was common knowledge among school officials that most of the whites scheduled to attend Graysville had simply enrolled in nearby, predominantly white Minor High. Lone white students also enrolled at nearby Westfield High, with 812 black students, and Woodward School, with 281 black students, and left shortly thereafter in each case. No whites showed up at Red Ore School, Brighton Elementary, Brighton High, or A.G. Gaston High. The LDF plaintiffs in the *Stout* case filed a motion with Judge Lynne's court seeking a contempt citation for Jefferson County Superintendent Revis Hall, whom they charged with blatant disregard for what they estimated were 10,000 non-conforming students. Attorney U.W. Clemon argued, "These schools that were all-black two years ago are still all-black," as a result of widespread disregard of assignments. Clemon insisted that it was the Jefferson County school board's duty to "seek out those students" who were refusing to conform to the plan "and see that they attend schools either in the zones where they live or attend private school." Clemon had already appealed the plan on the basis that certain schools should have been paired, that transportation and priority space should have been provided for majority-to-minority transfer students, and that the school board should not have been allowed to make changes in zone lines with no notice to the court or the plaintiffs.⁴⁸

Birmingham City Schools experienced non-conformity and absenteeism as well, though not as markedly as Jefferson County and Mobile. Enrollment in the first week in Birmingham was down approximately 4,000 from an expected 60,000, as some students fled to neighboring districts or to private schools. Many simply stayed home to avoid anticipated violence and ultimately returned in the

⁴⁸ *Los Angeles Times*, Sept. 1, 21, 1970; *Birmingham News*, Aug. 31, Sept 1, 2, 1970.

coming weeks. In addition to the no-shows were the non-conformers, however. Around 70 parents and students showed up at the formerly all-white Glen Iris School in lieu of the formerly all-black Center Street. Five whites showed up at Center Street. Teachers were absent, as well. Only three of the seven assigned to Center Street showed up for work. Superintendent Raymond Christian was rhetorically resolute about his duties under the court order, saying, "I cannot register students who have not been assigned I cannot accept their fees. I cannot issue them books." Christian claimed that the school system would also not tolerate teacher non-conformity, saying, "If a teacher who has been transferred to a different school goes to her old school, then the principal will tell her she is at the wrong school and ask her to go to the school to which she has been assigned. If she insists on remaining at her old school," he added, "she will be given no duties there" and would "in effect be giving up her job." Despite the tough talk, the parents and students were not removed, and the teachers were not removed or replaced. Clemon was thus compelled to enter a motion for an order forcing Birmingham to remove the students and parents at Glen Iris and to force teachers to conform or be fired.⁴⁹

Judge Lynne was willing to quickly enter relief as to the more egregious examples of defiance, but on widespread student non-conformity, particularly in Jefferson County, he was reluctant to act. On the motion of the LDF, Lynne entered an order in which he acknowledged that parents in Birmingham had "repeatedly accompanied their children to certain schools outside of their legally prescribed zones . . . occupied those schools with their children . . . directed their children into classrooms in those schools notwithstanding the request of school personnel to the contrary, [and] engaged in other conduct disruptive to the normal operation of schools and interfering with the implementation of the court order." Lynne then threatened the parents with a show cause order and contempt citations if they did not cease and desist. He also entered an order against protesting teachers in Birmingham. The teachers were hiding behind the state's teacher tenure law, which they claimed allowed them to appeal

⁴⁹ *Birmingham News*, Aug. 31, Sept 1, 2, 1970.

transfers to the school board and, if not satisfied, the state's tenure commission. Birmingham-Jefferson Concerned Parents had formed a Teachers Defense Fund upon realizing that the Birmingham school authorities intended to abide by the court's order and force the teachers to maintain their desegregated assignments. But their efforts received a swift blow when Lynne ruled that "local teacher hiring statutes may not be interposed to frustrate a constitutional mandate." The Fifth Circuit had already ruled that such statutes could not apply when their effect was to frustrate a desegregation plan. Lynne ordered the teachers to conform or be dismissed in five days. A few of the teachers and their supporters made a futile attempt to obtain an injunction in state circuit court, which was quickly nullified. Several protesting teachers eventually reported to their assigned schools, while over 50 ultimately chose to "resign." In the case of Jefferson County, Lynne stopped short of entering contempt citations for Revis Hall or the county school board for refusing to compel students to attend their assigned schools. The board was instead ordered to compile, and to furnish to the court and the plaintiffs, an accurate count of students enrolled in, or otherwise attending, each school in the system. This effectively gave the school board and the non-conforming students a reprieve for the semester.⁵⁰

Jefferson and Mobile Counties were not the only sites of this sort of resistance in the state that fall. In Talladega, for example, 30 miles east of Birmingham, a group of white parents actually commandeered classrooms in three public schools and began conducting their own, all-white classes. Nine parents organized the effort on behalf of 500 white students who had been assigned to formerly all-black schools in the county. In one instance, 170 white students assigned to formerly all-black Ophelia Hill School instead accompanied their parents to Mumford School, where parents took control of six classrooms and proceeded to operate a school of their own within the school. Parents repeated these actions at two other schools – Talladega County High and Winterboro High – to which they actively recruited students attending more heavily desegregated schools in the system. One of the

⁵⁰ *Race Relations Law Survey* 2, No. 5 (Jan., 1970), p. 170; *Birmingham News*, Aug. 28, Sept. 7, 11, 14, 28, 1970.

purported ringleaders, local upholsterer Allen Lockridge, claimed that among the reasons for the takeover were that black boys had been “pulling and pinching” white girls and that the marching band had been forced to give up the Confederate battle flag.⁵¹

The Civil Rights Division was informed of the Talladega parents’ actions and asked the FBI to investigate the situation. Upon ascertaining the leaders of the scheme and the schools involved, the CRD quickly asked Judge Hobart Grooms for a show cause order against Lockridge and eight other parents (the Talladega case had been severed from *Lee v. Macon* and reassigned to Grooms’ district court). Grooms added the nine to the injunction against the school authorities. However, when addressing the group in court, along with 300 white spectators, the judge issued a stern warning rather than any citation, per the request of the CRD. He said that he was assuming the parents had acted in ignorance of the law and that they appeared to be “decent, upstanding citizens” who were “substantially law-abiding.” But he warned, “I hope I don’t have to punish anyone” in the future, particularly for trespassing on school property. Grooms added that he had used the contempt power of the court “sparingly” in the past and wanted to keep it that way. “I try to be tender-hearted and merciful,” he said, “[but] I just want you to know that the court will not permit defiance.” Grooms closed with the sort of apologia that Judges Thomas and Lynne often made. “I don’t make the laws This court has no alternative but to obey the laws.” He concluded, “We must have order; I plead with you to obey the law.” A substantially similar situation occurred in Tuscaloosa, where a group from the Northport Concerned Parents organization commandeered a closed elementary school and began to operate it as their own. Newly appointed Federal District Judge Frank McFadden ordered the parents to vacate the building and threatened them with contempt. Parents had learned from state and local

⁵¹ *New York Times*, Sept. 5, 1970; *Birmingham News*, Sept. 4, 1970.

officials that they could, and should, push their resistance to force the federal courts to act. In these more visible and brazen acts of direct defiance, the courts were obliged to do so.⁵²

Federal courts had to take further action to prod other systems towards unitary status early that fall. The Bessemer city school board was forced to implement a late summer Fifth Circuit appeals court ruling ordering the pairing of certain schools “without delay.” And the Huntsville city school board was forced to augment its desegregation plan, which the board argued was the “only desegregation plan in the U.S. that [was] effectually working.” The Huntsville system had managed to remain on a combined freedom-of-choice/zoning plan, but the CRD moved for further relief when it discovered that nearly a third of the system’s black students had enrolled in virtually all-black schools that fall. Judge Grooms ordered Huntsville to work with HEW on a plan which would eliminate freedom of choice and eradicate the system’s remaining three nearly all-black schools: Cavalry Hill, with 925 blacks and two whites; Council, with 141 blacks and 34 whites; and West End, with 150 blacks and 6 whites. Huntsville had maintained a minority-to-majority transfer policy which allowed black schools to resegregate as such. Its faculty was also not fully integrated per the *Carr* standard. Judge Grooms seemed particularly disappointed to deliver the blow to what had been, arguably, one of the more cooperative school systems in the state. “I’m sorry,” he said from the bench, “but I’m going to have to approve [the CRD’s motion]. You have made tremendous progress,” he added, “but I’ll be reversed if I don’t approve this. This court is only an agent of the appeals court.”⁵³

Problems Linger into 1971

Many of the same problems which marred the first fall of compulsory-assignment desegregation continued into the following winter and spring. Non-conforming students remained in the schools of

⁵² *Race Relations Law Survey* 2, No. 5 (Jan., 1970), p. 170; *New York Times*, Sept. 5, 1970; *Birmingham News*, Sept. 4, 1970.

⁵³ *Birmingham News*, Sept. 3, 16, 1970.

their choice, particularly in Jefferson County, while school boards took their time in compiling reports to submit to the courts. LDF attorney U.W. Clemon argued that the Jefferson County school board was still fostering defiance of the desegregation plan. “In every case where whites have not shown up at a black school,” he said, “you can go to the nearest white school and find an excess of white students enrolled there.” Clemon compared the behavior of the county board with that of Birmingham city, which he said had reluctantly but insistently forced strict compliance with its own plan. Clemon charged that the county was refusing to force either students or teachers to accept assignments. The result, he said, was that 3 out of 4 black students in the system were attended a school which was 99 percent black and that only 12 of the system’s 88 schools had anywhere near the required 70-30 white-to-black teacher ratio.⁵⁴

Violence between black and white students continued to be an issue as well, particularly in Mobile. Teachers at Murphy reported a number of incidents to the school board over the course of the school year: from fist fights to knife fights. Prichard’s formerly all-white Vigor – where a number of black students from nearby Blount High had been assigned – was closed for a day in the fall of 1970 because of an early morning brawl between white and black students. In February of 1971, the situation at Vigor became even more critical, as a series of skirmishes led to what police called a “general racial melee” involving over 100 students. A week after the melee, a “major riot,” as newspapers recounted it, broke out involving between 200-300 students. One hundred officers from the Prichard, Chickasaw, and Mobile police departments and the Alabama State Troopers took 40 minutes to quell the “riot,” in which ten students were injured and 13 arrested. The school board closed the school for several days afterwards and only slowly reopened it. Groups of students were allowed to return over the course of three days, under what was described a “massive armed guard.” The newly reinstated Governor Wallace sent his legal advisor to recommend that the school authorities pray to the court for relief in the form of U.S. Marshalls or some sort of alteration of the system’s desegregation plan. School officials

⁵⁴ *Birmingham News*, Jan. 31, 1971.

happily did so, offering the violence as still more evidence that the compulsory assignment plan was a wrongheaded failure. They beseeched Judge Thomas for “emergency relief” given the “intolerable” situation, asking the court to use its injunctive and contempt powers against offending students. Neither the CRD nor the court was moved, however, as the tensions in the school died down and the armed guard was able to restore a sense of normalcy. Many parents continued to keep their children out of the school, and some undoubtedly saw the incident as the final push towards private schools or another school district.⁵⁵

At the end of the school year in May, a fourth major outbreak closed Vigor and brought police to Murphy yet again. The state legislature took the opportunity to pass another doomed freedom of choice law, this one introduced by Mobile’s state representative, Monty Collins. The new “student transfer” bill, which passed handily, proposed to allow students to transfer to the school of their choice if they had been “harassed, intimidated, or assaulted.” Wallace called the latest choice act a “must bill” and “one of the finest ever passed by [the Alabama] legislature.” Even then Wallace and Alabama legislators were conceiving an even more potent form of legislative resistance, one that allow segregationists an out when they finally had to give way to compulsory assignment and abandon all hope of freedom of choice.⁵⁶

A black Mobile school teacher went before Senator Walter Mondale’s Select Committee on Equal Educational Opportunity to testify in 1971. She told a story quite different than the one that members of STAND and Concerned Parents had been telling each other and any else who would listen. In trying to speak to the support in Mobile for the CORE/Innes plan, she argued that black students had been “suspended, intimidated, harassed, and jailed.” There had been threats on the lives of black

⁵⁵ *Birmingham News*, Oct. 28, Dec. 17, 1970, Feb. 15, 16, 17, 19, 1971.

⁵⁶ *Birmingham News*, May 4, 23, 1971.

movement leaders, unexplained bombings, and “complete unresponsiveness [on the part of the] school board to the desires of the black community.” It made one understand, she explained, “why the black community might enthusiastically endorse any alternative to this continued method of desegregation.” Black students had, in fact, started their own organization – the United Student Action Movement of Mobile (USAMM) – and had opened a “center for the advancement of black awareness.” They started a legal fund to represent members who had been jailed for participating in USAMM boycotts and demonstrations against the manner of Mobile’s desegregation. Many had become bitter and disillusioned.⁵⁷

Members of the USAMM group from Vigor High, Toulminville High, and Toolen High explained their views to an investigative reporter from the Southern Regional Council. One said, “Desegregation won’t work, because when we go to a white school they treat us like some dog.” Even sincere attempts by white teachers to make black students feel more at home were backfiring. One student explained, “The teacher looks at [the black student] in the morning . . . and to make him feel good he says ‘good morning’ to him and says nothing to the little white folks and that’s turning the white folks against him and at the same time making him feel inferior.” Another student argued, “How can you have integration when the white man is at the top of the pole?” The students felt that desegregation in Mobile was forcing blacks to “become white.” Black students in white schools could never win votes for students council, for the cheerleading squad, for other offices. When they did, it was “invariably the one with the straightest hair.” Blacks at some schools were prevented from expressing themselves by, for example, wearing Afros or dashikis; black males could not braid their hair, whereas white males could wear ponytails. A third explained, “So far integration has only meant humiliation, oppression, and a loss of identity to these black students. They can’t conceive of it working until black people control their own

⁵⁷ Fancher, *Voices from the South*, pp. 1-7, 15-28, in *Facts on Film, 1970-1971 Supplement*, Miscellaneous Materials.

money and their own schools and their own districts.” The students in USAMM had become radicalized as direct result of their experiences with desegregation. One student explained:

Here is what the system offers: using the constitutional rights, going to court, getting bogged down. This is just what we were doing and getting nothing. As long as you have a racist judge and a racist lawyer and a racist President, along with his cousin, George Wallace, working through the system is like working through hell. The only way you can survive is to make white people listen through violence.⁵⁸

⁵⁸ Fancher, *Voices from the South*, pp. 15-28.

CHAPTER 17: "HARVEST TIME": PROTESTING THE REALITIES OF COMPULSORY ASSIGNMENT STATEWIDE,
1969-71

On August 26, 1971 Federal District Judge Daniel Thomas was holding court, not in his home courthouse in Mobile, but in the federal satellite courthouse in Selma, in the west-central Alabama Black Belt. The Wilcox County Board of Education was brought forth to answer for its continuing recalcitrance. "I am willing to help anyone who will help themselves," Thomas announced from the bench, "but the Wilcox County school board has to come up with something. So far all I've heard is excuses," he said, "I want a plan." The all-white school board had refused to work with HEW in crafting a desegregation plan which used some method other than freedom of choice to bring about more than token desegregation in the county's largely black school system. Nor had they submitted any plan of their own. Thomas ordered the school officials to meet with HEW as soon as possible to hammer out some solution. As the judge was preparing to adjourn for the day, HEW attorneys asked the court to order the school board to meet with HEW representatives right then and there. The federal authorities argued that if the local school officials left the courtroom, HEW would not see or hear from them again until they were called back into court. The school board was thus forced to sit down with HEW officials at the courthouse and work out a plan. The two sides agreed to attendance zones for many of the county's schools, but the school board refused to agree upon pairing arrangements for other schools, including formerly all-white Wilcox County High and all-black Camden Academy. The meeting broke up in tension and frustration. As he prepared to leave, Wilcox Superintendent Guy Kelly told the bureaucrats, "You will not live to see what you want to do in Wilcox County, not if you live a thousand years."¹

¹ *Wilcox Progressive Era*, Aug. 26, 1971.

The school board drafted and submitted its own plan days later. The board opened its plan by avowing, "In order to establish a so-called unitary school system in Wilcox County, the following recommendations are made under duress. These recommendations are educationally unsound and will completely segregate and eventually destroy the Wilcox County School System." It then proposed a zoning plan which left a number of schools all-black and which allowed whites to concentrate in a few token-desegregated schools. Judge Thomas approved the plan. Superintendent Kelly and the school board were operating from the assumption that compulsory assignment would lead inevitably and justifiably to a total white exodus. Rather than implement such a plan in good faith and work to forestall such an exodus, they fought to maintain some semblance of freedom of choice – which they had fought bitterly against since the U.S. initiated a suit against the county in 1965.²

At the top of the school board's plan, the school officials also included a quotation from Pope John Paul in which the pontiff seemingly spoke in favor of parents' "freedom in their choice of schools." When the Catholic Bishop of Mobile, John L. May, wrote a letter to the editor of the Wilcox County newspaper arguing that the board had taken the quotation out of context, Superintendent Kelly wrote a response to the bishop which revealed much about white opposition to compulsory assignment. May was a distinguished clergyman who had recently risen to the bishopric and had warned Mobile's segregationists that the diocese's parochial schools would not serve as havens for segregated education. Kelly first called May a "misguided and uninformed religious zealot" whose ilk had "conducted the Spanish Inquisition and brought reproach upon the church." He then warned the bishop that if he chose to get into a fight over the county schools with "a veteran" of such battles, he was sure to leave it "with [his] clothes soiled." May had argued that Kelly was making "a stand against integration." Not true, Kelly retorted. "My stand," he said, "is against the destruction of education in this county for all children regardless of race, color, or creed." The Justice Department and "a little band of willful people" were

² *Wilcox Progressive Era*, Sept. 9, 1971; Wilcox County Board of Education Plan for Desegregation, *Facts on Film, 1971-1972 Supplement*, Miscellaneous Materials.

dedicated to such destruction. “My quarrel,” Kelly added, “is with the government about the abridgement of freedom of education which is the first and inalienable right and duty of the parent.” If this sounded like it might be informed by the long-held white southern belief that the Civil War had nothing at all to do with slavery and everything to do with states’ rights, Kelly removed any doubt by adding, “The United States is continuing the Reconstruction of the South” The effort was “simply a continuation of the economic war prosecuted by the North against the South from the beginning of the 1830s which inevitably led to the War Between the States.” Public education in Alabama had been “built from the ashes of that struggle,” and Kelly vowed to do “everything in [his] power to thwart [the] effort to destroy [it].” Bewildered HEW officials complained to Judge Thomas, “We have integrated the entire South, and Wilcox County and Kelly are fighting as hard today as they were in the beginning.” Wilcox *Progressive Era* editor M. Hollis Curl argued that such a comment ought to “stand as the highest possible tribute to Mr. Kelly and the Board.” For many Wilcox whites, it certainly did.³

Across the state, whites mounted protests to compulsory assignment between 1969 and 1971. The well-organized, massive non-conformity and picketing associated with Mobile and Jefferson County was reflected in communities from Decatur to Evergreen, in the form of letter-writing, editorializing, and petitioning. It was also reflected in the most significant increase in segregationist academy establishment and enrollment the state had ever seen or would subsequently see. This was particularly evident where whites did not have white suburbs or heavily-white neighboring districts to which to flee. In each case, whites couched their protest and their flight in terms of their constitutional, and sometimes natural, rights. They either demanded a return to freedom of choice or rearticulated it as a freedom of association to justify their exodus to private schools. Though their epistolary efforts brought

³ *Wilcox Progressive Era*, Aug. 26, Sept. 2, 9, 1971; see, on Bishop John L. May, Andrew Moore, *The South’s Tolerable Alien: Roman Catholics in Alabama and Georgia, 1945-1970* (Baton Rouge: Louisiana State University Press, 2007), pp. 50. 153-4.

little in return, the segregationist academy movement matured, and a core of private, white schools was established which has remained intact ever since.

Blacks did not universally celebrate the coming of compulsory assignment. In fact a black protest movement developed in response to many of the realities of the process, which in some ways rivaled its white counterpart. Blacks in many communities decried the closure of black schools. The closures were a ubiquitous consequence of whites' refusal to attend formerly all-black schools and the recognition by courts and school boards that they could not force whites to attend as long as flight options were available. And in Alabama, white flight options were by then available anywhere to those who could afford them. Many blacks who were forced into white schools also began to protest the symbolic vestiges of the Confederate Old South. Black students bemoaned being forced to cheer for the Rebels, to play or sing "Dixie," or to study biased textbooks which exonerated and venerated the antebellum slave regime. Some were invigorated by finding a channel for their activism. Others began to wonder if this was what the previous generation of activists had in mind when they sought to desegregate schools in the first place.

Frank Johnson Bears the Brunt in *Lee v. Macon*

Over the course of late 1969 and early 1970, the 99 systems involved in *Lee v. Macon County* had been made parties defendant to the case and ordered to formulate "terminal" desegregation plans, most of which involved significant faculty desegregation, school closures, pairing, or geographical zoning. That spring the three-judge panel determined that as soon as these "terminal-type" desegregation plans were approved and ordered implemented for the 1970-71 school year, each system would then have its case transferred to a single judge in its appropriate geographical district. Almost all systems had been, or would soon be, ordered to use some method other than freedom of choice to eliminate their dual system. In conferences with Judge Frank Johnson, attorneys Fred Gray and Solomon

Seay, and representatives from the Justice Department's Civil Rights Division, many school boards filed their final plans to attain "unitary" status within the next year or two. Some school boards, particularly in east and south Alabama, worked with educationists at Auburn University's Center for Assisting School Systems with Problems Occasioned by Desegregation to draft feasible plans which the court could accept; the Center was awarded a U.S. Office of Education grant to fund its program and helped at least 75 school systems formulate their plans. Many other school boards either failed to draft acceptable plans or refused to formulate any plans at all, in which case the court ordered HEW to draft a plan which it would then order implemented. In some cases, the three-judge court approved a delay in full desegregation until the fall of 1971, but every system involved in the case had some sort of plan in place and was facing significant changes for the fall of 1970. When these terminal plans were adopted, each system's case was splintered from the main *Lee v. Macon* litigation and assigned to a single federal district judge in that system's district for monitoring progress in implementation.⁴

For segregationists who had only recently come to digest freedom of choice, compulsory assignment plans were difficult to swallow. They responded with rhetorical assaults on the court, with petitions and protests, and with a reinvigorated move to private schools. The most viscous assaults were reserved for Judge Johnson. He had long been a lightning rod for segregationist attacks, in part because George Wallace had singled the judge out for rhetorical barbs ever since the pair's initial struggle over voting records in Wallace's Barbour County. As terminal, post-*Green* orders began to come down in each of the *Lee* systems, whites focused their vitriol squarely on Johnson. Perhaps they correctly perceived that Johnson was the chief administrator of the *Lee* case's enforcement. Whatever

⁴ *Lee v. Macon County Board of Education*, Order of March 31, 1970, *Race Relations Law Survey* 2, No. 1 (May, 1970), p. 13; see, in general, *Lee v. Macon* (CA 604-E) Docket Report, *Lee v. Macon* Trial Record, Federal District Courthouse, Montgomery, Alabama; see also *Washington Post*, April 6, 1970. See various desegregation plans drafted with the assistance of the Auburn University Center for Assisting School Systems with Problems Occasioned by Desegregation at Frank Johnson Papers: *Lee v. Macon* Case File, Individual System Files, Containers 23-27; on the Auburn Center, see also *Birmingham News*, March 1, 1970.

the reason, the aging Judge Richard Rives and the more cautious Judge Hobart Grooms were spared the worst of the threats and accusations and pleas.

An editor at the Greenville *Advocate* captured the thinking of many angry whites when he responded to the pending implementation of the Butler County desegregation plan by damning Johnson to hell. "The first crop of bitter fruit was harvested last week, Judge," he wrote, "and it is just too bad that you could not be there to share the fruits of your labor, you and the planners of the spiritless gray world." The student bodies of formerly all-white Greenville High and all-black Southside High had been consolidated as part of the Butler County plan that fall. Whites had protested by bolting for the newly established Fort Dale Academy, which opened the previous fall. Some of the public school's remaining whites refused to participate in integrated extra-curricular activities, including the marching band and the majorettes. The *Advocate* editor told Johnson of the resulting "harvest of humiliation, sorrow and despair" which he observed at a football game. The depleted Greenville marching band was evidently outclassed by its visitor, causing some of its members to weep "silent, bitter tears" on the sideline. "You gutted the group by edicts and decrees, Judge," the editor wrote, "maybe there is an eternity of instant replays of these children growing old before their time awaiting you. Souls laid bare are for God, not for newspaper people. Damn you, Frank Johnson, damn you." Johnson first became aware of the editorial when a young Greenville man, a student at the University of Alabama, forwarded it to him, writing, "The editor has expressed my feelings in such an outstanding manner that I am compelled to bring it to your attention." He added, "It is my sincere hope that you will spend an eternity in hell for the strife and misery you have caused the people of Alabama." He accused Johnson of "butchering" Greenville High and of "playing God with other people's lives." In closing he wrote, "I hope that you will realize the

extent to which you are despised in this state. If this realization disturbs your sleep in the least, than this letter will have served a purpose.”⁵

Not all letters to Johnson were so venomous. A Decatur woman invoked heaven rather than hell in a no-less desperate appeal. “The Lord laid it on my heart to write you,” she claimed. She asked Johnson, “Do you know Jesus Christ as your own personal savior?” She also wondered, did Johnson have children in school? “Or . . . like the President you do not have to send your children to school with the negroes,” she speculated, “you do not have to eat and sleep with them.” She argued that God had no desire for her to “mix with them,” for he had put a curse on Cain and made him black and made his children “servants of servants.” She concluded, “He did not intend for us to intergrate” [sic]. She warned Johnson, “Just as you are born you will go to one of two places, Heaven or Hell. . . . Which one are you going to choose?” When Johnson stood before God, the Almighty would surely tell him, “Depart, I never knew you.” Unless the judge decided to “pray and ask God for guidance in this matter of intergration” and to “straighten out all of this.” In closing, the woman revealed the enduring political attachment that had manifest itself in the recent gubernatorial election: “You hate George Wallace, but thank God for a man that will stand up and fight for our rights. . . . Get right with the Lord.” She attached some “literature” for the judge which indicated the endurance, as well, of certain long-held segregationist beliefs: that the NAACP’s primary goal was to “promote intermarriages between whites and negroes,” and that Martin Luther King, Jr. had been a revolutionary communist.⁶

Many of the most desperate letters came from whites in the Black Belt, where blacks constituted the majority in all but a few systems. A letter from a Selma man to Judge Johnson captured the fundamental fear which helped doom desegregation in the region. Henry Vaughan was an

⁵ Brooks Barganier to Frank Johnson, Sept. 14, 1970 (The letter itself is undated; this is the date it was received at the court.), *Greenville Advocate* editorial attached, dated Sept. 10, 1970; Frank Johnson Papers: Lee v. Macon Case File, Container 24, Folder 4.

⁶ B.B. Harper to Frank Johnson, Nov. 20, 1968, various “literature” attached, Frank Johnson Papers: Lee v. Macon Case File, Container 25, Folder 2.

accountant and wanted to relay to Johnson what a client had recently told him. The client had “expressed his concern over [the Selma] school situation so clearly” that Vaughan felt “a compulsion to pass it along I am sure,” he wrote, “that it represents the way most parents feel.” The client had told Vaughan, ““You know, if the public schools here fold up, this community is doomed. . . . I have two girls in the public schools, and I simply cannot send them to Hudson High next year.”” Vaughan explained that this man and other parents had learned to accept the freedom of choice plan which Selma had been operating under for four years. “However,” he added, “if we have only one junior high and one senior high next year there will be more negroes than whites in each school, and parents are literally afraid for the physical safety of their children.” Vaughan reiterated, such “a complete upheaval where all at once white children in junior and senior high school are in the minority, is more than human nature can absorb.” He asked Johnson, “Please help us arrive at a solution which will be in keeping with the spirit of the law and still preserve our public schools.” Black students already at the city’s white high school had warned that “if they make the rest [of the city’s black students] come next year there’s going to be lots of fights.” Another Selma man had recently called the courthouse and warned of “an all out battle” if freedom of choice were jettisoned. He told Judge Johnson that he did not care “whether he went to jail or not” and that if he had to send his children to a majority black school he would “just as soon die.” Parents like this began to swell the ranks of John T. Morgan Academy. Morgan had opened after the first desegregation order hit Selma in 1965. In 1969 it had added a high school building with science labs and an enlarged cafeteria. That fall, 1970, it was preparing to open eight new classrooms and a gymnasium. With increasingly sophisticated private schools for whites, Vaughan feared that a total exodus would occur, and he thought the court might consider that.⁷

One letter from a Pike County man demonstrated a comparably sensible yet equally futile approach. It also illustrated segregationists’ continuing concerns about black teachers and black school

⁷ Henry A. Vaughan to Frank Johnson, May 23, 1970, Frank Johnson Papers: Lee v, Macon Case File, Container 25, Folder 1; “Morgan History,” at <http://www.morganacademy.com>, accessed April 1, 2013.

closure and their desperate and doomed attachment to freedom of choice. Charles Johnston told Judge Johnson that he reckoned that the two of them “had common ancestors” despite the slight difference in spelling in their surnames. Johnston was a grandfather to two white girls in a Pike County elementary school. He had seen “lots of water pass under the bridge,” and he was of the “firm opinion” that “the freedom of choice” was the best program for Pike County. Due to a recent influx of funds and an equalization project, the black schools were “by far the newest, most modern in the county. I have seen with my own eyes,” he wrote, “the carpeted floors, central heat and air conditioning, sound proof rooms, and the very latest in equipment of every description.” He “was told” that this applied to all black schools in the county. Johnston had also talked to a number of Pike’s black citizens. “They invariably tell me,” he wrote, “that they want their children in their own school.” He felt that the “main problem” with the black schools in the past had been “that the Negro colleges turned out teachers with degrees that they did not earn,” because “their standards were not up to the white colleges.” Whose fault that was, Johnston did not know, but he figured it could be “corrected in time.” The upshot of all of this was that Johnston was a wealthy man, and he had been “asked to make a substantial contribution to a private school” – Pike Liberal Arts School, which had just opened that fall. He was prepared to do so if necessary, but he told the judge, “If the freedom of choice plan is allowed to continue in Pike County then I feel sure that we can and will have quality education in our public schools.”⁸

Of course, the freedom of choice plan in Pike had not disestablished the dual school system and thus would not continue. Many white families removed their children to Pike Liberal Arts or sent them to schools in neighboring Dale County which were not as substantially desegregated. When Johnson learned of the latter practice, he informed the Dale County school board that this was a “flagrant

⁸ Charles D. Johnston to Frank Johnson, Jan. 30, 1970; Memorandum of Phone Call, William Denham to Frank Johnson, Jan. 14, 1970; both in Frank Johnson Papers: Lee v. Macon Case File, Container 26, Folder 16; “About PLAS” at “Profile and Philosophy,” <http://www.pikelib.com>, accessed March 31, 2013.

violation” of each system’s desegregation plan and ordered the students back to Pike schools. A Pike County woman wrote Johnson in protest, asking “why there was such an immediate action taken.” She argued that the students had already finished most of the semester at their new school in Dale and had, in the case of the seniors, purchased caps and gowns and such. They ought to have been allowed to finish the year there. She called their removal an “outrageous decision” and wondered why no one cared about the children, in general. “They didn’t have any say-so whatsoever in this,” she wrote, and “this is suppose to be a free country” [sic].⁹

An editorial in the *Evergreen Courant* revealed a similar law-and-order approach to rebuking not just Johnson, but HEW and the Justice Department as well. When orders in *Lee v. Macon* forced the Conecuh County school board to close all-black China Junior High and substantially desegregate formerly all-white Evergreen City School for the 1970-71 school year, Conecuh’s whites reacted by opening Sparta Academy. Many whites stayed in the county schools, though, leading the *Courant* to struggle to make sense of “fine, practically new school buildings standing idle and unused” while “temporary or mobile classrooms [were] being used at other schools because pupils from the closed schools spilled over the available classrooms.” Why was this so? “Because the planners in Washington wish[ed] to achieve something they call “racial balance” in the schools of the South,” the editor wrote. HEW and DOJ were “doing the ‘balancing’ by closing perfectly good school buildings, by busing students in direct violation of the 1964 Civil Rights Act and by pairing.” Conecuh’s black citizens were not to blame; in fact, they had “borne this intolerable burden” in a commendable manner. All of the county’s citizens, the *Courant* argued, would “continue to obey the law and to get along with one another,” while “those in authority” would “continue to seek legal redress through legal channels and only ask that HEW and the Justice

⁹ Frank Johnson to Charles Woods, November 1, 1972; Frank Johnson to Ira DeMent, Oct. 27, 1972; Elizabeth Phillips to Frank Johnson, Nov. 13, 1972; all in Frank Johnson Papers: *Lee v. Macon* Case File, Container 24, Folder 18.

Department and the Federal Courts be made by the Congress and the President to do what every citizen does, OBEY THE LAW.”¹⁰

Another editorial, from the *Randolph Press*, revealed a particularly distorted understanding of Judge Johnson’s role in *Lee v. Macon*, and of the federal judiciary generally. Randolph County – in east central Alabama on the Georgia state line – had recently implemented a court-ordered geographic zoning plan which closed certain black schools and resulted in over 400 black students in formerly-white schools. White parents were irate and had been flooding the school board offices with complaints. The superintendent was even physically assaulted by one woman. The editor wondered, “How could it happen in what was a democracy?” All-black Randolph County Training School had been closed and its several hundred black students moved to the formerly all-white county high school. This was, he argued, “being done at the pleasure of some federal judge named Frank Johnson, and probably nobody else’s.” Other all-black schools had been closed, too. “One man pointed his finger at the Pleasant Grove School,” he wrote, “and it was no more.” The editor wondered if it ought to be renamed Johnson Memorial. He felt that Johnson had assumed “absolute, near total tyranny in the area” and was forcing integration upon it under the theory that “when blacks and whites are thrown in the common pot and stirred until brown, universal salvation is at hand.” He tellingly evoked two charged metaphors, calling it “a shotgun marriage” and “the enslavement of two races.” There was “no appeal,” he argued, from Johnson’s rulings, unless “one dare[d] approach HEW,” which had “shown little consideration for health, and none for education and welfare.” He concluded that to “go from one to the other” would only “be crawling further up the anus.”¹¹

¹⁰ “An Editorial,” *Evergreen Courant*, Undated, in Frank Johnson Papers: Lee v. Macon Case File, Container 24, Folder 14.

¹¹ *Randolph Press*, Aug. 29, 1970, filed in Frank Johnson Papers: Lee v. Macon Case File, Container 26, Folder 17; see also, in the same, Memorandum of Phone Call, Frank Johnson with R.D. Simpson, Superintendent of Randolph County Schools, June 17, 1969 and Memorandum of Phone Call, Johnson’s secretary with Shelby McCleod, June 3, 1969.

The mass influx of black students into formerly all-white schools jarred many white parents. Some of the schools had already been desegregated, of course, but only in a token way. When white majorities were threatened, parents panicked. One Russell County man indicated as much when he sent Judge Johnson a telegram after county schools opened in the fall of 1970 under a geographic zoning plan. "A group of responsible parents," he wrote, had recently met with the county school board "seeking answer to [the] unjust and unfair percentage ratio as [to] whites to blacks." He broke down the relevant particulars for Johnson: "In class with one daughter – 1 white pupil, 35 black pupils; in class with one daughter – 2 white pupils, 33 black pupils." He requested that Johnson use "the powers of [his] office" to "change the situation at Mount Olive School from ungodly to fair for all, black or white." Many whites of a similar persuasion in Russell County began sending their children to Glenwood School, a segregationist academy in the nearby Lee County town of Smiths which opened its doors for the first time that fall, 1970.¹²

Judge Johnson often received a steady flow of letters from one community or school district. In the case of Autaugaville in Autauga County, the concerns of the white community had been deflected by the school board. Like many school boards, the Autauga County officials simply blamed the particulars of their desegregation plan on Judge Johnson, with whom they had been dealing. White parents were incensed that the closure of the 10th-12th grades at the all-black Autauga County Training School in 1969 was going to bring over 250 black students to the formerly all-white Hicks Memorial School. Hicks had previously enrolled around 285 whites and about 40 blacks via freedom of choice. The Autaugaville parents were particularly concerned that the school board was planning to concentrate the county's rural black students at Hicks, rather than among the county's four rural, white high schools. They felt that taking the black students on at Hicks would be "an impossible task" which would probably 'destroy

¹² Telegram, A.J. Thomas to Judge Frank Johnson, Sept. 3, 1970, Frank Johnson Papers: Lee v. Macon Case File, Container 26, Folder 19; "History" of Glenwood School, <https://glenwoodgators.org>, accessed March 31, 2013.

the school and possible the entire system. “We accepted the freedom of choice plan without trouble,” they argued. They considered themselves “a law abiding community” with “peace-loving people” and “hard-working, middle-class” who believed in “equal rights for all people.” And yet, now there would be “no freedom of choice for either race.” It simply did not “seem fair.”¹³

Some Autaugaville parents wondered if the federal courts were becoming “communist infested.” The United States was, after all, “a country founded on freedom.” One parent asked Johnson to consider if he would want his child to “receive the standard of education in a school with the majority being Negroes.” Would he want his child taught by a black teacher? Did he not “want justice.” Some portended mass “disciplinary problems.” Some couched their concerns in terms of overcrowding. All of the parents were ‘praying’ and ‘begging’ that Johnson would reconsider what they assumed was his decision alone. Most expressed their protest in terms of constitutional rights. “According to the U.S. Constitution,” one parent wrote, “everyone has equal rights, just as long as they do not infringe on the rights of others, [but] we feel that if the Negroes are forced upon the students at Hicks . . . they are infringing our rights.”¹⁴

When concerned Autaugaville parents assumed that white faculty would refuse to teach at a majority-black school and that most white parents would remove their children from the school system, they understood that local private options would soon be available. Autauga Academy was opening its doors for the first time that fall, 1969, in an old public school building. It stood poised to accept as many as 200 students and had plans to open in a new facility the following fall. One mother captured the feeling of many when she wrote, “Some [home-owning parents] have already enrolled their children in

¹³ Letters to Frank Johnson from Mrs. W.A. Durbin, May 1, 1969; Mr. and Mrs. J.A. Rainwater, April 21, 1969; James and Lorena Plaster, April 23, 1969; Curtis Jackson, April 15, 1969; Mr. and Mrs. R.H. Shackelford, Sr., April 17, 1969; Mr. and Mrs. Rastus McLendon, March 31, 1969 all in Frank Johnson papers: Lee v. Macon Case File, Container 23, Folder 15.

¹⁴ Letters to Frank Johnson from Mrs. J. Raymond Jones, April 23, 1969; Jackie Wheat, April 19, 1969; Mr. and Mrs. O.E. Williams, April 1, 1969; Vivian S. Hallman, March 17, 1969; all in Frank Johnson papers: Lee v. Macon Case File, Container 23, Folder 15.

private schools, others say they will send theirs to stay with relatives, that will leave just a few left here which will make two Negro schools in our little town.” Some of the white parents who were trying to stem the tide formed a Committee of 100 and petitioned the court for intervention. The petition was denied, but the court did work with the school board and the CRD to restructure the county’s plan such that Hicks Memorial took on only a portion of the black students from Autauga County Training School. The following year, the county plan called for “freezing” students in the schools which they had attended the previous fall. The court could not accept this and instead ordered the implementation of the CRD’s plan. A parent wrote Johnson again and argued, “Although there was some feeling about having over 40% colored students in the former all-white school last year (1969-70), the community leaders urged acceptance of the law, [and] we had a successful year.” The new 1970 plan, however, had caused the community to “split wide open.” It called for projected enrollments at Hicks (newly renamed Autaugaville High) and Autauga Training (Autaugaville Elementary) of 401 black to 121 white and 443 black to 115 white, respectively. As they continued to press for relief from Johnson, some parents argued that the county schools were “the only way” they could “afford to educate [their] children.”¹⁵ Some of these public school supporters described the difficult situation in which the segregationist academies placed them:

Our opinion does not represent a majority of the white citizens and many strong feelings prevail. A very active group of our citizens are directing their efforts toward securing a large enrollment of white students for the private school being built in this county [Autauga Academy]. Our mayor, all the members of the City Council who have school age children and many others have thrown their influence and support behind the private school. Our elected member on the County Board of Education, and all of our school trustees, except one, have resigned and are

¹⁵ Letters to Frank Johnson from Mrs. W.H. Gaines, March 25, 1969; Milton Wendland, James Pearson, and James Plaster to Frank Johnson, Aug. 26, 1970; Lee v. Macon County Board of Education: Motion to Intervene, May 7, 1969, of the Committee of 100; Order Denying Motion to Intervene, June 20, 1969; Order of July 16, 1969; all In Frank Johnson Papers: Lee v. Macon Case File, Container 23, Folder 15; “History” of Autauga Academy, <http://www.autaugaacademy.com>, accessed April 1, 2013.

recruiting for the private school. Their competition for students, which is of course necessary for financing, has put considerable social pressure on both parents and children.¹⁶

In addition to the many letters Johnson received, and the many editorials that were written, there were petitions. And just like the letters and editorials, many of them were couched in the language of constitutional law. One such petition from a group of Montgomery parents called on the U.S. Congress to impeach Johnson. It read:

Whereas certain inferior Federal court judges have arrogated unto themselves unlawfully the original jurisdiction over the sovereign State of Alabama as a party – (see *Lee vs Macon County et al . . .*), and whereas the time has come for the sovereign citizens of our State must call a halt to these unlawful actions by judicial dictators in order to end tampering with the education of our children, which is a right reserved to the people as provided by the Tenth Amendment . . . Therefore, we the sovereign citizens of Alabama do hereby resolve, petition, and demand that our representatives in Congress bring forth an instant Bill of Impeachment . . . ”¹⁷

Despite their preference for constitutional claims, many of these most passionate segregationists clearly lacked a sound understanding of the federal judiciary. *Alabama Journal* Editor Ray Jenkins joked with his friend Johnson, writing the judge in reference to this petition and with a nod to other federal judges then in the spotlight, “Judge, when this movement gets going, you’re going to be in more trouble than [Clement] Haynsworth and [Abe] Fortas together.”¹⁸

Of course, Johnson was not the only judge deciding matters in *Lee v. Macon*, and he and Judges Grooms and Rives were, indeed, cognizant of the devoted resistance to desegregation at the local level. In the terminal order for Sumter County, issued in the summer of 1970, the three-judge court acknowledged, “Each member of this court is acutely aware of the customs and traditions of the people

¹⁶ Milton Wendland, James Pearson, and James Plaster to Frank Johnson, Aug. 26, 1970, Frank Johnson Papers: *Lee v. Macon* Case File, Container 23, Folder 15.

¹⁷ Petition to the Congress of the United States, Circulated by Elizabeth Cooper, Montgomery, Alabama, Frank Johnson Papers: *Lee v. Macon* Case File, Container 30, Folder 7.

¹⁸ Petition to the Congress of the United States, Circulated by Elizabeth Cooper, Montgomery, Alabama; Ray Jenkins to Frank Johnson, Oct. 30, 1969, Petition Attached, in Frank Johnson Papers: *Lee v. Macon* Case File, Container 30, Folder 7. Fortas had recently resigned as an associate justice of the Supreme Court amid an ethics scandal and impending impeachment proceedings. Nixon appointed Haynsworth to replace him, but Haynsworth faced a grueling confirmation hearing and was rejected by the Senate.

in this section of our country. We enter this order in this case,” they continued, “with the full realization that . . . the student body in the Sumter County school system will, in all probability, be composed only of Negro students.” The county school board had proposed a plan which would have allowed for the retention of a number of all-black schools. Thus, the court was forced to order the implementation of the HEW plan for Sumter County, which would render whites the minority in most county schools. Even the court assumed at that point that whites in Sumter would flee for Sumter Academy, which had been established in a former public elementary school the previous fall. The court was bound to order the elimination of the dual system, however, and higher courts had already held that white flight was not a justification for limiting relief. At the same time, the court could not force whites in Alabama to accept minority status in schools, to attend formerly all-black schools, to accept black teachers, to dispel all of their preconceived notions about black people in general, or to exercise the kind of moral leadership which might have rallied other whites to any of the above. The one-time *National Observer* columnist and future Ronald Reagan advisor Jude Wanniski observed in the fall of 1970, the “lead role in trying to win acceptance for these [desegregation] plans has fallen to the public educators themselves. Where they have given up,” he continued, “as in Marengo County, where Superintendent Fred Ramsey has placed his own children in private school – there may be no integration at all.”¹⁹

The Maturation of the Segregationist Academy Movement

Many local newspaper headlines in the fall of 1969, 1970, and 1971 featured the assertion that schools had opened “without incident.” The White Citizens’ Council newsmagazine, *The Citizen*, accurately explained the significance of this claim: “What this means in practice is that no rapes,

¹⁹ Lee v. Macon County Board of Education, Terminal Order Adopting HEW Desegregation Plan for Sumter County, entered June 11, 1970, as listed on Docket Report, Lee v. Macon Trial Record; Unattributed News Story on Terminal Sumter County Desegregation Plan, dated July 7, 1970, in Frank Johnson Papers: Lee v. Macon Case File, Container 27, Folder 3; see, for Sumter Academy, *Birmingham News*, Aug. 23, 1969; *National Observer*, Aug. 10, 1970. Wanniski went on to serve as editor of the *Wall Street Journal* and as an influential economic advisor to President Ronald Reagan.

murders, or riots on the school ground were recorded on the police blotter that day.” The “main underlying reason why” was the fact that “the segregationists [had] established an alternative to federally-dictated education . . . by setting up private schools.” This had the effect of taking “the heat and pressure off of integrated schools.” The Council might have overstated its case in several ways, but fundamentally it was right. Segregationist academies had alleviated some of the potential for violent confrontation in desegregated schools by providing an alternative for the most staunch segregationists and their children. And in Alabama, the academies were booming.²⁰

The majority of Alabama’s segregationist academies were established between 1965 and 1975, with the most significant spike coming between 1969 and 1971. Academy establishment had been closely associated with desegregation milestones: first the *Brown* decisions themselves in 1954-55, then the first court orders and HEW efforts which produced the breakthrough of 1963-1966, and then most especially, the post-*Green* compulsory assignment orders in 1969, 1970, and 1971.²¹ The number of segregationist academies in the South as a whole nearly doubled from the fall of 1969 to the fall of 1970 (to over 600), and Alabama contributed its fair share. In 1965 there were 34 private schools in the state which could be identified as segregationist academies. By 1970 that number had increased to 109: a 221 percent increase. By 1975, it would be 134. While the cities which already had multiple segregationist academies – including Mobile, Montgomery, and Birmingham – each saw increases in the number of private schools within their respective districts from 1969 to 1970, the number of districts with one or more private schools increased dramatically during that period as well. Entering the 1969-

²⁰ “Without Incident,” *The Citizen* 15, No. 1 (Oct., 1970), p. 2.

²¹ See discussions of other, previously established Alabama segregationist academies – or otherwise racially exclusive private schools which served as white flight havens – at CHs 3, 7, 10, and Epilogue, *supra* and *infra*, including: Montgomery Academy, St. James School, and Trinity Presbyterian in Montgomery (CHs 3, 10); St. Paul’s Episcopal and U.M.S. Wright Preparatory in Mobile (Epilogue); Hoover and Jefferson Academies in Birmingham (CHs 7, 10); Macon Academy in Tuskegee (CH 7); Lee and Scott Academies in Lee County (Epilogue); and Perry Christian, Warrior, Southern, Marengo, Lowndes, and Morgan Academies in the Black Belt (CH 10).

70 school year, there were 38 school districts with at least one private school (14 city and 24 county systems). The following year, there were 55 (22 city and 33 county systems).²²

The increase in the number of pupils in private schools was even more dramatic, though it was hard to accurately assess. A 1973 study undertaken by the LDF concluded that information on Alabama's segregationist academies was "minimal at best," and that data on enrollment, specifically, was "incomplete and almost meaningless." The state department of education indicated that the number of students enrolled in private schools in the state increased from 39,524 in 1968-69 to 68,123 for 1970-71. One Alabama educationist, in his doctoral dissertation, isolated the students in this data who were determined to be enrolled in "private, non-sectarian schools"; this limited the number in 1970-1 to 20,500 but still indicated an enrollment increase of nearly 100 percent. By 1975, there would be nearly 28,000 students in these schools, according to that study. But these figures were problematized by the fact that many of the academies simply did not report to the state. According to the LDF, the state in general did not enforce laws intended to regulate private schools. Sixty-five schools belonged to the nascent Alabama Private School Association, which was itself affiliated with the Citizens' Council-sponsored Southern Independent Schools Association. Of those 65, only 35 reported anything to the Alabama Department of Education in 1970-71. The state did not even recognize the existence of 13 of the remaining 30. What everyone seemed to agree upon, however, was that enrollment had increased significantly on account of the post-*Green* orders, and that accurate enrollment figures were undoubtedly and significantly higher than those being reported by the state.²³

²² William John Heron, *The Growth of Private Schools and Their Impact on the Public Schools of Alabama, 1955-1975* (Ed.D. diss., University of Alabama, 1977), pp. 61-107; Allen Davis Cleveland, *Alabama's Private, Nonsectarian Elementary and Secondary Schools in 1970* (Ed.D. diss., Auburn University, 1970), pp. 55-59; *New York Times*, Nov. 17, 1970.

²³ Richard Fields, *The Status of Private Segregated Academies in Eleven Southern States* (New York: NAACP Legal Defense and Education Fund, Division of Legal Information and Community Service, Sept., 1972), pp. 3-7; Heron, *The Growth of Private Schools and Their Impact on the Public Schools of Alabama, 1955-1975*; Cleveland, *Alabama's Private, Nonsectarian Elementary and Secondary Schools in 1970*. Heron and Cleveland both acknowledge that without mandatory reporting to the state, precise private school establishment and enrollment data were difficult to ascertain. The *Los Angeles Times* reported that during the 1971-72 school year, there were

Post-*Green* orders in Black Belt systems had the most immediate and observable effect. Between the fall of 1969 and the fall of 1970, the extent of the white exodus across the state was directly proportionate to the percentage of blacks in the school system. In districts where blacks constituted 25 percent or less of the student population, only about 1 percent of white students withdrew. In districts where blacks made up 25 to 50 percent of enrollment, during the same time period, the percentage of whites fleeing increased to 6 percent. The percentage of whites fleeing the system increased significantly when the percentage of blacks in the system was above 50, or in other words, when whites were in danger of becoming the minority race in schools. In systems in which blacks were between 51 and 75 percent of enrollment, 21 percent of whites fled. When blacks were more than 75 percent of the student population, the white exodus was 54 percent on aggregate, and near total in some cases. Most Black Belt systems fell into the latter category.²⁴

As one of the founders of Lowndes Academy later remembered, "I was working in the public school system, and I could see that [as a result of compulsory assignment] there would be 5 white and 30 black children in the same class, and I could see that that would pull down education; it would not elevate it." At the time, most in the school's leadership couched the school's mission in terms of freedom of association. Locally legendary head football coach and Lowndes Academy principal Mac Champion told a reporter, "We don't hate Negroes. There's a difference," he explained, "between segregation and discrimination. We get along fine with them, but we believe that we have the right to socialize and study the way we please and with whom we please." Speaking to the possibility that a black student might one day seek admission to the academy, Champion clarified exactly what that freedom meant: "It's not likely the student would be admitted, because that's the reason for having the school in the first place." Referencing a portrait of Confederate General Robert E. Lee on his office wall,

47,098 students in 301 private schools in Alabama, with an expected increase for 1972-73; *Los Angeles Times*, Sept. 4, 1972.

²⁴ John C. Walden and Allen D. Cleveland, "The South's New Segregation Academies: Are We Repeating Separate but Equal under a Different Guise?" *Phi Delta Kappan*, Dec. 16, 1971, pp. 234-39.

Champion added, "That doesn't mean we are not Americans. We are good ones down here," he said, "but America means freedom to choose what school you want to attend."²⁵

Lowndes Academy was successful from its inception, in part because of Champion, and other schools attempted to follow suit. Champion worked with Lowndes County segregationist leader Ray Bass to organize an "independent" schools' athletic association, through the Alabama Private Schools Association, in 1969. The two organizations eventually became the Alabama Independent Schools Association, the primary purpose of which was (and remains) to coordinate athletics. A number of segregationist academies subsequently exploited Alabamians' love for football by recruiting successful football coaches like Champion, then recruiting local white players from the public schools. The new private athletics association allowed students to transfer in and immediately play. To prevent such recruiting, the public association, the AHSAA, maintained rules which insisted that transfer students sit out a year.²⁶

Despite his quest to save public education, Governor Albert Brewer offered his encouragement and assistance to the segregationist academy movement as well. When post-*Green* and post-*Alexander* orders came down in Alabama, Brewer voiced his desire that public and private schools could "co-exist." He announced that he had received letters from "many parents who intend to send their children to private schools and who suggest that part of the taxes they pay go to help support the education of their children" He ensured the parents that his administration would try to find a "constitutional way" to get such assistance to the "great many children" who were sure to be flocking to private schools, and he reminded detractors that "each child who goes to private school takes part of the burden off the public education system." Despite the fact that even Brewer, himself, doubted if the state could still find a way

²⁵ *Birmingham News*, Dec. 1, 1969, Aug. 13, 18, 1973; Carla Crowder, "Private White Academies Struggle in Changing World," *Birmingham News*, Oct. 27, 2002; Walden and Cleveland, "The South's New Segregation Academies," *Phi Delta Kappan*, Dec. 16, 1971.

²⁶ "A Brief History of the Alabama Private School Association from the AISA Archives, 1972," Alabama Independent Schools Association Website, <http://www.aisaonline.org/main.html>.

to financially assist private school families, segregationist academies saw that substantial spike in enrollment in 1970, and many existing institutions expanded their operations.²⁷

Once desegregation proceeded beyond tokenism, many academies did not need to tout their football team, nor did they need the assistance of the governor. When compulsory assignment orders portended the desegregation of Lowndes County's remaining predominantly white high school at Fort Deposit in the late summer of 1973, Lowndes Academy began to benefit from a gradual but ultimately total exodus of whites from the Lowndes County public school system. Lowndes Academy also benefitted from white flight from surrounding counties' systems when they were forced fully integrate their last predominantly-white schools. From the vantage point of late 1969, Champion had correctly predicted the future: "You wait until you have more than token integration. It's one thing when there's 10 percent Negroes in an all-white school. Wait 'till it gets to 50 percent or more and see what happens."²⁸

Another example of an existing segregationist academy which benefitted from increasingly stringent desegregation orders was Greene County's Warrior Academy. The private school had been established in 1965 after the first HEW efforts to force token desegregation. From that time until the fall of 1970, it had served only grades 1 through 8, enrolling around 200 students. When Greene County was added as a party defendant to the *Lee v. Macon* litigation in 1969 and forced to implement a compulsory assignment desegregation plan for the fall of 1970, Warrior Academy expanded to 12 grades and prepared to double its enrollment to around 400 students, all white. White teachers bolted the Greene County system almost as quickly as the students, as 25 of the district's 40 white teachers resigned that summer rather than teach in the fully desegregated system. When white teachers left, it only exacerbated student flight, and the entire system quickly approached all-black status. As the

²⁷ *Birmingham News*, Jan. 15, 1970.

²⁸ *Birmingham News*, Dec. 1, 1969, Aug. 13, 18, 1973; Carla Crowder, "Private White Academies Struggle in Changing World," *Birmingham News*, Oct. 27, 2002; Walden and Cleveland, "The South's New Segregation Academies," *Phi Delta Kappan*, Dec. 16, 1971.

attorney for the nearby Choctaw County Board of Education, John Christopher, described, “The main complaint is the quality of teaching.” He added, “It is a fact that [white] parents believe the Negro teachers are not qualified,” lacking “sufficient background and training. . . . That is why my son is at [Jefferson Davis Academy in] Vimville,” Mississippi. By the opening of the 1970-71 school year, all but about 20 of Greene County’s white students had left the public system and Warrior Academy’s enrollment neared 500.²⁹

While the ranks of the established segregationist academies swelled, white parents organized and opened new academies across the state at an unprecedented rate. In Choctaw, parents like John Christopher had sent their children to not just Jefferson Davis Academy in Mississippi, but also to neighboring Marengo Academy. With the specter of compulsory assignment looming in Choctaw, demand increased enough to warrant the opening of the county’s own South Choctaw Academy in the town of Toxey in the fall of 1969. Among the other Black Belt segregationist academies that sprung up in 1968 and 1969 as a result of compulsory assignment orders were Autauga Academy in Prattville; Crenshaw Christian Academy in Luverne; Ft. Dale Academy in Greenville; Lakeside School in Eufaula; Monroe Academy in Monroeville; and Patrician Academy in Butler. In 1970 more Black Belt schools appeared and prospered. As the court had predicted, whites left the Sumter County system upon the implementation of the county system’s compulsory assignment order. Fewer than 40 white children joined 3,655 blacks in the county schools, while newly opened Sumter Academy enrolled over 450 white pupils. Other segregationist academies which opened their doors for the first time that fall included: Grove Hill Academy in Clarke County; Edgewood Academy in Elmore; Hooper Academy in Hope Hull; Jackson Academy in Clarke County; Pickens Academy in Carrollton; South Montgomery Academy in Grady; Sumter Academy in York; and Wilcox Academy in Camden. Segregationist academy growth was not limited to the Black Belt during this period, though. Academies appeared elsewhere between 1967

²⁹ *Birmingham News*, Jan. 15, Aug. 8, 1970; *Race Relations Reporter*, July 16, 1971 (Nashville: Race Relations Information Center).

and 1972: Chambers Academy in Lafayette in east Alabama (69); Abbeville Christian Academy in Henry County in the Wiregrass (70); Ashford Academy in Houston County in the Wiregrass (70); Bessemer Academy in Bessemer (70); Cahawba Academy in Bibb County in west Alabama (70); Central Christian School in Baldwin County on the eastern shore of Mobile Bay (70); Coosa Christian in Gadsden (72); Coosa Valley Academy in Shelby County, south of Birmingham (70); Escambia Academy in Atmore in south Alabama (67); Faith Academy in Mobile (as Lott Road Christian School in 1969); Glenwood School in Lee County in east Alabama (70); Springwood School in Chambers County in east Alabama (70); and Tuscaloosa Academy in Tuscaloosa (67).³⁰

The various new schools were diverse. A study by an educationist in 1970 found, "Nothing seems true of all such schools." Some schools enrolled upwards of 500, even approaching 1,000 students. Some had fewer than 100 students. Most fell somewhere in between. The physical plants of the academies were especially varied. Some school organizations had the advantage of moving into old public school facilities, while others were forced to convert old houses or recreation centers, or to hastily build simple sheet metal or cinder block facilities of their own. Many of those which opened in 1968 or 1969 were able to move into new facilities and expand in 1970 or 1971. Some which opened in 1970 were able to expand soon thereafter. Some had the benefit of using nearby city recreational facilities; for example, Montgomery segregationist academies used the city's sports facilities until Judge Johnson enjoined the city from allowing the practice. With funding coming exclusively from tuition and community fund raising (for operating expenses) and from donations (for capital outlay), some struggled to meet students' basic needs, particularly in their earliest years. But the desire to avoid mass integration and potential minority status was enough to keep the school open. In some cases,

³⁰ Alabama Independent School Association (AISA), 2012-13 Directory (Montgomery: Alabama Independent Schools Association, 2012), <http://www.aisaonline.org>, accessed March 31, 2013. The directory lists each school's website; the websites, in turn, reveal each school's date of founding or establishment in various histories, 'welcomes,' crests, and signs; all of these schools were, thus, successful enough to still be in operation as of 2013; see also *Birmingham News*, Sept. 2, Oct. 3, 1969; *U.S. v. Choctaw County Board of Education*, 417 F.2d 838 (5th CCA, 1969).

schools came to thrive (each of the schools listed in the previous paragraph was still in operation as of 2012-13). What was true of public schools was exacerbated for these private schools: where families were more wealthy, schools were better funded. Also, where there were more families to contribute, schools were better off. Thus, the schools that struggled the most were those in sparsely populated areas or lower class areas, and in the worst cases, both. Some benefitted from large donations from wealthy individuals. Others were dependent on barbecues, bake sales, and deer hunts to make ends meet. The only schools which suffered to the point of possible closure were those in places where whites left the area entirely, not simply the public school system. This included the city of Birmingham, where Hoover Academy and Jefferson Academy had short lives, and certain Black Belt counties, such as Macon, where Macon Academy was forced to move from increasingly all-black Tuskegee towards suburban east Montgomery in order to survive.³¹

In the spirit of law-and-order disingenuousness, these segregationist academies generally did not – then or later – officially acknowledge their primary *raison d'être*. Most segregationists described them as bastions of freedom of association. As editors at *The Citizen* proclaimed, “Nothing is more attractive to the patrons of private schools than the air of freedom.” Likewise, nothing was more odious to integrationists, supposedly, than “an arrangement which promise[d] potential victims an avenue of liberation.” The schools themselves often expressed vague commitments to something – other than segregation and white supremacy – which the federal government was trying to take away. Bessemer Academy’s founders, for example, proclaimed themselves to be “committed to building a school where children could receive a challenging curriculum within a framework of traditional values.” Others professed to be motivated by a need to provide students with “a comprehensive college preparatory education in a safe and supportive environment.” The schools were often associated with local white

³¹ Cleveland, *Alabama's Private, Nonsectarian Elementary and Secondary Schools in 1970*, 144-5; Walden and Cleveland, “The South’s New Segregation Academies,” *Phi Delta Kappan*, Dec. 16, 1971; Crowder, “Private White Academies Struggle in Changing World,” *Birmingham News*, Oct. 27, 2002; *Pittsburgh Courier*, Feb. 5, 1972.

churches, and indeed, the freedom to teach Christian values and to compel Bible study and prayer were significant motivational factors for some school founders.³² Some sectarian, denominational private schools were also racial exclusive, and several had purposefully expanded to attract students in the wake of desegregation rulings. Most of the 1965-to-early-1970s wave of segregationist academies in Alabama were expressly nondenominational, but they nonetheless professed Christian values. They described themselves as offering a “Christian-based” education. Cahawba Christian’s founders were concerned that parents would lose sight of the “philosophical differences that exist between Christian education and public education.” As historian Joseph Crespino has argued, for some church schools, particularly those established after 1972 under fundamentalist auspices, “race was one of the less relevant lines along which they discriminated.” Crespino argues, though, that even the enrollment of racial minorities in such schools “hardly bespoke their racial progressiveness.” Certainly for the schools which were opened in Alabama between 1965 and 1972, race was the primary motivator. It manifest itself in diverse, law-and-order style appeals: parents were lured to the school based on fears of educational deterioration, cultural deterioration, violence, and in many cases miscegenation. These were still motivating factors for families in 2013. A revealing recruiting “testimonial” from a teenage white girl on the Bessemer Academy website in 2013 read simply, “I like coming to school and feeling safe.”³³

Alabama’s segregationist academies, church-affiliated and otherwise, benefitted from federal tax exempt status. Black activists in Mississippi filed a challenge to the granting of such status in 1969. And in January of 1970, Leon Panetta of the HEW Office of Civil Rights’ convinced HEW secretary Robert

³² This was particularly clear in light of the Supreme Court’s invalidation of compulsory, state-sponsored prayer and Bible study in *Engel v. Vitale*, 370 U.S. 421 (1962), and *Abington School District v. Schempp*, 374 U.S. 203 (1963), although the decisions in and of themselves did not lead to a significant increase in private school establishment or enrollment in Alabama, which was limited in those years to areas threatened by desegregation orders.

³³ “Tree of Liberty,” *The Citizen* 15, No. 11 (Sept., 1971), p. 2; Crespino, *In Search of Another Country*, p. 252; Bessemer Academy Website, <http://bessemeracademy.com>, accessed, April 1, 2013; Edgewood Academy Website, <http://www.edgewoodacademy.org>, accessed April 1, 2013; see also various other seg academy websites as listed in AISA 2012-13 Directory, supra, fn. 30.

Finch to remove such status from schools which were clearly established to avoid desegregation (this was one of the reasons why Panetta was forced to step down). Around the same time, a federal court in Mississippi entered an injunction, in the case of *Green v. Kennedy*, against granting segregating private schools tax exempt status. In a continuation of the Johnson Administration's policy, the Nixon Justice Department submitted a brief in the case supporting tax exempt status for all private schools. Nixon himself privately argued that whites could not "send their kids to schools that [were] 90 percent black." He concluded, "they've got to set up private schools." Later that year, having conceded the more hardline southern segregationists to third party candidate George Wallace, Nixon's advisors counseled moving towards the political middle in an effort to woo more moderate segregationists. The White House then announced that the official IRS policy would be to deny tax exempt status to racially discriminatory private schools. For a while, it looked like tax law enforcement might deal a real blow to the maturing academy movement.³⁴

But behind the scenes, the Nixon Administration assured southern congressmen that the IRS would accept written statements from private schools as proof of nondiscrimination; in other words, segregationist academies would be able to claim nondiscrimination in principle and continue to discriminate in practice. The IRS tried to persuade the court that the issues in *Green v. Kennedy* were no longer relevant, since the administration had reversed its own course and had begun enforcing nondiscrimination. The court, in what was by then styled *Green v. Connally*, ruled that the IRS must take more affirmative steps to determine which schools were genuinely nondiscriminatory. The Supreme Court affirmed this ruling under the styling *Coit v. Green*. However, the IRS proceeded to scrutinize private schools across the country using two standards: a strict standard for Mississippi, where the

³⁴ Crespino, *In Search of Another Country*, pp. 226-32, 252-3; *Green v. Kennedy*, 309 F.Supp. 1127 (DC, 1970); *Green v. Connally*, 330 F.Supp 1150 (DC, 1971), affirmed *sub nom* *Coit v. Green*, 404 U.S. 997 (1971).

court's injunction applied, and a more lax one for everywhere else. Alabama's segregationist academies were safe.³⁵

Meanwhile, as early as 1970, Alabama Black Belt school systems were already beginning to approach the all-black system status which some had predicted, and which had been, in essence, a self-fulfilling prophesy. The percentages of black students in the Bullock, Greene, Sumter, and Wilcox County systems increased from 77, 86, 84, and 83 percent, respectively, in 1965, to 98, 98, 98, and 92 percent by 1975. White parents in Wilcox filed a claim in that county's school desegregation case alleging that the school board had purposefully adopted the plan most unpalatable to whites, while Wilcox Academy boosters, some of them members of the school board, were encouraging parents to stage a "100 percent" white boycott of the public schools. At the same time, Lowndes and Macon were on their way to a complete exodus of whites from the public systems, and in the case of Macon, from the county altogether. Outside the rural Black Belt, the cities of Birmingham and Anniston each saw a 21 percent increase in the percentage of black students in the system from 1955 to 1975, while Mobile, Montgomery, and Tuscaloosa each experienced at least a 9 percent increase during that time period. These numbers portended a more complete exodus to come.³⁶

Over the course of the following decade, federal court rulings and administrative decisions would seem to threaten Alabama's segregationist academies. In 1973, a federal court in Virginia ruled in *Runyon v. McCrary* that private schools could not legally deny students' applications on account of their race, prompting the Southern Independent Schools Association to lament, "There is no longer a place of refuge for any group." The Supreme Court upheld the decision in 1976. At the same time – during the Carter Administration – the IRS attempted to apply the Mississippi standard for tax exemption to the rest of the country and to place the burden of demonstrating nondiscrimination back on the private

³⁵ Crespino, *In Search of Another Country*, pp. 226-32, 252-3; *Green v. Kennedy*, 309 F.Supp. 1127 (DC, 1970); *Green v. Connally*, 330 F.Supp 1150 (DC, 1971), affirmed *sub nom* *Coit v. Green*, 404 U.S. 997 (1971).

³⁶ Heron, *The Growth of Private Schools and Their Impact on the Public Schools of Alabama, 1955-1975*, pp. 61-107.

schools themselves. If a school had been established and opened in close proximity to desegregation orders, and if it continued to enroll an “insignificant number of minority students,” then it would have to show that it had taken affirmative steps to recruit minority students. The Reagan Administration ultimately reversed the Carter Administration’s policy, however, and attempted to support tax exemption for all private schools. This prompted a successful intervention in the reopened *Green v. Kennedy/Connally* case (then *Green v. Regan*), but an unsuccessful intervention in another case involving racially discriminatory church schools, *Bob Jones University v. U.S.*³⁷

A case which was closer to Alabama’s segregationist academy flowering, both geographically and temporally, posed a seemingly greater and more immediate threat. In 1969 and into 1971, Hoover Academy encountered legal opposition to its acquisition of former public school facilities and equipment in the small City of Brighton, just west of Birmingham. Blacks filed a class action suit in federal court to prevent the Brighton City Council’s lease of the old Brighton Junior High building to the segregationist academy, which had already moved several times since its founding. In January of 1970, Judge Hobart Grooms upheld the lease, which the plaintiffs had argued was not only unconstitutional but procedurally dubious – the white mayor had voted twice to break a racially divided 3-3 tie in the city council vote approving the lease. The plaintiffs appealed to the Fifth Circuit, which reversed the decision. The appellate court challenged Groom’s assertion that Hoover Academy could not be proven to be a segregated school, calling the academy “lily white from its natal day.” Judge Irving Goldberg delivered the opinion of the three-judge panel, which included Judges Thornberry and Ainsworth. Goldberg argued that “in historical context” the court would “have to be more naively unsophisticated than this job allows to fail to recognize that the city fathers . . . were integrally involved in the founding and funding of a private, segregated school in order to afford the children of Birmingham an opportunity to

³⁷ *Washington Post*, July 30, 1973; Crespino, *In Search of Another Country*, pp. 226-32, 252-3; *Runyon v. McCrary*, 427 U.S. 160 (1976); *Green v. Regan*, 670 F.2d 1235 (DC CCA, 1981); *Bob Jones University v. U.S.* 461 U.S. 574.

continue their education in a segregated facility.” The court held that “the city of Brighton’s determination to sell a public school building to an institution which the city knew would operate an all-white segregated school had the ultimate effect of placing a special burden on the black citizens of that community.” It was a “relic of slavery . . . visited as much else upon the black man as a humiliation.” The city had “in effect encouraged the maintenance of a segregated facility by its action” and had thus violated the Fourteenth Amendment rights of the plaintiffs. The appellate court denied rehearing and rehearing *en banc*.³⁸

There were several reasons why these litigious developments surrounding tax exemption and school facilities did not significantly damage the segregationist academy movement in Alabama, however. First, the Hoover decision was not meant to be statewide or retroactive. By the spring of 1971, Alabama had already seen an explosion of segregationist academies, many of which had already acquired public facilities. Second, tax exempt status was also most crucial when private school foundations were setting up these school plants, often by way of land and facilities donations. Thus, schools which were already established had less to worry about regarding their federal tax exemption status, regardless of whether they had acquired public or private facilities. The third, and probably most important reason the segregationist academies in Alabama were able to survive despite these decisions was the simple fact that blacks in Alabama were not interested in mounting a further legal challenge to them. *Lee v. Macon* plaintiff Anthony Lee said of his early involvement in the litigation, “I don’t even think that we thought about [the segregationist phenomenon] that much.” Longtime *Lee v. Macon* attorney Solomon Seay remembered bluntly, “[We] never really looked at it.” Few blacks were

³⁸ *Birmingham News*, Aug. 29, Sept. 10, Dec. 30, 1969, Jan. 9, 1970, March 30, 1971; *Baltimore Afro-American*, March 30, 1971; *Wright v. City of Brighton*, 441 F.2d 447 (5th CCA, 1971); see also *Race Relations Law Survey* 3, No. 2 (July, 1971), pp. 53-4.

interested in following up one lengthy court battle with another one, only to have to pay tuition to attend a school at which they were not wanted, in the event that such a battle even proved successful.³⁹

Complicating matters was the fact that many white private schools proved, especially in later years, willing to token desegregate in order to blunt any legal challenge that might come. As early as the fall after the initial *Virginia/McCrary* decision in 1973, some academies allowed small numbers of blacks to enroll, usually those of higher socio-economic background or those who excelled at athletics. Montgomery Academy, for example, welcomed its first black student in the fall of 1973. As one Virginia public school official put it, "The very elite private schools [were] aggressively after the qualified black student so they [could] say, 'Look at us, we are integrated.'" For many schools, the choice did not come until years later, sometimes out of the desperate need for funds. In no circumstances did the academies accept more blacks than would constitute a tiny percentage of the total student enrollment. Thus, all of these schools which did accept some blacks were, in effect, able to reproduce the characteristics of freedom-of-choice desegregation. Freedom of choice had, after all, proved most preferable to law-and-order moderates after the litigious breakthrough.⁴⁰

A Lowndes Academy teacher explained that school's decision to consider black students out of necessity: "While they don't want a preponderance of blacks at Lowndes Academy, they will accept a black." He added that he personally "would have no objection to an integrated school" if whites were "not in the minority." Like most Black Belt segregationist academies, Lowndes was not forced to consider accepting blacks until the late 1990s. And when it and others did, it was primarily because each was in such financial shape that it needed to recruit black students to stay afloat. More successful, even thriving, segregationist academies, like Montgomery Academy and St. James in Montgomery, also actively recruited blacks, both as a shield from potential litigation and as a way to cultivate a more

³⁹ Seay Interview; Anthony Lee Interview; Willie Wyatt Interview; Crowder, "Private White Academies Struggle in Changing World."

⁴⁰ *Montgomery Advertiser*, July 31, Aug. 8, 1973; Seay Interview; Anthony Lee Interview; Willie Wyatt Interview; Crowder, "Private White Academies Struggle in Changing World."

progressive image. Nonetheless, the legal challenge from the state's blacks never came. The day after the *McCrary* decision was handed down in Virginia, the *Montgomery Advertiser* observed that the ruling, when upheld by the Supreme Court, "could lead to litigation challenging the all-white status of private schools founded in the state as an alternative to desegregated public schools." But, the *Advertiser* continued, "the legal scenario for making the ruling effective nationwide would probably be a repeat of public school desegregation efforts of the past 20 years – and might take as long." Blacks were exhausted from decades of litigation and direct action, some were disillusioned with the effects of continuing white resistance, and most had no stomach for another 20 year battle. Many were more concerned with how to improve conditions in the public schools to which they had finally won some measure of equal access and, in some cases, how to maintain those which they had fought so hard to develop under segregated conditions.⁴¹

"We Lost Our Full Identity": Blacks Protest School Closures

As the historian David Cecelski has argued, "school desegregation was a far more complex matter than a demand by blacks to attend school with reluctant or hostile whites." In many school districts which maintained white majorities, blacks mounted protests to the way desegregation was actually carried out. This came into sharp focus when court-ordered compulsory assignment plans began forcing the closure of black schools. The *Lee v. Macon* court had held that these school "closures" did not mean that school plants should be closed permanently, only that they not be used as all-black schools any longer. More often than not, however, school boards took certain whites at their word, assumed that they would refuse to attend formerly all-black schools, and opted to close blacks schools permanently. In some cases, they decided to turn these schools into vocational centers or alternative disciplinary schools. In others they transformed formerly all-black high schools into junior high schools,

⁴¹ *Montgomery Advertiser*, July 31, 1973; Seay Interview; Anthony Lee Interview; Willie Wyatt Interview; Crowder, "Private White Academies Struggle in Changing World."

or formerly all-black junior high schools into elementary schools. In the latter cases, these transformations often came with a name change, which school boards thought would mollify reluctant whites. Taken with the threat to black teachers and administrators of demotion, dismissal, or otherwise discriminatory treatment, these changes amounted to what Cecelski has called the “dismantling of black education” in many districts. This was especially true in a number of the *Lee v. Macon* systems.⁴²

In the east Alabama city of Opelika, the city system’s 1970 desegregation plan called for the retention of the all-black Darden High, as the renamed Opelika High-Southside Campus. Characterizing the former Darden as a separate campus of Opelika High allowed the school system to count the two student bodies as one and achieve the desired system-wide, 63-37 white-to-black ratio which the CRD and the court desired. Southside Campus was operated that year as a vocational adjunct, open to all who chose a vocational curriculum – all of whom turned out to be black. The existing Opelika High was not large enough to house all of the system’s white and black students, and the school board argued that whites would refuse to attend the former Darden. Johnson and the CRD temporarily accepted this and allowed the “Southside Campus” situation to continue for a year, during which time the Opelika school board had a large facility hastily constructed to accommodate all of the system’s high school students. In 1971 the new Opelika High School took all of the students from both the former Opelika High and the former Darden. The Darden facility was subsequently sold to the local Head Start operation. Its loss was widely lamented in the black community.⁴³

Darden had been named for Dr. J.W. Darden, the first black doctor in Lee County, and had been a source of tremendous community pride. Historian Adam Fairclough has cautioned against the romanticization of black schools in the Jim Crow era, but in a city like Opelika, with a reasonably strong black middle class, the black schools were not as pitiful as some in the nearby rural Black Belt. The black

⁴² David Cecelski, *Along Freedom Road: Hyde County, North Carolina and the Fate of Black Schools in the South* (Chapel Hill: University of North Carolina Press, 1994), pp. 10-11.

⁴³ Bagley, *A Meaningful Reality*, pp. 46-51.

community made Darden an integral part of its identity. And its pride was underscored by the discriminatory conditions in which it had achieved this feat: the city's black schools, like so many others, were underfunded and neglected relative to the white schools. As one Darden student, Birdie Peterson, remembered, "We had a premiere school, even in the fifties, that a lot of students around here didn't have. We kept that building up as if it were our home. You could open up the front door, and the [hardwood] floors would just be sparkling." The school's principal and teachers were community leaders. Assemblies were often community events. The community identified with the school's colors and mascot and football team. Shared memories and experiences from the school formed a community bond. Additionally, blacks become minorities at the integrated Opelika High, where they had to compete with whites for awards and for participation in extra-curricular activities. Darden student Henrietta Snipes remembered, "We totally lost everything. For females . . . we lost cheerleading, we lost majorettes. . . . It was not a good time for blacks, because most of us felt like we were forced to change . . . to give up everything. It took a lot of adjusting and a lot of praying to get through." Peterson similarly recalled, "We lost our full identity. We lost everything . . . when we lost Darden."⁴⁴

Like the complaints of white parents, black parents' concerns often manifested themselves in letters to Judge Johnson. The judge suspected that certain petitions were the result of pressure from white officials, particularly in the Black Belt, but many petitions, letters, and concerns were clearly genuine. For example, a group of parents from Enterprise, in the southeastern Wiregrass region of the state, beseeched Johnson to prevail upon the Coffee County Board of Education to retain all-black Coppinville High in some capacity, rather than close it down entirely. They wrote, "We as citizens of the Negro community would like to get the court order modified – we would prefer white children being sent this way under the zone method." They appealed to Johnson to consider the black children who had made the Coppinville High football team one of the strongest and most successful in the 2A

⁴⁴ Bagley, *A Meaningful Reality*, pp. 51-3; Adam Fairclough, *Teaching Equality: Black Schools in the Age of Jim Crow* (Athens: University of Georgia Press, 2001), 66.

classification. They praised the condition of the former school plant and its many programs, writing, “We had a new school – with auto mechanics, shop, art, band – and all this is going to be lost. . . . We need two high schools.” The parents had already spoken to the school board, which had blamed the court. The board had purportedly agreed “that they would send white children to this school instead of wiping us completely out.” Another Coppinville parent wrote a separate letter with a similar plea. “We have 60 band members and 10 majorettes,” she asked, “What will become of them when they are transferred to an all-white school?” She added, “It’s suppose to be a freedom of choice then why are we going one way” [sic].⁴⁵

Even before freedom of choice had given way to system-wide compulsory assignments, black parents were engaged in efforts to save black schools. After the omnibus August, 1968 school closure order forced the Greene County school board to close all-black Jameswood school, the Jameswood PTA used freedom of choice in an attempt to force the school back open. The PTA counseled all parents to choose Jameswood as their first choice, followed by the all-white elementary school at the town of Eutaw. The idea was that this would severely overcrowd the Eutaw school and force the board to reconsider opening Jameswood. The school board’s attorney, Maury Smith, informed Judge Johnson of the effort. Plaintiffs’ attorney Harvey Burg corroborated the information. Johnson advised asking Fred Gray to go to the black parents and ascertain which ones actually wanted to attend the Eutaw school in lieu of others, because Jameswood “would not be reopened” and the parents ought to be “impressed with this fact.”⁴⁶

⁴⁵ Billy Cooper, Eugene Ford, and Joe Roy Berry to Frank Johnson, Oct. 16, 1969; Velma Williams, Sept. 19, 1968; both in Frank Johnson Papers: Lee v. Macon Case File, Container 24, Folder 12. For concerns of authenticity and pressure from white officials, see Hugh Lloyd to Frank Johnson, May 6, 1969, and Petitions of “trustees and patrons” of Coxheath Junior High School (2), Undated, Frank Johnson Papers: Lee v. Macon Case File, Container 26, Folder 4.

⁴⁶ Memorandum of Phone Calls, Sept. 13, 1968, Frank Johnson Papers: Lee v. Macon Case File, Container 25, Folder 14.

Black parents often had practical concerns, beyond attachment to community schools. A man from sparsely populated Chambers County, on the northeastern fringe of the Black Belt, asked Judge Johnson in a letter if he had considered the effect of “his” school closure order on children in the county. “Surely you couldn’t have had children in mind who at the present time is riding a school bus 30 to 40 miles a day” [*sic*]. “Think about how much earlier they will have to leave home,” he wrote, “and how late they will be getting home if they are forced to ride a bus 22 additional minutes each day – dark when they leave home and dark when they get back,” at which time they would have to walk a considerable distance in many cases down dark rural roads. What good would the children be, he wondered, if they were sleeping all day and exhausted when they got home. “We honestly believe in what you are trying to do,” he added, “but we are also interested in the health and welfare of our children.”⁴⁷

Often school administrators and teachers, themselves, pleaded for the retention of black schools. The principal of the Lockhart No. 2 School in south Alabama’s Covington County, Mrs. Willie Kitchen, sent an appeal to Johnson not only touting the school’s facilities, but also describing the very practical concerns of its parents. Lockhart No. 2 had been ordered closed by the school board at the insistence of HEW. Kitchen told Judge Johnson that no black children had to walk more than 5 blocks to get to the school, situated in the middle of the tiny town’s black community. The school to which the students were to be transferred, however, was 1.25 miles away – too short a distance to demand transportation from the school board, but long and dangerous enough to cause concern. The principal argued that there was “a very long and dangerous highway” that separated the black village from the rest of the town. Also, most of the village’s black parents worked at the U.S. Air Force base (Eglin) across the Florida state line and left their children very early in the morning. “Most of the children,” Kitchen wrote, “can be left alone to go to school . . . with no fear of danger, [and] when the weather is

⁴⁷ Lemonde Motley to Frank Johnson, Oct. 21, 1968, Frank Johnson Papers: Lee v. Macon Case File, Container 24, Folder 7.

bad the children can run to and from school.” This would not be so, she argued, if they were forced to attend formerly all-white Harlan. “Judge, your honor,” she added, “it isn’t that we are fighting desegregation, we are just thinking about the safety and welfare of our children.”⁴⁸

Principal Kitchen also argued that Lockhart was in great shape. In fact, recent improvements made by the school board in an attempt to avoid substantial desegregation had undoubtedly made it the envy of blacks in neighboring school districts. Kitchen explained, “We have a new lunchroom, new in-door restrooms, water cooler inside, and water fountains outside, televisions and record players in each classroom, movie and film projectors, and the entire school is heated with electric, thermostatic heaters.” Each classroom had “bookshelves, books, and maps,” and the school had “an automatic time clock” and was “well-supplied with playground equipment.” She pleaded, “Let us keep this school awhile longer.” The parents of Lockhart petitioned the court and the school board and were able to delay the school’s closure for two more years. But no white children ever chose to attend it under freedom of choice, and the board would not send white students to it. It was closed in 1969.⁴⁹

“Old Times There are Not Forgotten”: Blacks Protest the Symbols of the Confederacy

Black complaints included more than black school closures. Some school systems were willing to, or were forced to, incorporate to black schools into their desegregation plans rather than close them, although this almost invariably involved renaming the formerly black schools to remove what was seen by white officials as a stigma which would drive white parents to private schools. More often than not, though, blacks were assigned to formerly all-white schools, and in these cases, the terms of integration

⁴⁸ Mrs. Willie M. Kitchen to Frank Johnson, Aug. 3, 1967; see also Mrs. Dorothy Lee (Lockhart teacher) to Frank Johnson, Aug. 3, 1967; both in Frank Johnson Papers: Lee v. Macon Case File, Container 24, Folder 16.

⁴⁹ Mrs. Willie M. Kitchen to Frank Johnson, Aug. 3, 1967; see also Mrs. Dorothy Lee (Lockhart teacher) to Frank Johnson, Aug. 3, 1967; Thomas W. Carroll (Covington Superintendent) to Mrs. Lillie V. Jordan, cc: Frank Johnson, petition attached, Aug. 16, 1967; Lillie Jordan to Frank Johnson, Aug. 20, 1968; Memorandum of Conference, Feb. 25, 1969; all in Frank Johnson Papers: Lee v. Macon Case File, Container 24, Folder 16. See, on *Know Alabama* and like textbooks, CH 11, *supra*.

almost always favored whites. Sometimes they were detrimental to all: for example, many schools cancelled homecoming dances and proms rather than sponsor integrated events, while private parents' groups then organized their own, segregated events. Many schools eradicated entire programs, like marching band, rather than integrate them. But when it came to a school's name, its mascot, its colors, and its traditions, those of the formerly all-white schools were all generally retained in desegregated situations. In many instances, this meant blacks attended schools which were nicknamed "the Rebels"; which flew the Confederate "battle flag"; which played and sang the unofficial anthem of the Old South, "Dixie," at sporting events and assemblies; and which used textbooks like *Know Alabama*, which glorified the antebellum South, apologized for slavery, lamented Reconstruction, and celebrated Redemption.⁵⁰

Know Alabama was only the most egregious and widely protested example of a distorted history text in general use in Alabama; it was certainly not the only one. Like *Know Alabama*, the secondary school text *Alabama History for Schools* also presented an apologia for slavery and described slaves as docile and content. "While the Negro was badly treated as a rule in the foreign slave trade," it read, "he was generally very well treated by Alabama farmers." It noted that "most of the slave trading ships were owned and operated by Northerners," and argued that, "with all the drawbacks of slavery, it should be noted that slavery was the earliest form of social security in the United States." According to the text, "Slaves enjoyed little luxury but suffered little or no want . . . in clothing, as in food and housing." They were even able to live together in the slave quarters, which they liked to do "to keep from getting lonesome." Slaves also "received the best healthcare which the times could offer." Distortions unsurprisingly clouded the book's coverage of the Civil War, as well. The "War between the States" was not caused by slavery, but by "the crusade against slavery," mounted by the abolitionists. If "crusading abolitionists" had "stopped to realize that many of the slaves had been brought to this

⁵⁰ *Birmingham News*, May 21, 1969.

country by Northern slave traders who had made vast fortunes in this trade, they might have been more willing to have the northern states share the cost of emancipating slaves”⁵¹

In another widely used secondary school text entitled *The Land Called Alabama*, all antebellum white southerners seemed to share the one-time sentiments of Thomas Jefferson: “As a result of the liberal atmosphere of the American Revolution, Southerners became apologetic about [slavery], admitting that it was intrinsically wrong, but arguing that slaves existed in the South in such large numbers that they could not be turned loose on Southern society.” They were soon convinced, though, that “slavery was the best means of social and economic control of a subject race ever devised.” This was partly because, “Generally, a planter took keen interest in his slaves, attending to both their physical and spiritual needs,” even “encouraging family life.” The slave codes and “public opinion generally functioned to give slaves fair treatment.” Also, “most masters wanted their overseers to enlist the cooperation and appeal to the good sense of their slaves rather than use brute force.” After the “War Between the States,” blacks constituted the “great bulk of the votes” in the Reconstruction coalition, “but only a very small fraction could even sign their own names,” according to the text. The Ku Klux Klan played a prominent role in overthrowing this “Radical” coalition. The KKK would “ride out of the woods on Negroes coming home from Union League meetings, where they were being indoctrinated by Republicans.” The Klan “did not hesitate to resort to extreme punishment under certain circumstances.” There was scarcely any mention of the civil rights movement in the text, only a few brief references to things like the Freedom Rides or the Montgomery bus boycott. But George Wallace appears as a heroic figure who barred black students from the University of Alabama, whereupon “only the introduction of federal troops forced the governor to withdraw.”⁵²

⁵¹ Charles Grayson Summersell, *Alabama History for Schools* (Birmingham: Colonial Press, 1961, 1965); Melton McLaurin, “State Textbooks: Distorted Image of Negroes Presented in Some Histories,” *South Today* 2 (Southern Regional Council, 1970-71) p. 8. For an extended discussion of *Know Alabama*, see CH 11, supra.

⁵² Malcolm McMillen, *This Land Called Alabama* (Austin, TX: Steck-Vaughn and Co., 1968); McLaurin, “State Textbooks: Distorted Image of Negroes Presented in Some Histories.” Jefferson, on two occasions during

A study undertaken by a history professor at the University of South Alabama in Mobile presented some generalized conclusions about history texts in Alabama schools in the early 1970s. The study concluded, "The negro is never portrayed as an actor; rather, he is always acted upon, always described as a passive agent," with all of "his contributions to society . . . slighted." There was also "a deliberate attempt to perpetuate the image of the Negro as an emotional, trusting, lazy, childlike creature." It was an "inescapable conclusion" that the black person was "made to seem to prefer his position," because "almost no attention [was] given to his efforts to become an active member of society." At the same time, southern whites were universally portrayed as "the Negro's friend and protector, always kind and benevolent." At their best, the texts surveyed in the study presented a "heavily qualified objectivity." The study concluded with a number of rhetorical questions regarding the implications of these findings:

How can black children taught from such texts develop a sense of pride in their race? How, on the other hand, can white children come to understand why so much criticism is leveled by those outside their culture at practices which their formal education, at the very least, does not condemn? How can they begin to understand the racial revolution in which they are participants?⁵³

Many blacks understood that the answers to all of these questions was: they cannot. The state NAACP and local parents groups continued into the mid and late 1970s trying to eradicate such texts from schools.⁵⁴

Black students did not have to delve into their history books to find celebratory reminders of their chattel past. Symbols of the Confederacy were all around them. And of all the old emblems of the Old South which were prominently displayed in formerly all-white schools, "Dixie" was perhaps the most

the debates over the Missouri Compromise and the future of slavery famously argued, "We have the wolf by the ear, and we can neither hold him, nor safely let him go. Justice is in one scale, and self-preservation in the other." See, for a convenient reference/citation, the Monticello website, <http://www.monticello.org>, Quotations, Famous Quotations.

⁵³ McLaurin, "State Textbooks: Distorted Image of Negroes Presented in Some Histories."

⁵⁴ McLaurin, "State Textbooks: Distorted Image of Negroes Presented in Some Histories."

abhorrent to blacks. Confederate flags were commonplace, of course, on school flag poles and in school classrooms – sometimes above or in lieu of the American flag. But “Dixie” was participatory. At football games and homecoming rallies, students sang – and the school band was forced to play – the song which lamented the death of the old “land of cotton.” The song had begun as a parody act in a Jim Crow-style, northern minstrelsy show, meant to be sung by a white performer in blackface portraying a slave who yearned to return to the antebellum South. It was spontaneously adopted by southern secessionists not long thereafter. After the defeat of the Confederacy and the implementation of Reconstruction, the song became more of a dirge for a bygone era, for a lost generation, and for slavery – the institution upon which the entire socio-economic structure of the white South had been dependent. After the Redemption of the South by the Democratic, Bourbon white supremacists, the song became a more gleeful nod to a glorious past. Then in times of successful civil rights activism, it became a sad commentary on the state of things.⁵⁵

Across the South, blacks in choruses and marching bands protested playing or singing the song. When one student in Tennessee was expelled in May of 1969 for such a refusal, he filed suit in federal court. During the trial, the plaintiff alleged that white students often replaced the words of the song with lines like, “Nigger, go back and pick that cotton.” The following year, the Sixth Circuit Court of Appeals would decide 2-1 to uphold the boy’s suspension, accepting the argument that he had been punished for walking away during a performance, not for refusing to play the song. Alabama schools continued to celebrate the song in the meantime. In November, 1969, a melee erupted at a homecoming ceremony in Anniston, Alabama when black students protested the playing of the anthem. In response to this incident, W.C. Patton of the state’s NAACP called on state Superintendent Ernest

⁵⁵ McLaurin, “State Textbooks: Distorted Image of Negroes Presented in Some Histories”; see, on the origins of “Dixie,” Christian McWhirter, “The Birth of ‘Dixie,’” *New York Times*, March 31, 2012, <http://opinionator.blogs.nytimes.com/2012/03/31/the-birth-of-dixie/>, accessed April 10, 2013.

Stone to prohibit the display of the battle flag and the playing of “Dixie.” Patton sardonically suggested that the two *might* possibly be replaced by “The Star Spangled Banner” and the Stars and Stripes.⁵⁶

Early in 1970, the Emancipation Association of Birmingham and Vicinity, of which Patton was president, issued a statement in observance of the 107th anniversary of the signing of the Emancipation Proclamation. The statement was broad in its aims but ultimately spoke to black’s concerns over Confederate symbols. The group generally decried the fact that the promise of the 1963 demonstrations in Birmingham had not been fulfilled but instead had given way to “efforts at make believe” and the building of “propaganda images.” They specifically denounced the notion of law and order which the city’s white leadership had hidden behind since that time. “We believe in and seek to participate in law and order as a way of justice and not a rage of bigotry. . . . We reject the concept of ‘law and order’ in the context of racism, dual justice, and as a cover up for economic and social bigotry.” In this context, they argued that the Birmingham school board’s 1970 desegregation plan was “faulty and unacceptable” and ought to be “opposed and fought in the courts.” The statement continued, “We denounce and oppose the singing of ‘Dixie’ and the display of the Confederate flag by public schools . . . as an activity, part of a program, and at athletic games.” Both were “symbolic of a cause, spirit, and hostility which reminds us of division, disunity and an unhappy past.”⁵⁷

Alabama’s black students, themselves, had protested Confederate symbols in desegregated schools as early as 1968, when students at Shaw High in Mobile had unsuccessfully demanded that the school’s mascot be changed from the “Rebels,” that its band cease playing “Dixie” at sporting events, and that it allow the formation of an Afro-American Club for the study of black culture. When compulsory assignment plans went into wide effect in the fall of 1970, such protests exploded across the state. On a Friday night in October, 1970, black students at Huntsville’s Butler High engaged in an

⁵⁶ *New York Times*, May 5, 1969; *Los Angeles Times*, Oct. 16, 1970; *Birmingham News*, Nov. 6, 1969; *Caldwell v. Craighead*, 432 F.2d 213 (6th CCA, 1970).

⁵⁷ *Birmingham News*, Jan 10, 1970.

impromptu protest which ignited a firestorm in the city. Butler was the state's largest school at the time – with 2,600 students, 300 of whom were black. At a pep rally in preparation for the night's football game, around 100 blacks rose from the assembly and walked out when the band began playing "Dixie," which it had refrained from doing at each of the fall's previous pep rallies. Moments later, 50 or so black students returned, stormed the stage, and attempted to remove and destroy the Confederate flag. The principal was driven from the stage in the ensuing brawl, which did not abate until the police arrived, accompanied by a riot squad. When the school board announced that 113 of the black students had been suspended, solidarity marches and demonstrations followed at the city's Robert E. Lee High and Huntsville High as well as at nearby Alabama A&M College. The suspended black students began calling upon the school board for the dismissal of the 38-year-veteran Butler principal, who they argued did not know "how to communicate" with blacks. White parents responded in kind, as a delegation of 30-40 PTA members turned into a throng which besieged the city superintendent at his office and began firing questions. Did he support the Butler principal? What was the school board's position on "Dixie" and the flag? As the superintendent tried to deflect the queries, someone spontaneously began singing, "I wish I was in the land of cotton; old times there are not forgotten!" The entire crowd then joined in singing "Dixie" as the dismayed superintendent looked on helplessly.⁵⁸

White counter-protests of this kind occurred elsewhere across the state. Two weeks after the Butler incident, 400 white students at West End High in Birmingham walked out of classes and gathered on a football practice field to protest what they characterized as preferential treatment for black students. The West End principal had boldly attempted to appease black students by acquiescing to the naming of a "Mr. and Mrs. Soul" in addition to the annual naming of a "Mr. and Mrs. West End" and other popularity-driven distinctions to be published in the school's yearbook. The 1,700-student school was approximately 60 percent white, and voting on these things had broken down on strictly racial lines.

⁵⁸ *Birmingham News*, Oct. 10, 13, 14, 1970.

Accordingly, the 28 'awards' – like "Most Like to Succeed" – had all gone to white students. When black students complained to the principal, he agreed that black students "ought to have representation." White parents responded by calling for his resignation, and the white students initiated the walkout, which turned into a 750-student boycott on its second day. The white students subsequently listed a number of grievances, chief among which was the band's recent removal of two bars of "Dixie" from the school's anthem. The white principal audaciously defended the decision of the school's band director, who was black, by saying, "He possibly could find it offensive."⁵⁹

The protests and counter-protests continued. The Butler High Rebels had cancelled their game the week of the melee but resumed their season thereafter. At the first football game after the incident, the band initially refrained from playing the contentious song. But with the Rebels down late in the game, white students began chanting "We want 'Dixie,'" and the band relented. Whites in the stands waved tiny Confederate flags as police, sheriff's deputies, and state troopers discouraged any further violence. One month later, Pell City High School in suburban east Birmingham was closed after a series of fights. Black students had asked that the band not play "Dixie," while whites responded by protesting the appointment of two black cheerleaders to the school's all-white cheerleading squad. On the same day, Jones Valley High in Birmingham was partially closed. Fights had erupted there when blacks refused to stand for the school's *alma mater* in protest of the naming of an all-white homecoming court. Blacks had only recently been forced to abandon the community schools which had served as a source of identity for many. On top of that, they then felt forced to accept an identity which was not only alien and offensive, but down right threatening to them.⁶⁰

Whites responded with appeals to their own heritage and identity and, of course, their constitutional rights. The organ of the national Citizens Council, *The Citizen*, ran an editorial in which it castigated anyone who understood "Dixie" to be a symbol of slavery. Anyone who knew their history

⁵⁹ *Birmingham News*, Oct. 26, 27, 28, 1970.

⁶⁰ *Birmingham News*, Oct. 17, Nov. 17, 18, 1970; *Los Angeles Times*, Oct. 16, 1970.

understood well that “the War Between the States was fought over tariffs and the right of secession – not slavery.” The fact that “in Huntsville, Alabama the school band [could] not play “Dixie,” and no one could “wave a Confederate flag,” demonstrated a “depressing declination of freedom of speech.” Some Alabamians were equally incredulous that “Dixie” was even an issue. Alabama lieutenant-gubernatorial candidate and Clayton attorney Jere Beasley argued, “The playing of Dixie has been a longtime southern tradition that was never meant to be derogatory to anybody. And things are pretty bad,” he added, “when this traditional right is threatened.”⁶¹

An Auburn woman echoed these sentiments in a letter to the editor, joking that the song was being “picked on.” She added another, and perhaps unintentionally revealing, metaphor, insisting that the song’s detractors were “‘in heat,’ culturally speaking.” They had “never been on the barricades in the fight for justice,” anyway, she alleged. Not content to rest there, she added that a case for “‘racial balance’ in the nation’s musical fare” could not be made, since the country’s taste in music had “already tipped too much in favor of words and noises, imitative of music, which [were] not worthy of the nobler virtues of the black race to whom they [were] credited.” Finally, she predicted that the assault on “Dixie” would inspire a “musical backlash.” Not only would “Dixie” be “more ubiquitous than ever,” but blacks might find themselves “treated to renditions of that more candid southern paeon [*sic*], ‘The Lay of the Last Rebel.’” Its words were, indeed, more blunt: “O’ I’m a good old rebel, Now that’s just what I am. For this ‘Fair Land of Freedom,’ I do not care a damn.”⁶²

⁶¹ *Birmingham News*, Oct. 14.

⁶² *Jackson Daily News*, Nov. 14, 1970, letter to the editor from Leslie Campbell of Auburn, Alabama. The song in question appears to be a clever mash-up of the song “Good Ole Rebel Soldier” with the title of the Sir Walter Scott poem, “The Lay of the Last Minstrel.”

CHAPTER 18: SWANN SONG, 1971-73

On the afternoon of May 15, 1972, presidential hopeful George Wallace took the podium at a shopping mall in suburban Baltimore before a crowd of 1,000 loyal supporters and one would-be assassin. A twenty-one year old bus boy and janitor from Wisconsin named Arthur Bremer had been following the governor's campaign for some time. He had heard the denunciations of the "briefcase-carrying bureaucrats" who were enforcing the "asinine busing decisions" being handed down by the overbearing federal courts. Trial court, circuit court, and Supreme Court decisions in 1971 and early 1972 had put busing on the national agenda. This had only increased Wallace's appeal to white, working-class conservatives across the country. They had begun to see the Alabamian as someone who would fight to keep their hard-earned tax dollars from being squandered on the welfare state. If the Nixon Administration failed to put the brakes on busing before courts forced it upon cities across the country, then perhaps Wallace would. An apprehensive Nixon had actually pressured Wallace into running as a Democrat, instead of a third-party candidate, by threatening the governor's brother with prosecution for corruption. It was assumed that Wallace would not be able to win the primary and thus not factor in the general election. But as of that day in May, he had already won three Democratic primaries and was favored to win in Maryland.¹

Wallace's adoption of the politics of law and order had allowed him to appeal to voters' racial sensibilities with a colorblind language which scarcely resembled the fiery segregationist rhetoric of his former speechwriter Asa Carter. But if his campaign speeches sounded different, a concomitant change in his actions at home lagged a little behind. Wallace had at least one more round of hopeless defiance left in him. While in Alabama, he embarked on a series of what were – many had come to realize –

¹ *Washington Post*, May 16, 1972; Carter, *Politics of Rage*, pp. 432-50. Carter could not say unequivocally that a deal *per se* was made between Nixon and Wallace regarding the latter's candidacy, but he suggests strongly that, at the very least, there was a mutual backing off. The IRS announced it was ending its investigation of Wallace's brother in January, 1972, and Wallace announced the following day that he would run as a Democrat.

publicity stunts, which the national press sardonically dubbed the “stand in the schoolbus door.” Even as he understood that Albert Brewer’s more restrained approach to resistance was perhaps more effective, the governor knew there was still political hay to be made from direct defiance. So he challenged the courts and the Nixon Administration to one final row over Alabama’s schools, only this time it supposedly had nothing to do with race.²

Arthur Bremer did not care about any of this. Though Nixon worked behind the scenes after the assassination attempt to paint him as a liberal, he was wholly unconcerned with politics or race or, as it turned out, with anything but fame. He had, in fact, strongly considered killing Nixon. Instead it was Wallace whom he stalked to the rally in Laurel, Maryland, where the governor accused the White House of hypocrisy in its failure to stop “senseless and asinine” busing. After a short speech, Wallace descended to shake hands with well-wishers, including Bremer, who shot him four times at point blank range, gravely wounding the governor and three bystanders, including an Alabama State Trooper and a Secret Service agent. Wallace was paralyzed from the waist down. He carried Maryland and Michigan that night, but he had no energy or desire to continue the race. George McGovern won and was subsequently defeated soundly by Nixon.³

In the year leading up to Bremer’s failed assassination attempt, metropolitan school desegregation dominated political discussions. With the Supreme Court’s April, 1971 *Swann v. Charlotte-Mecklenburg* decision, it became a national issue. Wallace tried to exploit it at home and aboard. Every school system in Alabama was under some sort of desegregation order. The *Lee v. Macon* case had been broken into 99 separate cases, and the three-judge court had only the issue of the state’s junior colleges and trade schools to resolve. One of the severed *Lee v. Macon* cases, along with the cases against Jefferson County and Mobile, would become entangled in the controversy over “busing to achieve racial balance” and the many ways in which whites tried to avoid it. Ultimately,

² *Washington Post*, May 16, 1972; Carter, *Politics of Rage*, pp. 432-50.

³ *Washington Post*, May 16, 1972; Carter, *Politics of Rage*, pp. 432-50.

Wallace was as powerless against the thrust of two decades of school desegregation litigation as he was against Bremer's bullets. But metropolitan white flight continued apace, despite the best efforts of the NAACP-LDF and some of the trial courts to shoot it down.

Loose Ends in *Lee v. Macon*: Trade Schools and Junior Colleges

Entering 1971 most systems under the *Lee v. Macon* umbrella had been placed under terminal-type orders and were in the process of implementing corresponding desegregation plans. Accordingly, most of these individualized cases had been severed from the statewide case and the jurisdiction of the three-judge court and had been transferred to single judges in their respective districts. The one issue that remained under the purview of the three-judge court was that of the state's trade schools and junior colleges. During the first Wallace Administration, the governor and state legislature had spent millions on an expansion of the two-year college system in an effort to make it accessible to, supposedly, every student in the state. Certain aspects of the expanded system were made the responsibility of a state Trade School and Junior College Authority. But since this body was established under the state department of education, and since much of the two-year schools' administration fell to the state board of education, it had been easy to include them in the March, 1967 *Lee v. Macon* statewide desegregation decree. In 1969 the court had ordered HEW's Office of Education to formulate a feasible desegregation plan for these schools, since the state board had proved incapable, or unwilling, to do so. A year later, on August 14, 1970, the *Lee* court entered a decree adopting substantially the HEW plan. The plan provided for the elimination of dual attendance zones and separate transportation areas based on race, the elimination of racial identifiability through faculty desegregation, and the elimination of duplicate programs at geographically proximate schools.⁴

⁴ For a discussion of these developments, see CH 15.

Beyond these broad goals, the desegregation of the junior college system required what Judge Hobart Grooms called “a rather detailed treatment.” The state’s junior colleges did not have restricted attendance areas; they were technically open to anyone. But most did not have dormitories, either. They were “commuter-type” schools, and the state traditionally provided free bus transportation within certain zones around the schools. This meant that each school had a *de facto* attendance/transportation zone which it served, and the formerly all-white schools’ zones overlapped with those of two black junior colleges. The state’s 15 white junior colleges had been token desegregated, but the two black schools remained all-black. The black junior colleges were also underfunded relative to the white schools and had limited curricula and course offerings. The state’s 21 white trade schools had been token desegregated along with the junior colleges. But Mobile, Tuscaloosa, Montgomery, Birmingham, Gadsden, and Huntsville each had a pair of trade schools, one predominantly white and the other predominantly or all-black. The same *de facto* attendance and transportation policy applied to the trade schools, so these had overlapping zones as well.⁵

The court undertook to eliminate this duality by means that proved quite controversial. In the Mobile region, for example, the court ordered the state board to split the attendance zones of formerly all-white Faulkner State and formerly all-black Mobile State, and to restrict enrollment to those zones. Faulkner had been recently established under the Wallace initiative in 1965. It provided southern Alabama’s white students with a cheaper, more accessible alternative to the recently established University of South Alabama, itself created in 1963 from extension programs previously administered by the University of Alabama. Mobile State had been established in the 1930s as a two-year branch of all-black Alabama State in Montgomery. It had been granted independent junior college status under the Wallace initiative, but it was located in the middle of large black neighborhood in downtown Mobile, from which it drew most of its student body. Under the court-approved plan, Faulkner State would

⁵ Decree of Aug. 14, 1970, *Lee v. Macon County Board of Education*, 317 F.Supp 103; see also at Frank Johnson Papers: *Lee v. Macon* Case File, Container 22, Folder 8.

serve only Baldwin County on the eastern side of Mobile Bay, and Mobile State would take Mobile County and largely rural Washington County to the north. The court also made the Trade School and Junior College Authority a party defendant to the case and ordered it to undertake an equalization program which would bring the facilities and course offerings at Mobile State up to par with Faulkner. Until the equalization was complete, students would be allowed to register for courses at the school outside their zone if those courses were not offered at the school in their own zone. The two schools were ordered to exchange faculties through temporary assignments until each could attain a substantially desegregated faculty of its own. "Substantially" was to mean equal to the ratio of whites-to-blacks in the State of Alabama, which was roughly 75-25 white. The court included provisions to protect black teachers and administrators from discrimination and to promote the recruitment of minority students. It also required the state board to report regularly on enrollment and faculty assignment, just as it had done with the 99 elementary and secondary systems.⁶

One aspect of the court-ordered plan for Mobile was particularly unpopular. The court enjoined further capital outlay for Faulkner State until the facilities and curriculum at Mobile State could be brought up to standard. The school's namesake – newspaper publisher and avid George Wallace supporter James H. Faulkner, Sr. – called his longtime friend, Judge Richard Rives, to express his concern. Faulkner had served as a state senator and had run for governor in 1954 and 1958. He had served as the mayor of the Baldwin County town of Bay Minette at a young age and had remained tremendously popular with local whites for his educational philanthropy and industrial development efforts. Rives had been "personally and politically friendly" with Faulkner before, in Rives words, Faulkner had "[become] so addicted to Wallace" and Rives had become a federal judge. In 1970 locals had just persuaded the state legislature to rename Bay Minette's new Yancey Junior College for Faulkner – it having been previously named in honor of the fire-eating secessionist William Lowndes Yancey. Faulkner told Rives

⁶ Decree of Aug. 14, 1970, *Lee v. Macon County Board of Education*, 317 F.Supp 103, stayed in part 453 F2d 524 (5th CCA, 1971); the Trade School and Junior College Authority was added as a party defendant later.

he felt that the school then bearing his name was being unfairly punished. He argued that it had been more aptly funded than Mobile State because of contributions from local citizens, namely himself, not because of inequitable capital outlay. He stressed that he and others associated with the school “had no problem” with integration. Faulkner requested an in-chambers meeting with the judge, but an uncomfortable Rives advised his friend to write all three judges on the *Lee* court and express these concerns. Enough time passed that Rives forgot that he had suggested Faulkner write the letter, until it arrived in September of 1970. Judge Johnson surmised that Faulkner intended to publicize the letter in one of his papers and refused to respond, but he told Judges Rives and Grooms that they had his approval to respond on behalf of the court. He pointed out that the issue of desegregating the junior colleges had been under consideration by the court for three years, during which time the court had purposely been “nursing” it along. It was “indeed a late hour” for Faulkner to be complaining. Rives nonetheless forwarded the letter to each of the attorneys involved in the *Lee* case for any such action as they deemed necessary.⁷

One week later, the defendants submitted a petition for modification of the August 14 decree. They asked for a few minor alterations in the plan for the state’s trade schools and then turned to the subject of Mobile State and Faulkner State. Faulkner enrolled nearly 800 full-time students, around half of which came from Mobile County and would therefore be forced to attend Mobile State under the new plan. The defendants argued that the Baldwin County school was obligated on a \$100,000 bond issue which it had used to recently build dormitories. These dormitories housed the students from Mobile County, whose rent was used to pay the monthly debt obligations. They argued that there were not enough students, black or white, in Baldwin County and that the school would lose too many

⁷ J.H. Faulkner to Frank M. Johnson, Sept. 4, 1970; Frank Johnson to Richard Rives and Hobart Grooms, Sept. 9, 1970; Richard Rives to Hobart Grooms and Frank Johnson, Sept. 9, 1970; Richard Rives to Jerris Leonard, Ira DeMent, Craig Crenshaw, Fred Gray, and Thomas Thagard, Sept. 10, 1970; all in Frank Johnson Papers: *Lee v. Macon Case File, Container 22, Folder 8*; Edwin Stanton, *Faith and Works: The Business, Politics, and Philanthropy of Alabama’s Jimmy Faulkner* (Montgomery: New South, 2002).

students and too much revenue and thereby become insolvent. They thus petitioned the court to allow students from Mobile County to attend Faulkner in the event that they furnished their own transportation. Restricting their proposed relief to students with transportation was a seemingly race-neutral provision which would allow the court to maintain its stance on overlapping transportation zones. But its effect would be to discriminate against poorer black students in the city of Mobile who could not furnish their own transportation. White students were more likely to be able to provide their own. The Civil Rights Division opposed the motion, ignoring the contention that the school might become insolvent and simply reiterating that an “open door” enrollment policy was not enough to discharge the state of its affirmative duty to desegregate the schools by the most effective and reasonably available means possible. In mid-October, the court denied the defendant’s motion, prompting an appeal to the Fifth Circuit. It was this portion of the *Lee* case that lingered before the three-judge court in 1971.⁸

As the defendants awaited the judgment of the appellate court in the late winter of 1971, Judge Johnson continued to receive complaints about the junior college desegregation order, particularly that portion of the order requiring a statewide 75-25 faculty desegregation ratio, per the *Carr v. Montgomery* standard. The faculty at Mobile State were among the dissenters, arguing that their ranks would be “cherry picked” by the state board when it determined who should transfer to white schools. This had been the case with the elementary and secondary schools, they understood, so why would their case be any different. The outcry from white junior colleges which would be forced to accept a large influx of black teachers was even louder, of course. An Albertville woman wrote to Johnson in January on behalf of her “Home Makers Club,” insisting that the judge divulge how he arrived at such numbers as 75-25. Why 25 percent negroes when “on the national average there [were] only ten percent approximately?”

⁸ Petition to Modify, Sept. 18, 1970; Response of the United States to Show Cause Order, Oct. 9, 1970; Alabama State Board of Education, Notice of Appeal, Oct. 29, 1970; *Lee v. Macon County*, Frank Johnson Papers: *Lee v. Macon* Case File, Container 23, Folder 1.

The area around Albertville and Snead Junior College – on northeast Alabama’s Sand Mountain – was only 2 percent black, so the faculty provision in the order would deny both black and white teachers their “right to choose their place of abode.” The judge was “in effect . . . usurping the rights and privileges guaranteed by the Constitution of the United States.” The club asked that Johnson please reconsider the ruling, which would “only cause confusion” if allowed to stand. Another Sand Mountain women’s club, the “Philos Study Club” of Boaz, issued a similar request, in which it appealed to “the choice of professional people as to where they may work,” as well as to “simple human dignity.” Johnson received other letters from garden clubs and the like, and a resolution from the Snead State faculty, with similar requests and claims.⁹

Sand Mountain did, indeed, have a relatively small percentage of black residents, and integrating the Snead State faculty would certainly have required movement of both black teachers in and white teachers out. What white residents petitioning to Johnson did not admit was that Sand Mountain had for decades proudly hailed itself as a place where blacks were not welcome. It had not been long since crude signs warned, “Nigger, don’t let the sun set on you on this mountain,” and since state Superintendent of Education Ernest Stone had recalled for George Wallace, “A negro was not allowed to travel over Sand Mountain when I was a boy.” As with the elementary and secondary schools, it had become easier to couch one’s concerns in terms of constitutional rights rather than race, however.¹⁰

The flap over the junior college decree intensified in March, after a hearing on its implementation for the fall of 1971. The Birmingham *News* published a front page story on the hearing in which it insinuated that Judge Johnson did not consider the state’s junior colleges to be institutions of

⁹ Mrs. D.M. Benefield to Frank Johnson, Jan. 11, 1971; Mrs. Jerry Wordlaw, Jan. 26, 1971; Mrs. James R. Burns to Frank Johnson, March 1, 1971; Resolution of the Snead State Faculty, Nov. 13, 1970; all in Frank Johnson Papers: Lee v. Macon Case File, Container 22, Folder 8.

¹⁰ On Ernest Stone and Sand Mountain, see CH 11; see also James Loewen, *Sundown Towns: A Hidden Dimension of American Racism* (New York: Free Press (Norton), 2005), pp. 236, 291, 345, 380.

higher learning and in which it implied that the HEW plan for the fall was going to be implemented as-is. Johnson received a number of letters from students, parents, and educators fiercely defending their institutions and objecting strenuously to the HEW plan. Johnson was compelled to respond to some of these and to indicate, yet again, that he was not the only judge hearing the case. He also pointed out that the assertion that the court did not consider the junior colleges institutions of higher learning was “exactly the opposite” of what the court had held. It had indeed applied the principles of the Auburn University-Montgomery case (*Alabama State Teachers Association v. Alabama Board of Education*) to the junior colleges and trade schools, broadly speaking. And finally, the HEW plan had not been approved as-is but was subject to state objection and potential modification.¹¹

Ironically, the clamor was increasing just as the trial court and the appellate court were softening the blow by modifying the August, 1970 decree. On March 8 the *Lee* court entered an order *sua sponte* in which it changed the meaning of “substantially” as it related to faculty desegregation in the trade schools and junior colleges. The court determined, “Some of the junior colleges and trade schools located in Alabama actually serve geographical areas that have comparatively fewer and others have comparatively greater than the average ratio of Negroes and whites in the State as a whole.” It held that requiring them to desegregate their faculties and staff such that the ratio was the same as the state’s “may probably cause an unnecessary hardship on some of the institutions concerned and on some of the instructors and teachers affected.” In determining what “substantially” desegregated would be, the court would take into account the racial composition of each school’s attendance zone.¹²

Then, later that summer, the Fifth Circuit court stayed a portion of the decree pertaining to Faulkner State and Mobile State. As the appellate court was considering the case, the student bodies of

¹¹ Order of March 8, 1971, *Lee v. Macon County Board of Education*, Frank Johnson Papers: *Lee v. Macon Case File*, Container 22, Folder 8.

¹² Gene Branham to Frank Johnson, March 11, 1971; M.C. Jeter to Frank Johnson, March 23, 1971; Memorandum on *Birmingham News* Story, March 9, 1971; F.B. Yielding, Jr. to Frank Johnson, March 17, 1971; all in Frank Johnson Papers: *Lee v. Macon Case File*, Container 22, Folder 8.

the two schools remained largely segregated: Faulkner State enrolled 699 white students and 85 black students, while Mobile State enrolled 822 black students and 7 white students. But since the appeal of the trial court's order had been filed, the Trade School and Junior College Authority had initiated the court-ordered equalization program at Mobile State, which included the construction of a number of new facilities. And the state board of education had revised the curriculum at Mobile State, to include a number of new course offerings and degree programs. In light of these facts, the appellate court turned to the issue of attendance zones for the two schools. Citing the Auburn University-Montgomery case, the appellate court announced that it felt "some reluctance to require school attendance zones for college level institutions." The court also pointed to the situation in Jefferson County, where formerly all-white Jefferson State and all-black Wenonah State had not been ordered to submit to a similar plan. The court thus stayed the portion of the trial court's order requiring rigid attendance zones for Faulkner State and Mobile State. This was, in essence, an application of the pre-*Green* principle for the elementary and secondary schools. The court was willing to give the junior colleges a chance to desegregate substantially under a free choice plan (in this case called an "open door" policy) once choice-influencing factors were eliminated, that is, as soon as facilities and curricula were equalized and faculty were fully desegregated.¹³

The desegregation of the trade schools and junior colleges would remain under the supervision of the three-judge *Lee v. Macon* court into the following year. When the former president of Livingston University in west Alabama petitioned the court for a temporary restraining order in the spring of 1972, seeking his reinstatement, the court found occasion to dissolve itself. Judge Johnson wrote, "While the current problems of desegregation could hardly be described as less serious than in the past . . . present difficulties are of a more localized quality than was previously true." The complaint in question, he suggested, could have been brought as a separate action before a single district judge. Additionally,

¹³ *Lee v. Macon County Board of Education*, 453 F.2d 524 (5th CCA, July 15, 1971).

Johnson wrote, “the major constitutional issues have been decided and are no longer in question.” Thus, “the time [had] come” for the transfer of individual state college, trade school, and junior college cases to the relevant individual districts and for the dissolution of the three-judge court. Dick Rives, who had been a Circuit Judge for over 20 years, told Judges Johnson and Grooms that the three-judge panel had lasted longer than any other he had ever served on. It had, after all, been convened nearly a decade before, in 1964. When “it is finally dissolved,” he wrote, “we three should get together at an early date for a real celebration.”¹⁴

Swann v. Charlotte-Mecklenburg

The U.S. Supreme Court’s April, 1971 decision in the *Swann v. Charlotte-Mecklenburg* case demonstrated why Judge Johnson would a year later claim that “the current problems of desegregation could hardly be described as less serious than in the past.” As the *Lee v. Macon* court was considering the trade school and junior college issue in the winter of 1970-71, the Supreme Court was considering the Charlotte case alongside four other cases dealing with the unresolved issues of metropolitan desegregation and busing to achieve “racial balance.” One of these cases was the *Davis v. Mobile* case, in which the LDF had applied for *certiorari* because it felt the school system’s plan was still inadequate. The Nixon Justice Department had taken the position that the Mobile plan was adequate, and the Civil Rights Division was, therefore, calling for the Court to uphold district and appellate court decisions which approved it. Nixon had made opposition to “busing” the hallmark of his school policy, thus the CRD was compelled to support a reversal and remand of trial and appellate court rulings in *Swann* which had ordered and upheld significant busing of students in non-contiguous zones, the sort of which the LDF was calling for in *Davis*.¹⁵

¹⁴ *Lee v. Macon County Board of Education*, Order of May 29, 1972, Frank Johnson Papers: *Lee v. Macon* Case File, Container 30, Folder 4.

¹⁵ *Charlotte Observer*, Sept. 13, 1970; Patterson, *Brown v. Board of Education*, pp. 155-6.

In the *Swann* decision itself, the Court upheld the district court and appellate court rulings, despite the CRD and the Solicitor General's arguments to the contrary. It was able to issue a unanimous decision despite the reluctance of Chief Justice Warren Burger and Justice Hugo Black to approve large-scale busing to achieve racial balance. Burger ultimately wrote the opinion himself, insisting that the Court had not "deviated in the slightest" in the seventeen years since *Brown* "from that holding or its constitutional underpinnings." Accordingly, the Court rejected the notion that the language of the Civil Rights Act was intended to limit the powers of the courts to implement *Brown*. It instead held that, in cases of plainly *de jure* segregation, a range of remedies was appropriate to bring about conversion to unitary system, and that this range included busing students beyond the schools nearest to their homes. Busing had been, the Court said, a "normal and accepted tool of educational policy" for years. Indeed, segregating school boards had long bused black students considerable distances, often past white schools, to maintain dual systems. When the facts of a case showed that assigning students to the schools nearest to their homes would not effect conversion to a unitary system, then busing students farther out was 'favorably comparable' with previous such transportation plans and, in the words of the Fourth Circuit appellate court, perfectly "reasonable." The Court did hold that *reasonableness* – or *feasibility* in its own words in *Green* – could limit such busing as to time and distance relative to the age of students. In other words, a transportation plan might be unreasonable if it called for busing elementary students for an hour each morning and afternoon. But the Court stressed that appropriate remedies might include plans that were "administratively awkward, inconvenient and even bizarre," for such was the price of eliminating *de jure* dual school systems.¹⁶

In addition to the deliberately ambiguous requirement that plans be reasonable, even though they might also be awkward, inconvenient, or bizarre, the Court included other limiting factors in its decision. It stopped short of declaring all one-race schools unconstitutional. It did not endorse fixed

¹⁶ *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *Race Relations Law Survey* 3, No. 1 (May, 1971), pp. 7-9; Patterson, *Brown v. Board of Education*, pp. 156-7.

racial ratios for pupil assignment, even as it reaffirmed their validity in cases of faculty assignment, per Judge Johnson's *Carr* decision. And it did not require the readjustment of school zones every year after the attainment of unitary status. Perhaps most importantly, it explicitly limited its ruling to instances of *de jure* segregation, thereby giving school districts outside the South the relief for which they had hoped. Nonetheless, the ruling was, in the words of historian James Patterson, "another large step forward on the path towards serious enforcement of *Brown*." Southern state and local officials had lost their latest "colorblind" defense of white privilege: the "neighborhood school."¹⁷

This became immediately clear in the *Davis* ruling, in which the Court reversed portions of the district and appellate courts' approval of Judge Thomas' desegregation plan for Mobile. The Court first upheld the Fifth Circuit court's demand that the school system desegregate its faculty and staff such that each school's racial ratio mirrored that of the system as a whole – the *Carr* standard. It then held that the lower courts should not have continued to consider the downtown area – east of Interstate 65 where 94 percent of the black students in the metropolitan area lived – as a distinct and separate area. The appellate court had already ordered Judge Thomas to disregard the distinction as it pertained to the metropolitan area's junior and senior high schools and to utilize pairing and grade restructuring as necessary. But it had allowed Thomas to continue to treat the eastern district in isolation in formulating a plan for the metropolitan area's elementary schools, six of which remained all-black. It had stopped short of requiring large-scale busing across I-65 or otherwise between non-contiguous school zones. Enrollment for 1970-71 had demonstrated clearly that the appellate court had based its plan on inaccurate projections. As it was actually implemented, the plan produced nine elementary schools in eastern Mobile which were over 90 percent black and housed 64 percent of all black elementary students in the metropolitan area. More damningly, the appellate court had projected that zero junior

¹⁷ Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971); *Race Relations Law Survey* 3, No. 1 (May, 1971), pp. 7-9; Patterson, *Brown v. Board of Education*, pp. 156-7.

or senior high school students would be in all-black or nearly all-black schools, but the fall had revealed that over half of the metropolitan area's black junior and senior high students were in such schools.¹⁸

Based on the fundamental principles in *Green* and on the ruling in *Swann*, the court held in *Davis* that "'neighborhood school zoning,' whether based strictly on home-to-school distance or on 'unified geographic zones,' [was] not the only constitutionally permissible remedy," nor was it "*per se* adequate to meet the remedial responsibility of [the school board]." In cases of *de jure* segregation, the district judge and school authorities were obligated to "make every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation." The district court in *Davis* should have considered "the use of all available techniques, including restructuring of attendance zones and both contiguous and noncontiguous attendance zones." The appellate court had clearly "felt constrained" to treat the eastern section of the city in isolation and had, thus, failed to give adequate consideration to "the possible use of bus transportation and split zoning."¹⁹

In short, "busing" was coming to Mobile. And there would be implications for Alabama beyond the port city, too. *Swann's* impact would be felt in the *Stout v. Jefferson* case and the splintered *Lee v. Macon* cases, as well. Sensing this, the *Birmingham News* wrote, "What was hoped for [across the state] was a Supreme Court statement to the effect that the Constitution does not require such measures as massive busing of students to achieve integration or the establishment of ratios to determine acceptable racial balance in school in a given district." What was delivered, however, was going to be "small comfort to those who believe that in some cases the courts have gone far beyond reasonable criteria in determining whether a district [was] in fact in compliance with the law . . ."²⁰

¹⁸ *Davis v. Board of School Commissioners of Mobile County*, 402 U.S. 33 (1971); *Race Relations Law Survey* 3, No. 1 (May, 1971), pp. 9-10.

¹⁹ *Davis v. Board of School Commissioners of Mobile County*, 402 U.S. 33 (1971); *Race Relations Law Survey* 3, No. 1 (May, 1971), pp. 9-10.

²⁰ *Davis v. Board of School Commissioners of Mobile County*, 402 U.S. 33 (1971); *Race Relations Law Survey* 3, No. 1 (May, 1971), pp. 9-10; *Birmingham News*, April 21, 1971.

Swann's Impact and "the Stand in the Schoolbus Door"

The most obvious and immediate impact of *Swann* in Alabama came via the companion *Davis* ruling. The district court was compelled to order the school board, the plaintiffs, and the CRD to fashion a plan which would satisfy the new mandate. This would have to include some sort of busing between non-contiguous zones so as to meaningfully desegregate the eastern portion of the city. Longtime Mobile activist John LeFlore celebrated the ruling. LeFlore reminded Mobilians that "one of the primary causes [for] filing the school desegregation petition in 1962" had been the fact that "black high school children living in Hillsdale Heights were being transported 52 miles to St. Elmo when Shaw and Davidson were within three and four miles." Such logic did little to dampen the white outcry.²¹

At a public meeting of the Mobile school board just days after the ruling, segregationist activists seemed to accept a measure of finality in the Supreme Court's decision but continued to vehemently protest various perceived consequences of compulsory assignment. STAND's William Westbrook continued to warn of an exodus of tax paying whites from the public schools, while complaining about the sensitivity training being required of Mobile's teachers. The leader of the newly organized Unified Concerned Parents of Alabama tried to warn the school board of the health hazards inherent in busing, insinuating that black students were unclean and unhealthy and would transmit infectious diseases to white children. Representatives of the Murphy High PTA lamented the demise of their organization, which they argued had been ruined by black communist elements in the schools. LeFlore also spoke at the meeting, however, and addressed his remarks to not only white segregationist activists and the state and local authorities, but also to black separatists partial to the CORE/Innes plan. He argued, "Those who would keep us divided . . . whether they be segregationists or separatists, are rendering our country a serious disservice as they seek to perpetuate the unworkable social experiment of the last 352 years." Segregation, he said, had "spawned a quagmire of prejudice, hatred, and confusion" and could

²¹ Pride, *The Political Use of Racial Narratives*, pp. 108-9.

certainly not be expected “to provide the answers to the problems in race relations that an accommodating political power structure has helped to create.”²²

Many white critics in Mobile continued the tradition of pointing the finger north and demanding “equal protection” for the South. They latched onto the Court’s refusal to include *de facto*, northern-style segregation in its ruling. One man wrote the *Mobile Register* to complain, “When it comes to the full justice and human benefits which should come to all people of this nation, the same kind of handing down of high court decisions should apply to all the land.”²³

President Nixon had to face such criticism when he flew to Mobile shortly after the *Swann* decision to speak at the dedication of the Tennessee-Tombigbee Waterway development – a canal project which was to connect the Tennessee River with Mobile Bay and the Gulf of Mexico. Nixon was keen to court would-be Wallace voters in the upcoming 1972 presidential election, and the March 25, 1971 Alabama appearance provided the opportunity for him to appeal to them at a crucial moment. Wallace was on hand at the dedication, however, and both men choose to keep their remarks light. Wallace had not yet officially announced his candidacy – which would feature denunciations of “HEW bureaucrats” using “every tactic existing to ram their guidelines down our throats” and engaging in an “all-out onslaught to force integration regardless of the consequences.” The Nixon White House knew Wallace would run, though; it was even then investigating Wallace’s brother for fraud and corruption, in an effort to convince Wallace to run as a Democrat instead of a third-party candidate. Nixon opened his 15 minute speech at the state docks in Mobile before a crowd of 20,000 by thanking “President Wallace . . . of the Tennessee-Tombigbee Development Association.” The brief appearance before mostly white Alabamians, and alongside the locally beloved Wallace, was not the forum for the president to speak at length on desegregation, especially when a more appropriate venue was awaiting nearby.²⁴

²² Pride, *The Political Use of Racial Narratives*, pp. 108-10.

²³ Pride, *The Political Use of Racial Narratives*, p. 109.

²⁴ *Birmingham News*, May 27, 1971; Carter, *Politics of Rage*, p. 399-402.

Nixon left Mobile and immediately flew to Birmingham, where he delivered a lengthy policy briefing before members of the Southern Press Association. In the absence of his rival, and with a conducive format, the president was able to more effectively play to white Alabamians' anger and frustration, as well as their sense of law-and-order style responsibility. He condemned the continuing tolerance of *de facto* segregation outside the South and doubled down on his rejection of busing. He insisted that he had "nothing but utter contempt for the double hypocritical standards of those northerners who look at the South and say, 'Why don't those southerners do something about the race problem.'" He praised the people of the South for their "religious faith, moral strength, [and] idealism" and claimed, "America needs it." He applauded them for having done what the North as yet had not. "Today 38 percent of all black children in the South go to majority white schools," he said, but "only 28 percent of all black children in the North go to majority white schools." There had been "no progress in the North in the past 2 years in that respect," while there had been "significant progress in the South." Nixon asked, "How did it come about?" And he answered, "Because farsighted leaders in the South, black and white, some of whom I am sure did not agree with the opinions handed down by the Supreme Court – which were the law of the land – recognized as law-abiding citizens that they had the responsibility to meet that law of the land, and . . . dealt with the problem." Nixon added, "The recent decision of the Supreme Court [*Swann/Davis*] presents some more problems, but I am confident that over a period of time those problems will also be handled in a peaceful and orderly way for the most part." It was precisely the sort of message white Alabamians had been articulating for years.²⁵

Even though the Supreme Court had given the rest of the country a reprieve, *Swann* had at least made busing, and school desegregation in general, a national issue. Nixon understood, as Wallace intimately did, that white voters across the country would be receptive to the message of law-and-order

²⁵ *Birmingham News*, May 27, 1971; Richard Nixon, "Remarks to Southern News Media Representatives Attending a Briefing on Domestic Policy in Birmingham, Alabama," May 25, 1971, *The American Presidency Project Online* (University of California, Santa Barbara: Gerhard Peters and John T. Woolley, 1999-2013), <http://www.presidency.ucsb.edu>, accessed April 15, 2013.

resistance which whites in the South had crafted in the wake of desegregation's litigious breakthrough. By the time the campaign had begun in earnest the following year, Nixon sounded like Ernest Stone, or like any of a number of school board attorneys in Alabama. He instructed his advisors to tell HEW and the CRD to "keep their left-wingers in step with [his] express[ed] policy," which was "to do what the law requires and not one bit more."²⁶

Despite the president's appeals to law and order, violence yet again erupted at both Murphy High and Vigor High in Mobile, as the 1970-71 school year came to end. White students, parents, and teachers blamed black students, prompting Mobile's state representative in Montgomery, Monty Collins, to introduce his take on a freedom of choice bill. The bill proposed to allow students to transfer to another school if they were "harassed, intimidated, or assaulted." Wallace supported it, and the legislature passed it handily, that is, after the first attempted filibuster of a "nigger bill" in the history of the Alabama state house. Newly installed in the state legislature were none other than longtime civil rights attorney and LDF associated counsel, Fred Gray, and Tuskegee restaurateur Thomas Reed, both representing Macon County. Reed and Gray resolved to mount an eleventh-hour mini-filibuster as the clock wound down on the legislative session. House members could only speak for 10 minutes each on a given subject, but as the end of the session's last day drew near, and the state house had still not passed the free choice bill, the state's first two black representatives since Reconstruction seized the opportunity. As the clock approached 11:30 pm, Reed took his ten minutes, followed by Gray. Gray knew better than anyone that the bill was an "unconstitutional . . . waste of time and money," doomed to invalidation, and he told his colleagues as much. When his time ran out, Reed prepared to introduce an amendment which would have given him an additional 10 minutes, with only 7 minutes remaining

²⁶ Carter, *Politics of Rage*, p. 418-24, 423; Wilkinson, *From Brown to Bakke*, p. 126; Crespino, *In Search of Another Country*, pp. 220-36; Kruse, *White Flight*, pp. 253-5.

until the session ended at midnight. House speaker Sage Lyons refused to recognize the desperately protesting Reed, however, and proceeded to call for a vote on the bill, which passed 65-10.²⁷

Condemnation of the free choice bill from the black activist community was swift. The Mobile NAACP passed a resolution in objection and argued that the bill would only incite more violence. They and others understood that the law was intended to allow white students to transfer back to predominantly white schools in cases of black harassment or intimidation – real or imagined. State NAACP director K.L. Buford pointed out another potential use of the law, which he called a “racially inspired . . . waste of taxpayers’ money.” Buford argued that the law “would encourage acts of harassment and intimidation to black students in previously all-white schools in order to force them to transfer back to segregated schools.” Buford wrote Monty Collins and told him as much, adding that the state legislature had “placed itself in a position where it [was] attempting to defy the law of the land” and engaging in a “criminal” act. Buford wrote, “We believe in law and order. It is strange that none of the strong advocates of law and order choose to add the words, ‘with justice for all.’” Collins responded by accusing the director of making “his living by trying to make racial turmoil where there [was] none.” He claimed he would “not be affected by rabble rousers like [Buford].” The feud continued when Buford spoke to a meeting of the Southwest Alabama Area NAACP. Buford asserted to great applause that “if Monty Collins [was] naïve enough to sincerely believe that there [was] no racial turmoil in Alabama,” particularly in Mobile, then the electorate there had “done all the people of Alabama a great disservice by giving this man of limited knowledge and ability a seat in the Alabama legislature.” The law was, of course, later invalidated, but the politics of defiance-cum-evasion still held rewards for those who supported its passage. Wallace’s recent victory had proved as much.²⁸

²⁷ *Birmingham News*, May 4, 23, 1971.

²⁸ NAACP News Releases, April 14, May 2, 1971, NAACP Papers: Group VI, Series C (Branch Department Files), Box 175, Folder: Newsletters, Alabama, 1971 (*Papers of the NAACP*: Part 29 (Branch Department Files), Series B (Branch Newsletters, Annual Branch Activities Reports, and Selected Branch Department Subject Files, 1966–1972), Reel 1).

Wallace had never been one to rest on his segregationist laurels. When the *Swann* decision brought motions for further relief in other cases across the state that summer, the governor tried to again channel the sort of defiance which had brought him repeated electoral success. In early August, Wallace issued an executive order directing the Jefferson County Board of Education to reassign one Pamela Davis, a white girl, to the school of her choice. Davis' mother had written Wallace and asked that he do something about their situation. Davis was assigned to Westfield School, a formerly all-black school which was 20 miles from her home in west Jefferson County's Mulga community. She had previously attended Minor High School, which was closer to her home. Wallace once again invoked the "police power" of the state in ordering the school board to reassign her to the closer school. Wallace announced, "To bus students right by the school nearest their homes and to a school 20 miles away to carry out a policy of the federal courts and HEW, which has been forced upon the board of education, strikes me as wrong." The following day, the governor ordered the Limestone County Board of Education to reopen the New Hope Junior High School. New Hope had enrolled 184 black students and 5 white students the previous year and had been closed as part of the county's desegregation plan. Wallace purported to be acting on behalf of the New Hope community, largely black, and offered \$30,000 towards the renovation of the school. He announced his action at a speech at Troy State University – where he was accepting an honorary doctorate – saying, "The president ought to find out what busing has done to the schools," adding, "This is not an Alabama matter . . . it is a national matter."²⁹

Wallace stressed that Alabama had "accepted a policy of nondiscrimination," and that his actions were not meant to signal a desire to return to the segregated days of his first term in office. In fact they were an attempt to continue winning favor with defiant Alabama voters, while at the same time forcing the Nixon campaign into a corner. He wryly told reporters, "You might say Governor

²⁹ *Birmingham News*, Aug. 13, 14, 1971; *Christian Science Monitor*, Aug. 16, 1971.

Wallace is working closely with the President to help carry out his desire not to have massive busing.” He accused Nixon of being a hypocrite, adding, “People find no credibility in officials pledging no busing and then appointing cabinet officers who openly advocate and push for busing.” Nixon had tried to avoid such an attack by forcing the resignation of Leon Panetta and Robert Finch from their positions at HEW. Nonetheless, Wallace knew that his defiant actions would invite motions against him in the Birmingham and Limestone County cases, and that when that happened, the Nixon Administration would be faced with moving against him. Wallace deftly described the potential conundrum by asking, “Do you think the Justice Department is going to ask for a contempt citation when Nixon is against busing?”³⁰

The Civil Rights Division did not immediately seek such a citation against the governor for his attempted interference in Birmingham and Limestone, but Solomon Seay and U.W. Clemon did. Seay, the Tuskegee attorney and partner of Fred Gray, had recently handled the last phases of the *Lee v. Macon* litigation and continued to represent black teachers and administrators in the severed individual cases. The three-judge court – still sitting for the purposes of the junior college and trade school phase of the litigation – denied the request. The judges argued that individual motions could be brought easily enough in the severed Limestone County case and the *Stout v Jefferson* case.³¹

The Limestone case was being heard by newly appointed U.S. District Judge for the Northern District, Samuel Pointer, Jr. Pointer was a Birmingham attorney who had been appointed by Nixon to a new seat in September of 1970. He had been a law school student at the University of Alabama during Autherine Lucy’s attempted enrollment and had subsequently returned to Birmingham and entered private practice with his father. He quickly indicated that Wallace’s shenanigans would not be tolerated in his court. When the Limestone County school board announced that it would comply with the

³⁰ *Christian Science Monitor*, Aug. 16, 1971.

³¹ *Washington Post*, Aug. 14, 1971; *Birmingham News*, Aug. 14, 1971; *Atlanta Constitution*, Aug. 26; *Lee v. Macon County Board of Education*, Order of Aug. 27, 1971, in Frank Johnson Papers: *Lee v. Macon* Case File, Container 30, Folder 8.

governor's order, Pointer conferred with members of the board and informed them that if they reopened the closed school per Wallace's order, then they could expect individual contempt citations and \$1,000/day fines. The board quickly announced that the school would remain closed.³²

Meanwhile, Clemon filed a motion with the court in *Stout v. Jefferson*, seeking a contempt citation against the governor for the Pamela Davis order. Clemon argued that the executive order was intended to "sabotage" the county's desegregation plan. Judge Pointer brushed aside Wallace's order to the Jefferson County board as well. He called it "an exercise of free speech" and ordered the school board to ignore it. The next day the Jefferson County school board announced that Ms. Davis had been erroneously assigned due to a clerical error involving her address and that she would be reassigned to predominantly white Hueytown High. This was not how the governor had envisioned the unfolding of what the *Washington Post* was already calling his "stand in the schoolbus door."³³

Wallace continued to run interference anyway. He threatened to have 7 white girls in rural, southern Montgomery County transported by state troopers from a formerly all-black school to the formerly all-white school to which they had previously been assigned. Nine whites had been initially assigned to the Pintlala Elementary School, and two of those had announced their intention to enroll in nearby the nearest segregationist academy, Hooper Academy, leaving the seven girls alone at Pintlala. Wallace claimed he would have them transported to nearby Seth Johnson School, "unless the board of education did something about it."³⁴

³² *Washington Post*, Aug. 14, 1971; *Birmingham News*, Aug. 14, 1971; *Atlanta Constitution*, Aug. 26; "Pointer, Sam Clyde Jr.," *Biographical Directory of Federal Judges Online*, www.fjc.gov, accessed May 1, 2013.

³³ *Washington Post*, Aug. 14, 1971; *Birmingham News*, Aug. 14, 1971; *Atlanta Constitution*, Aug. 26; *Miami Herald*, Aug. 17, 1971.

³⁴ *New York Times*, Sept. 4, 1971.

Lee v. Macon and Calhoun County

As part of his “schoolbus door” stand, Wallace also descended upon Alabama’s oldest all-black municipality, Hobson City, in support of the small town mayor’s request that its all-black schools avoid pairing with nearby white schools. Hobson City had been a self-governing black town since 1899, before which it had been a part of Oxford – the sister city to Anniston in east central Alabama’s Calhoun County. During the so-called Redemption, Oxford’s white authorities had petitioned the state legislature to draw the all-black Mooree Corner neighborhood out of the city’s corporate limits, and that section had then become Hobson City, just the second black-governed municipality in the United States. Since then Hobson had *de facto* had its own all-black schools, which were maintained by the Calhoun County school board. When Calhoun County was brought under the *Lee v. Macon* injunction, however, this arrangement was threatened. Hobson was relatively small, with around 1,500 residents. Oxford had around 6,000, but only 5 percent of them were black. Both towns were satellites of Anniston, which had approximately 35,000 residents. All of Hobson and Oxford’s black students attended Hobson’s Calhoun County Training School and Thankful elementary school. Oxford Elementary and Oxford High, less than two miles away, served Oxford’s whites and whites from the surrounding areas of the county. Motions for further relief filed in *Lee v. Macon* after *Green v. New Kent* had forced the Calhoun County school board to adopt a desegregation plan which did more than token desegregate the county’s white schools. The plan approved by the trial court proved unacceptable to the Fifth Circuit court upon appeal by the CRD. It was the appellate court’s subsequent ruling, influenced by *Swann*, which brought Wallace to Hobson City in the fall of 1971.³⁵

³⁵ *New York Times*, Aug. 18, 19, Sept. 4, 1971; *Birmingham News*, Aug. 13, 1971; *Lee v. Macon County Board of Education and Calhoun County Board of Education, and Oxford City Board of Education*, 448 F.2d 746 (5th CCA, 1971); “Hobson City,” *Encyclopedia of Alabama* Online (Alabama Humanities Foundation, A Service of Auburn University and the University of Alabama, 2012, 2013), <http://www.encyclopediaofalabama.org>, accessed April 10, 2013.

The situation in Calhoun County had been complicated in 1970 by the secession of Oxford from the county school system. To avoid the impending compulsory assignment order, Oxford had followed the lead of the nearby Birmingham suburbs and set up its own board of education during the summer of 1970 and had sought control of Oxford High and Oxford Elementary. The plaintiffs and the CRD had, of course, objected and filed motions with the district court in protest. The county had only recently been put under a terminal order and had its case transferred from the jurisdiction of the three judge court to the Northern District when Oxford decided to separate itself. The case was placed on the docket of Judge Frank McFadden – a Mississippi native and WWII Navy veteran who had returned from his studies at Yale Law, and from a brief stint in New York, to practice in Birmingham in the late 1950s. Nixon had appointed McFadden to replace Hobart Grooms when Grooms took senior status in 1969. McFadden ruled that Calhoun County and Oxford City should be treated as one system for the purposes of relief in the case. On appeal in June of 1971, a Fifth Circuit panel consisting of Judges John Minor Wisdom, John Bryan Simpson of Florida, and J.P. Coleman of Mississippi held that city systems could not “secede from the county where the effect – to say nothing of the purpose – of the secession [had] a substantial adverse effect on desegregation of the county school district.” Citing several other trial court rulings within the Fifth and Fourth Circuits, Wisdom added, “If this were legally permissible, there could be incorporated towns for every white neighborhood in every city.” Neither historically maintained distinctions, like Hobson’s, nor newly drawn distinctions, like Oxford’s, could be determinate if the result was less desegregation.³⁶

In addition to affirming the district court’s refusal to treat Oxford as a legitimately separate school system from Calhoun, however, the appellate panel reversed McFadden’s subsequently approved desegregation plan for the county. The Calhoun County school officials had initially proposed

³⁶ *New York Times*, Aug. 18, 19, 1971; *Lee v. Macon County Board of Education and Calhoun County Board of Education, and Oxford City Board of Education*, 448 F.2d 746 (5th CCA, 1971); *Birmingham News*, June 30, 1971; *Race Relations Law Survey* 3, No. 4 (Nov., 1971), p. 130; “McFadden, Frank Hampton,” *Biographical Directory of Federal Judges Online*, Accessed May 1, 2013, <http://www.fjc.gov>.

simply closing Hobson’s all-black County Training and Thankful Schools. Blacks in Hobson strenuously objected, as did the plaintiffs and the CRD. The latter two parties proposed school pairing plans which would have utilized the two schools as part of an integrated Oxford-Hobson system. Oxford objected but had little say in the matter. The Calhoun County school board objected as well, arguing that the two schools in Hobson would simply become all-black when whites fled the system for private schools rather than attend an all-black school. The county came back with a counter-proposal. It was a geographical zoning plan which – using the Hobson City boundaries – was to leave Country Training intact as an all-black elementary school and Thankful intact as a token-integrated, nearly all-black elementary school. Some Hobson residents acquiesced in this plan, but the plaintiffs and the CRD objected. The trial court nonetheless approved this plan for the 1971-72 school year, resulting in the appeal before the Fifth Circuit in the summer of 1971.³⁷

The principal flaw in the plan, from the appellate court’s perspective, was that it left 45 percent of the county’s black students in the two virtually all-black schools in Hobson. Wisdom wrote, “When historic residential segregation creates housing patterns that militate against desegregation based on zoning, alternative methods must be explored, including pairing of schools.” The county school officials had claimed that the people of Hobson took enough pride in their schools that they supported any plan which left them in operation. While it was true that Hobson residents took pride in the schools, it was not true that they were universally supportive of County Training being utilized as an elementary school. The mayor himself had indicated on the record that the black community preferred to have the schools continue “as they had in the past” insofar as they had served all 12 grades. Regardless of the Hobson resident’s wishes, however, the court insinuated that one of the proposed pairing options ought to be adopted. The court concluded, “The district court should require the School Board forthwith to

³⁷ Lee v. Macon County Board of Education and Calhoun County Board of Education, and Oxford City Board of Education, 448 F.2d 746 (5th CCA, 1971); *Birmingham News*, June 30, 1971.

constitute and implement a student assignment plan that complies with the principles established in *Swann v. Charlotte-Mecklenburg Board of Education*.”³⁸

When Judge McFadden dutifully entered an order requiring the Calhoun school officials to adopt a pairing plan which included the Oxford and Hobson schools, Wallace took it upon himself to order the county and Oxford city officials to ignore the court. When the governor visited Hobson in August to publically sign the relevant executive orders, he was greeted by a chorus of “boos” and shouts of “go home!” Since the court-ordered pairing plan had reduced County Training to an elementary school, the mayor of Hobson, J.R. Striplin, was supporting the governor’s orders and his visit. As Wallace shook hands with Striplin on the podium at the ceremony after signing the executive orders, a heckler shouted, “Get out of town, George, and take the Uncle Tom with you!” Striplin argued that the group of students was being encouraged by an “outsider” who did not share the views of the majority of Hobson’s residents. “We appreciate your coming to our town to give us some assistance,” Striplin told Wallace, “We are sorry that there are some who don’t live here who feel otherwise.”³⁹

In other appearances that same week, Wallace insisted that the federal government would have to take him to court again to stop his issuing such orders. He couched all of them as “anti-busing” orders, despite the fact that the Hobson case, notably, involved a pairing plan and no significant increase in bus transportation. The governor claimed, “This matter has to be adjudicated,” as he criticized the U.S. Attorney General, John Mitchell, for “failing to carry out the President’s mandate against busing.” He added, “The only way we’re going to bring any solution to this problem is for people in these prestigious offices to come out strong and tell Nixon and the other bureaucrats exactly where they stand.” Wallace insisted that if the courts told him to stand down, he would do so. And he argued that the “law-abiding folks . . . of the South” ought to do the same in that case. He did not immediately get

³⁸ Lee v. Macon County Board of Education and Calhoun County Board of Education, and Oxford City Board of Education, 448 F.2d 746 (5th CCA, 1971); *Birmingham News*, June 30, 1971.

³⁹ *New York Times*, Aug. 18, 19, 1971; *Birmingham News*, Aug. 13, 1971; *Charleston News and Courier*, Aug. 21, 1971.

his wish to have “the matter adjudicated,” however. The bewildered county school boards filed a petition for instructions with the court. Meanwhile, Judge Sam Pointer scoffed at the governor’s latest antics. He brushed aside the Wallace’s executive orders, calling them “legally meaningless.” The governor was temporarily resigned to sniping at Pointer in the media, claiming, “[He] hasn’t got the sense to fry a chicken egg.”⁴⁰

Wallace followed up his “police power” interference with another attempt to legislate resistance. He had an “anti-busing bill” introduced into the state legislature in late August, using language taken directly from the *Swann-Davis* decisions. The bill sought to prohibit the busing of children anytime parents felt that “time or distance” of their transportation would be “so great” as to “risk the health and safety of the child or significantly impinge upon the educational process.” The law would give parents the authority to send their children to the schools of their choice, compelling school officials to admit them. Wallace reiterated his desire to have “President Nixon carry out his promise” and send “his Justice Department and HEW back into court and ask them to stop busing.” He even claimed that he would “defer and get out” of the presidential race if Nixon would “stop busing, go back to freedom of choice, and restore neighborhood schools.” As the governor’s comment revealed, “busing” and “neighborhood schools” had become bywords for any sort of compulsory assignment desegregation plan – anything beyond freedom of choice. And Wallace knew there was nothing the Nixon Administration could do to immediately turn back the tide of decades of litigation. Nixon had arguably done his best to limit busing across the country. The CRD had supported the more limited plan in Mobile, even. Wallace was trying to put his rival in an impossible situation. The bill passed with overwhelming approval in the state House and unanimously in the Senate. Its few opponents correctly predicted that the law would meet with a swift and unceremonious demise at the hands of the federal courts. U.W. Clemon challenged the bill as part of the *Jefferson* legislation, which put it before Judge

⁴⁰ *New York Times*, Aug. 18, 1971; *Race Relations Law Survey* 3, No. 4 (Nov., 1971), p. 130.

Pointer. Pointer argued that the law was simply “a freedom of choice option dressed in slightly different clothing.” It was invalid on the basis of numerous earlier decisions, including *Swann*, which had itself invalidated a North Carolina anti-busing statute. It was so blatantly invalid, in fact, that Pointer determined that it was unnecessary to convene a three-judge court to hear the challenge, as would normally be proper for a challenge to a state statute.⁴¹

The End of the Long Beginning in Mobile

Meanwhile, the Mobile school board and the plaintiffs in the *Davis* case had been attempting all summer to come to terms on a desegregation plan for the coming school year. In July they announced an agreement. It was a historic accord, billed as a “Comprehensive Plan for a Unitary School System.” But it only inflamed opinions on both sides in the short term, and in the long term it failed to be the final settlement which the *Swann-Davis* decisions might have seemed to portend. On July 8 Judge Thomas entered an order adopting the plan. The school board was finally forced to concede non-continuous zoning and busing of whites and blacks across I-65, into and out of the inner-city. Approximately 1,000 white elementary students were to be bused east into a number of the inner-city elementary schools which had theretofore remained all-black, while more black students were to be bused west into predominantly white schools. White enrollment in formerly all-black schools, such as Blount High in Prichard, was to be annually increased until it “stabilized.” In all, the plan called for split-zoning in 19 elementary schools, five middle schools, and four high schools. The system had bused approximately 5,700 students the previous year; under the new plan, it would bus nearly 9,000 more, mostly blacks into white neighborhoods. There was a provision designed to curb non-conformity and another to ensure desegregation of the ‘central office’ school board administration and staff.⁴²

⁴¹ *Gadsden Times*, Aug. 27, 1971; *Florence Times*, Sept. 2, 1971; *Thomasville Times-Enterprise*, Sept. 17, 1971; *Virginian Pilot*, Dec. 4, 1971.

⁴² *Washington Post*, July 9, 1971; Pride, *The Political Use of Racial Narratives*, pp. 111-13.

The NAACP-LDF, represented by local attorney A.J. Cooper, agreed not to challenge the plan or its implementation for three years. Two black schools were to close, five to remain all-black, five more to remain over 90 percent black, and still another five to remain over 75 percent black. As experience had shown, these projections were probably best-case scenarios for the plaintiffs. It was only slightly more stringent than the plan which the Supreme Court had just struck down. Cooper argued that the LDF accepted it because a challenge would mean another year in Judge Thomas's court, which would probably mean more appeals and more time wasted. While the plan appeared to involve meaningful concessions from both sides, the *Swann-Davis* decisions had mandated most of that which the school board had agreed to. It was the LDF and plaintiff-parents who had compromised.⁴³

Cooper was criticized by some in the black community, and not just the Innes-style separatists. Many felt he had given up too much, especially on the heels of a huge Supreme Court victory which seemed, to some, to signal a real change. The school board was yet again lambasted by segregationists. William Westbrook of STAND called for the members' resignation, again. A delegate from Concerned Citizens condemned the "waste" of money on a "reckless" purchase of buses, which she argued had been made "for the sole purpose of attaining a social goal desired only for the benefit of a minority people." So much consideration had been given to black children, she argued, but what about white children, who were being "bused, cussed, beaten, shook-down, and utterly deprived of a quality education." Had it become "a misfortune to be fortunate?" A representative of the umbrella United Concerned Citizens of Alabama echoed these sentiments, then lamented that none of the white community's concerns had been reflected in the plan and accused the board of betrayal.⁴⁴

The most vehement segregationist reaction to the new Mobile school plan came from the local chapter of a group calling itself The Southerners, headed by long-time Klansman, Citizens' Councilor, and Wallace speech-writer Asa Carter. They were, in their own words, "a deliberate group of Anglo Saxon

⁴³ *Washington Post*, July 9, 1971; Pride, *The Political Use of Racial Narratives*, pp. 111-13.

⁴⁴ Pride, *The Political Use of Racial Narratives*, pp. 113-14.

white men,” who sought “to promote [their] racial heritage and culture, the knowledge of [their] civilization and the perpetuation of the white race.” The Southerners had been first created some years before, in the wake of *Brown*. The group receded from view for a while, then resurrected itself in 1970. The rebirth came about, in the immediate sense, because of the need to construct a private, segregated swimming pool in the small town of Red Level, Alabama, after court orders necessitated the integration of the public pool there. Ace Carter soon shepherded the organization’s newly rapid growth and helped organize “divisions” in Birmingham, Selma, Montgomery, Huntsville, and of course, Mobile. By the summer of 1971, the group boasted of nine divisions – two in Mississippi – and was thought to have between 5,000 and 10,000 members, many of whom were former Klansmen. Its members wore gray armbands with Confederate battle flags on them and attended bimonthly meetings, at which the primary focus was generally to “take up programs to help our children.”⁴⁵

Each division of the Southerners was named for a Confederate war hero. The “Admiral Ralph Semmes Division” represented Mobile; Semmes was the captain of the celebrated commerce raider, the *C.S.S. Alabama*. In the spring of 1971, Southerners of the Semmes division had begun distributing leaflets on Mobile street corners. The segregationist appeals were the same as they had always been. For example, men needed to recognize that there was an “obligation that manhood [owed] to his womanhood and his children,” and that this was “not being lived up to by the bulk of Southern men.” But there was a newfound urgency in the message: “War [had] been declared upon an entire generation of little white children, who [were] fighting for their lives, their right to decency, and their heritage of Christian civilization.” And it was “little white girls” who were “bearing the brunt of this savage assault.” The politician was “turning his face away,” and the newspapers were “attempting to hide the murder and death of an entire generation of Southern white children.” Would the man who read such a leaflet

⁴⁵ “The Southerners – The New Klan?” NAACP Papers: K.L. Buford Files, Group VI, Box C-26, Folder: Correspondence, July-December, 1971 (*Papers of the NAACP*: Part 29 (Branch Department Files), Series A (Field Staff Files, 1965-1972), Reel 1); *Henderson, N.C. Times-News*, March 16, 1972.

“honor his obligation of manhood towards . . . white children and womenfolk?” Or would he forsake it “out of fear [or] laziness?”⁴⁶

A telephone number at the bottom of the Southerners’ flyer sent callers to a recorded message which was even more explicit: “Today in the so-called public school system of Mobile, Alabama, little white girls are being savagely attacked by gangs of Negroes, [and] white boys are being intimidated, threatened, and severely beaten by roving gangs of blacks.” One “brother” in the Southerners had been forced to pay for an abortion for his daughter, who had purportedly been “raped by two niggers with a loaded shotgun.” According to the messenger, white children who were able to escape these “atrocities [and] physical anguish” were “having their minds destroyed by the Communistic teachings of a Karl Marx or a Martin Luther King.” They were being taught “to look to government instead of God for their needs” and “being robbed of their Christian heritage,” which had been “bought and paid for with the blood of their forefathers.” In general, the “public school system [was] a nightmare” wherein “white children [were] being savagely brutalized by niggers while the limp-wristed, weak kneed school officials [looked] the other way.” The school officials were being “matched in disgrace” by the biased news media, whose “blanket of silence” kept whites from knowing the truth. The end result was sure to be children “with banana-colored skin, wool for hair, and the light blown out in their brains. . . . Not since Reconstruction” had such a “black cloud of despair” hung over the “proud southland.” Then the South had been “occupied by nigger troops, governed by northern trash, and prayed for by blue-nosed hypocrites whose prayers got no higher than the ceiling.” The recorded voice asked, “Sounds a lot like today doesn’t it?” The rhetoric of racial Armageddon was straight out of the late 1950s: fears of miscegenation, of communism, of a loss of manhood, honor, Christian faith, even heterosexuality; along with appeals to honor, duty, aggressive masculinity, and the Lost Cause.⁴⁷

⁴⁶ “The Southerners – The New Klan?” NAACP Papers: K.L. Buford Files.

⁴⁷ “The Southerners – The New Klan?” NAACP Papers: K.L. Buford Files.

If the rhetoric was the same, the solutions had changed. The Southerners urged that “something must be done now,” and according to the FBI, that something included preparing for race war by hoarding weapons and drilling in the Talladega National Forrest. But even this seemingly militant group had a law-and-order style plan. Carter insisted that the group asked violence of no one, and that anyone who said it was a violent organization was “a damn liar.” Even as they asked for donations for the man whose daughter had purportedly been raped at shotgun-point, the Southerners offered hope in the form of non-violent resistance: “You can send your child to an all-white, segregated Christian school at no cost to you. That’s right, no cost.” The Southerners primary goal was to, in Carter’s words, “take every little white girl and every white boy out of the savage jungles” that were the “so-called public schools.”⁴⁸

On June 20, 3,000 Mobile whites gathered at the Mobile Stockyards to eat fried chicken, to drink iced tea, to listen to country, bluegrass, and gospel music, and to listen to Ace Carter extoll the virtues of the “holy cause.” Carter lamented “what that federal judge is going to do to our children,” along with “that H.E.W. man and that Internal Revenue man.” He railed about “the Negroid” and his communist connections and sniped at “limp-wristed” politicians. Given his group’s self-proclaimed identity as “a deliberate group of Anglo Saxon white men” who sought “to promote [their] racial heritage” and “the knowledge of [their] civilization,” it was ironic that Carter also claimed that the St. Andrew’s Cross in the Confederate battle flag represented “the old Scotch, English, Irish, and Dutch” who were now called “rednecks.” Finally, he got to the point. There at the stockyards, on the site a former cattle barn, the Southerners were building a church called the Assembly of Christian Soldiers, a “commissary,” and a Christian school. The plan was desperate and doomed from the start. The “commissary” was really just a segregated grocery store, which Carter thought could garner tax exemption through its connection with the church. The profits from the commissary were to provide free tuition for working-class parents

⁴⁸ ⁴⁸ “The Southerners – The New Klan?” NAACP Papers: K.L. Buford Files; *Henderson (N.C.) Times-News*, March 16, 1972; Douglass, et al., *The Reconstruction of Asa Carter*.

to send their children to the on-site school, or to any segregated school, but only “until one single nigger [was] admitted.”⁴⁹

Therein was the problem. The Southerners may not have openly advocated violence. And they may have accepted private schools as their only solution within the confines of some conception of law and order. But that conception had not developed along with that of the law and order vanguard. The politicians which Carter criticized – which by then included Wallace himself – had come to realize that successful maintenance of white privilege and white majorities in schools meant some sort of concessions beyond just non-violence. Ace Carter would not even accept freedom of choice. And his plan for what can readily be described as a segregationist commune flew in the face of a decade of federal legislation and litigation. Thoughtful and successful segregationists had adapted.⁵⁰

Implacable and dogmatic segregationists like Ace Carter often simply gave up and, occasionally, self-destructed. Carter managed to do both, with a brief period in-between which was both literally and figuratively something out of a Hollywood movie. The Southerners petered out by 1974, and Carter disappeared, resurfacing in Texas under the name Forest Carter. He changed his appearance, claimed to be a half-breed Cherokee Indian, and began writing novels and children’s books. His *Education of Little Tree* garnered critical success, and his *Gone to Texas* was adapted as the Clint Eastwood film, *The Outlaw Josey Wales*. His real identity remained mired in secrecy until his death in the 1980s, when he choked on his own vomit after a drunken feud with one of his sons.⁵¹

Swann, Jefferson, and Splinter Systems

In Jefferson County in the summer of 1971, many segregationists felt secure in their choice to flee the Birmingham or Jefferson County school systems for the newly established municipal school

⁴⁹ “The Southerners – The New Klan?” NAACP Papers: K.L. Buford Files; *Henderson (N.C.) Times-News*, March 16, 1972; Douglass, et al., *The Reconstruction of Asa Carter*.

⁵⁰ Carter, *Politics of Rage*, p. 320; Douglass, et al., *The Reconstruction of Asa Carter*.

⁵¹ Carter, *Politics of Rage*, p. 320; Douglass, et al., *The Reconstruction of Asa Carter*.

systems of Pleasant Grove, Vestavia Hills, and Homewood. These three were joined in 1971 by the industrial western suburban city of Midfield. All of these districts had been created since the original filing of the case in 1965. Prior to that, the cities of Mountain Brook, Tarrant, Bessemer, and Fairfield had all splintered. Judge Seybourn Lynne had guaranteed the post-1965 systems' independence in his 1970 ruling. Each had been ordered to accept token numbers of black students from areas near their city limits, but each remained safely white. They were guaranteed not to have to support a black student population over 25 percent – the percent of blacks in the county itself. Homewood and Vestavia were over 90 percent white. Pleasant Grove remained entirely white.⁵²

The Fifth Circuit Court of Appeals, however, applied *Swann* to *Stout v. Jefferson* on July 6, 1971, just one week after it ruled against the City of Oxford in the Calhoun case. The appellate court panel reversed Judge Lynne's ruling and directed the district court to "require the school board forthwith to implement a student assignment plan for the 1971-72 school term which [complied] with the principles established in *Swann v. Charlotte-Mecklenburg* . . . and which encompass[ed] the entire Jefferson County School District as it stood at the time of the original filing of this desegregation suit." The court more explicitly stated, "Where the formulation of splinter school districts, albeit validly created under state law, have the effect of thwarting the implementation of a unitary school system, the district court may not, consistent with the teachings of *Swann* . . . recognize their creation." This was a blow for the splinter systems but not necessarily a total loss. As long as they did not 'thwart the county's desegregation plan,' they might still exist, even with majority white schools.⁵³

⁵² *Stout v. Jefferson County Board of Education and Board of Education for the City of Pleasant Grove*, 448 F.2d 403 (5th CCA, 1971); *Race Relations Law Survey* 3, No. 3 (Sept., 1971), p. 90; *It's Not Over in the South: School Desegregation in Forty-Three Southern Cities Eighteen Years After Brown*, A Report by the Alabama Council on Human Relations, American Friends Service Committee, Delta Ministry of the National Council of Churches, NAACP Legal Defense and Education Fund, Inc., Southern Regional Council, and Washington Research Project (1973), in *Facts on Film, 1972-1973 Supplement*, Miscellaneous Materials (Hereinafter Cited as "Alabama Council on Human Relations, et al., *It's Not Over in the South*"), pp. 46-7.

⁵³ *Stout v. Jefferson County Board of Education and Board of Education for the City of Pleasant Grove*, 448 F.2d 403 (5th CCA, 1971); *Race Relations Law Survey* 3, No. 3 (Sept., 1971), p. 90; Alabama Council on Human Relations, et al., *It's Not Over in the South*, pp. 46-7.

The district court was forced to enter another order which more affirmatively asserted the splinter systems' role in the Jefferson County plan. Judge Pointer dutifully entered such an order. Pointer described from the bench the new standard, as he understood it, for the independence of the splinter systems:

The standard is not to deny the possibility of a creation of separate systems that is allowed under state law, unless that state law interferes with the disestablishment of a dual school system. There is nothing inherently wrong with it. The test . . . is to look at the particular school district involved and see whether the recognition of that district – with whatever modification would be made – thwart[s] the implementation of a unitary school system in the county as a whole. Then if it does, then to that extent, the Court would disregard the creation or existence of that system.⁵⁴

Pointer insisted that the four independent systems should be judged by the same standard and that the court must look at the county as a whole. However, he proceeded to describe what was, in effect, a class-based standard for scrutiny.

The judge argued that it was “pretty clear that the demography, the location of people and their colors,” was “different” in the southern, over-the-mountain area than it was in what he called the midwest, where Pleasant Grove and Midfield were located. In other words, the over-the-mountain suburbs were overwhelmingly white, whereas that area of the county on the western edge of Birmingham was relatively mixed. Pleasant Grove itself had been forced to make a conscious effort to draw blacks out of its municipal limits. “It very well may be,” Pointer held, “that more recognition in that sense of the viability of Homewood and Vestavia can be given than may be given to Midfield and Pleasant Grove, simply because of the reality of the situation of where the people live.” The effect of this would be that the two working class cities beyond Birmingham’s western industrial sector would be forced to accept more blacks than the affluent white suburbs beyond Red Mountain on the city’s

⁵⁴ District Court proceedings quoted in Appellate Court opinion, *Stout v. Jefferson County Board of Education and Board of Education for the City of Pleasant Grove*, 466 F.2d 1213 (5th CCA, 1972); *Race Relations Law Survey* 3, No. 4 (Nov., 1971), pp. 129-30.

southern belly. If either Pleasant Grove or Midfield asserted their independence in an attempt to thwart the county plan – for example, by refusing to accept an appropriate number of black students or to hire enough black teachers – then their independence might be more readily challenged than that of Homewood or Vestavia Hills.⁵⁵

This was precisely what happened later that summer. Pleasant Grove refused to accept its role in the Jefferson County desegregation plan, and Pointer was obliged to act. Pointer had ordered the implementation of a plan in which 400 black students were zoned into the Pleasant Grove school system. The Judge had instructed the city to provide bus transportation to the students, all of whom lived just outside the all-white city's limits. The city argued that it could not do this because it owned no buses. The LDF appealed to Pointer for relief, and the judge ordered the city in mid-September to purchase three buses from the Jefferson County surplus fleet and begin transporting the students. The ten-year-old busses were relatively cheap at \$500 apiece, but the Pleasant Grove board argued that it could not afford them, adding that the state board of education did not approve transportation in busses over 10 years old. Pointer responded by ordering the Jefferson County Board of Education to take control of the Pleasant Grove schools in late September, 1971. Richmond, Virginia segregationist-apologist James Kilpatrick called it "Appomattox redivivus," as Pleasant Grove was being ordered to "rejoin the union." George Wallace called it "another example of frock dictators on the bench overriding the will and wishes of the average citizen." Pleasant Grove Superintendent Rick McBride provided an even more explicitly law-and-order commentary. McBride called Pointer's decision "the most extreme ruling in a school case on record" and argued that "the rights of the citizens of Pleasant

⁵⁵ District Court proceedings quoted in Appellate Court opinion, *Stout v. Jefferson County Board of Education and Board of Education for the City of Pleasant Grove*, 466 F.2d 1213 (5th CCA, 1972); *Florence Times-Daily*, Sept. 26, 1971; *Race Relations Law Survey* 3, No. 4 (Nov., 1971), pp. 129-30.

Grove [had] been trampled upon and their flourishing school system stripped from them because they would not buy old surplus busses and initiate a student transportation plan.”⁵⁶

The Pleasant Grove school board immediately appealed the decision, and U.W. Clemon, Solomon Seay, and Jack Greenberg prepared to argue the LDF’s case before the Fifth Circuit. But the appellate court was compelled to await the adjudication of two cases, then pending before the U.S. Supreme Court, which involved the question of splinter systems. The Court had granted *certiorari* to two Fourth Circuit cases wherein the appellate court had upheld the independence of splinter systems in rural Greensville County, Virginia and rural Halifax County, North Carolina. In *Wright v. City Council of the City of Emporia* and *U.S. v. Scotland Neck City Board of Education*, the Supreme Court reversed the Fourth Circuit court and cited with approval the Fifth Circuit’s own splinter system rulings in the *Lee v. Macon and Calhoun County* case and the *Jefferson* case the previous year. As soon as *Wright* and *Scotland Neck* came down, the Fifth Circuit issued its ruling in the Pleasant Grove appeal in *Jefferson*. In September, 1972 it upheld Judge Pointer’s determination that Jefferson County should take over the Pleasant Grove schools. The appellate court also vacated part of Pointer’s order, mandating alterations in certain attendance zones and insisting that the district court eliminate the county minority-to-majority transfer plan and replace it with a strictly minority-to-majority transfer plan. It noted that splinter districts were “not forever vassals of the county board.” The court ought not “remove local control indefinitely,” only until the system was willing and able to prove that it intended to comply with its role in the county’s desegregation and that its “commitment to desegregation [would not] falter.” Rather than comply, the Pleasant Grove school board appealed. The Supreme Court denied *certiorari*.⁵⁷

⁵⁶ District Court proceedings quoted in Appellate Court opinion, *Stout v. Jefferson County Board of Education and Board of Education for the City of Pleasant Grove*, 466 F.2d 1213 (5th CCA, 1972); *Florence Times-Daily*, Sept. 26, 1971; *Fredericksburg Free Lance-Star*, Oct. 14, 1971; *Race Relations Law Survey* 3, No. 4 (Nov., 1971), pp. 129-30.

⁵⁷ *Stout v. Jefferson County Board of Education and Board of Education for the City of Pleasant Grove*, 466 F.2d 1213 (5th CCA, 1972), cert denied, 411 U.S. 930 (1972); *Race Relations Law Survey* 3, No. 4 (Nov., 1971), pp. 129-30.

If whites fleeing to the suburbs of Alabama's three largest cities – Birmingham, Mobile, and Montgomery – were beginning to more deeply fear the trajectory of desegregation law, their fears were soon assuaged. Two months before the post-*Swann* decisions in *Jefferson*, the Fourth Circuit Court of Appeals had reversed and remanded a District Court ruling in the Richmond, Virginia school desegregation case, *Bradley v. Richmond*. In January, 1972, District Judge Robert Merhige had approved a desegregation plan which would have forced the city schools of Richmond (70 percent black) to join with the suburban county systems of Chesterfield and Henrico (91 percent white) in a metropolitan area-wide busing system in which blacks would be bussed out of the city and into the suburbs and vice-versa. The appellate court in June, 1972 held that such a plan was unconstitutional. A federal court could not “compel one of the States of the Union to restructure its internal government for the purpose of achieving racial balance” unless it found evidence of “invidious discrimination in the establishment or maintenance of local government units.” The school districts had been established 100 years prior, and the court could find no evidence of their establishment being racially motivated, nor could it find that the counties and city had colluded to effect segregation in the systems. In May, 1973 an evenly divided Supreme Court upheld the appellate court's decision in a terse *per curiam* order, effectively issuing no opinion. The Court had explicitly held in *Swann* that the sort of relief prescribed for Charlotte was limited to cases of established *de jure* segregation (Charlotte had merged with its large, surrounding county in 1960 and, like Mobile, was one huge system). The Richmond ruling affirmed the distinction by denying such relief across district lines which were ostensibly *de facto* segregated.⁵⁸

One year later, the Supreme Court even more firmly established the distinction, and the limits of busing in general, when it struck down a massive cross-district desegregation plan for the Detroit metropolitan area in *Milliken v. Bradley*. Chief Justice Warren Burger argued for the 5-4 majority that

⁵⁸ *Bradley v. School Board of the City of Richmond*, 462 F.2d 1058 (4th CCA, 1972), affirmed sub nom *School Board of the City of Richmond v. State Board of Education of Virginia*, 412 U.S. 92 (1973); *Washington Post*, Jan. 16, June 9, 1972; *Montgomery Advertiser*, May 25, 1973.

“the notion that school district lines may be casually ignored or treated as a mere administrative convenience” was “contrary to the history of public education” in the United States. The court agreed that discrimination had been proven in Detroit’s school system, but it failed to find it in the 53 suburban cities and towns which were to be joined with the city. The court therefore ruled the inter-district plan to be “wholly impermissible.”⁵⁹

The five justices who constituted the *Milliken* majority were the four Nixon appointees (Burger, Blackmun, Powell, Rehnquist) and Potter Stewart. These same five also constituted the majority in the 1973 case of *San Antonio Independent School District v. Rodriguez*. The district court in *Rodriguez* had held that the school financing system in Texas – based as elsewhere on local property taxes – was violative of the equal protection clause of the Fourteenth Amendment. The Supreme Court disagreed and held that the equal protection clause did “not require absolute equality or precisely equal advantages,” that education was not a “fundamental interest” under the Constitution, and that financing was not the sole determinant of educational quality in any case. Both *Milliken* and *Rodriguez* were crushing blow for proponents of equal educational opportunity via litigation. Thurgood Marshal called *Milliken* a “solemn mockery” of *Brown* and called *Rodriguez* a “sham.”⁶⁰

In Alabama, it was mostly good news for segregationists. Jefferson County could rest assured that it would not soon be forced to enter into a desegregation plan with the increasingly black city of Birmingham. The post-1965 splinter systems (excluding the defunct Pleasant Grove system) would remain tethered to the county plan, of course, per the post-*Swann* decisions in *Jefferson*. But Judge Pointer’s recognition that the over-the-mountain systems would effectively be exempt from massive in-busing of blacks would stand. There were blacks in the vicinity of these suburbs, just as there were blacks in the vicinity of western-edge Pleasant Grove and Midfield. The difference was that the blacks

⁵⁹ Patterson, *Brown v. Board of Education*, pp. 177-80; *Milliken v. Bradley*, 418 U.S. 717 (1974).

⁶⁰ Patterson, *Brown v. Board of Education*, pp. 177-80; *Milliken v. Bradley*, 418 U.S. 717 (1974); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973).

close to the over-the-mountain systems were mostly in the city of Birmingham itself. Thus, the *Bradley v. Richmond* and *Milliken v. Bradley* rulings were a major relief to the over-the-mountain Jefferson County suburbs. Also off the hook was increasingly populous, suburban north Shelby County, on Jefferson County's southern border, where the cities of Pelham, Helena, and Alabaster were located.⁶¹

Whites who remained in the Mobile and Montgomery systems would have to live with some level of busing. There were increasingly numerous private school options for these families, however, and many took advantage. Others began to move out into whiter areas of the county where the likelihood of ending up in a majority black school decreased. Still others moved to burgeoning suburban communities in neighboring counties. White Mobilians moved eastward across Mobile Bay into Baldwin County, where Daphne, and later Fairhope and Spanish Fort, benefitted. Montgomery whites moved to Prattville in neighboring Autauga County, or to Millbrook in Elmore County. Of course, all of these systems were desegregated as well. But none was faced with the sort of black majority which compulsory assignment threatened to bring about in or near the major cities themselves. Blacks were ostensibly welcome to buy homes in these suburban communities, though many remained mired in the kind of poverty which kept them ghettoized. For some of those who could afford the house and the car, discriminatory practices in real estate and lending excluded them. Meanwhile, white who had fled to the suburbs refused to acknowledge that they enjoyed what historian Matthew Lassiter has characterized as a "racially exclusive" and "federally subsidized version of the American Dream." According to historian Kevin Kruse, white flight had come to be seem "innocuous and natural" to them. It had exempted them "from responsibility for problems which they had done so much to create."⁶²

⁶¹ See *Pegues v. Bakane*, 445 F.2d 1140 (5th CCA, 1971), also at *Race Relations Law Survey* 3, No. 4 (Nov. 1971), p. 157-8, for a case of real estate discrimination in Vestavia Hills; the realtor in this case had initially refused to even show a home to a black couple, but the realty company effectively settled the issue out of court by selling the house to them after they filed suit.

⁶² Lassiter, *Silent Majority*, pp. 1-3; see Lassiter for general conclusions about suburban "de facto" segregation; Lassiter rejects the notion of *de facto* segregation altogether, in fact, arguing that suburban segregation is locally planned and enforced and federally sanctioned and subsidized; Kruse, *White Flight*, p. 258.

In Birmingham proper in the summer of 1973 – ten years after the Armstrong boys first desegregated the state’s schools – two prominent figures on opposite sides of the legal struggle seemed to agree on the fundamental problems. The school system had become approximately 60 percent black and 40 percent white. Forty schools were nearly all-black, 20 were nearly all-white, and about 30 were substantially integrated, according to the city schools’ superintendent, Henry Sparks. The city had not been subjected to a district-wide, non-contiguous mass busing plan, in part because the city had never utilized bus transportation, even when segregated, and it owned no buses. White resistance in the form of non-conformity, sit-ins, and picketing had declined since the immediate aftermath of the first compulsory assignment orders. LDF attorney U.W. Clemon argued that this was because the most recalcitrant whites had “either moved out or put their children in private schools.” He added that black disillusionment was eroding support for the LDF’s program, as well. Not only did desegregation “hinder people’s opportunity to develop a black consciousness,” it had showed them that, in practice, it meant demotion for black teachers and administrators. Clemon continued to fight the school board for equity in teacher and administrator assignment. But even Birmingham Schools’ Sparks agreed that white flight to the suburbs was a problem. “We’ve done what the courts have said,” he argued, “but I think they realize that a man still has a freedom of choice about where he will live.”⁶³

In the winter of 1973, the Alabama Council on Human Relations co-sponsored a study of school desegregation in 43 of the South’s cities, which seemed to confirm Sparks’ frank admission. The study found that myriad problems existed in all of the districts, including obsolete and inadequate desegregation plans, widespread demotion of black administrators, lack of black student participation in extracurricular activity, discriminatory discipline policies, “tracking” or grouping students by ability into virtually segregated classes, voluntary social segregation, and a general lack of programs for black students. It also found that segregated schools were commonplace in many of these districts. In

⁶³ *Montgomery Advertiser*, April 15, 1973.

Birmingham, 18 of the city's 89 schools were all-black, while 13 were all-white. A further 14 were between 90 and 99 percent black, while 6 were between 90 and 99 percent white. Five were between 80 and 90 percent black, and six were between 80 and 90 percent white. If more than 20 percent minority representation constituted a desegregated school, then 62 of Birmingham's 89 schools were not desegregated.⁶⁴

In the Jefferson County system, the same standard revealed that 59 of the county's 76 schools were not desegregated, while 23 were between 99.9 percent and 100 percent one-race. The splinter systems of Mountain Brook, Homewood, Vestavia Hills, and Midfield were all over 90 percent white. A more damning indicator of white flight in metropolitan Birmingham, if only symbolically so, was the fact that four of the five members of the Jefferson County school board, along with Superintendent Revis Hall, lived in one of the county's splinter system municipalities. And it was not just Birmingham-Jefferson County. In Montgomery 24 of the system's 50 schools were not more than 80/20 percent desegregated. There were no fewer than 23 non-Catholic private schools in the county, too, which continued to take in whites fleeing the system by the thousands. In Mobile, 21 of the system's 81 schools remained segregated by the 80/20 criterion. The title of the Alabama Council study's published findings was, *It's Not Over in the South*. Indeed, it was not.⁶⁵

Law, Order, and Taxes

George Wallace was physically enfeebled for life by Arthur Bremer's attack, but he recovered quickly from any political ill effects. In the spring of 1973, some in the state legislature had come to question Wallace's ability to lead the state. He was in constant physical pain and subject to demanding daily physical therapy. The governor made almost no preparations for the regular 1973 legislative session and was blamed for its accomplishing very little. More than his physical condition, what kept

⁶⁴ Alabama Council on Human Relations, et al., *It's Not Over in the South*, pp. 45-8.

⁶⁵ Alabama Council on Human Relations, et al., *It's Not Over in the South*, pp. 45-8.

the paralyzed Wallace from compiling a legislative program was his return to electioneering. He had finally secured a constitutional amendment to allow gubernatorial succession and had already announced his intentions to run again in 1974. He had privately vowed, and most in the public assumed, that he would again run for the presidency in 1976, as well. The “stand in the schoolbus door” proved to be Wallace’s last campaign of outright defiance, but it was by no means the end of his resistance. In subsequent years, he and others mounted an indirect, law-and-order style assault on desegregated education, by way of the state’s property tax system. It was, in many ways, the culmination of the law-and-order style of resistance.⁶⁶

The idea of attacking desegregation by way of taxation had been conceived prior to the attempt on Wallace’s life, in the wake of the post-*Swann* decisions, although the anti-busing campaign was not the only impetus to action. As a federal court would determine decades later:

The convergence in one year, 1971, of four federal mandates requiring reenfranchisement of African-Americans, reapportionment of the Alabama Legislature, fair reassessment of all property subject to taxes, and school desegregation, had . . . created a "perfect storm" that threatened the historical constitutional scheme whites had designed to shield their property from taxation by officials elected by black voters for the benefit of black students.⁶⁷

By 1971 blacks were already gaining control of local offices in a number of Black Belt counties like Macon and Greene, thanks to the Voting Rights Act of 1965 and the continuing scrutiny of the Civil Rights Division. At the same time, the electoral reapportionment mandated several years before by the *Reynolds v. Simms* decision looked like it would soon contribute to a sharp increase in the number of black legislators. The final impetus for protective state action had been a three-judge federal court’s

⁶⁶ *South Today* 4, No. 6 (March, 1973), p. 2; *South Today* 5, No. 2 (Oct., 1973), p. 2; Carter, *Politics of Rage*, pp. 451-8.

⁶⁷ *Knight v. Alabama*, 458 F.Supp.2d 1273 (ND, AL, 2004), pp. 1286-97; in this section of his opinion, District Judge Harold Murphy liberally summarized and quoted from expert testimony by historians Robert J. Norrell and J. Mills Thornton. The court agreed with the two that the “lid bills” were part of a discriminatory tradition designed to deny black students equal educational opportunities at the perceived expense of white landowners.

decision in *Weissinger v. Boswell*, also in 1971, which mandated the creation of a fair and uniform statewide property tax assessment system. The state had traditionally used a ridiculous patchwork system in which some land was valued absurdly below its market value for the purposes of taxation. When the *Weissinger* decision called for a reform of such a system, it portended potentially widespread property tax increases.⁶⁸

Even then, in the midst of his more dramatic “schoolbus door” stand, Wallace linked his opposition to tax reform directly to the school busing decisions and urged legislators and voters to stand with him against both. In addressing the 1971 legislative regular session, the governor said, “I believe under existing revenues we can have a teacher salary increase, a better free textbook program, [and] a better retirement program” Wallace insisted he was proud that during his first term they had been able to achieve “a breakthrough in education” funding without any increases in property taxation. “But I am frank to tell you, and to tell educators,” he said, “that the people of Alabama are simply turned off on education and some educators because of what the Federal Courts and HEW have done to their children from Huntsville to Mobile. Every one of you know I am telling you the truth when I tell you that.”⁶⁹

Powerful landholding lobbies in Alabama were also vehemently opposed to property tax increases, particularly the Alabama Farm Bureau and the Associated Industries of Alabama. Wallace supported the Alabama Farm Bureau’s plan to constitutionally mandate a property gradation system which would serve to limit taxes on farm and timber land. As he defied the federal courts one last time on busing, the governor told voters that the details of this proposed property tax scheme were unimportant. What was important, he argued, was that the hated federal courts had not only issued their abominable school decisions, they had compounded them with a ruling insisting that Alabama

⁶⁸ Knight v. Alabama, 458 F.Supp.2d , 1273 (ND, AL, 2004), pp. 1286-97; *Weissinger v. Boswell*, 330 F.Supp 615 (MD, AL, 1971).

⁶⁹ Knight v. Alabama, 458 F.Supp.2d , 1273 (ND, AL, 2004), pp. 1286-97, quoting Wallace at 1293; *Weissinger v. Boswell*, 330 F.Supp 615 (MD, AL, 1971).

reassess all property (*Weissinger*). According to Wallace, this meant that Alabamians would soon have to pay more taxes to support increasingly desegregated schools, if something was not done. As a result, in 1971 the legislature passed the first so-called “Lid Bill” Amendment to the 1901 state constitution, which state voters approved in 1972 as Constitutional Amendment 325. It established an assessment classification system and corresponding “lids” on property tax millage rates: utilities property was to be taxed at a maximum 30 percent of its fair market value; business property at a maximum 25 percent; and residential, farm, and timber land at a maximum 15 percent. This had the effect of constitutionalizing the *de facto* classifications in place before the 1971 *Weissinger* decision mandating statewide reassessment.⁷⁰

As black political power continued to increase across the state, a “local option” in Amendment 325 was determined to be a fatal flaw. The local option was designed to give the legislature, and ultimately the counties themselves, the authority to vary tax rates from county to county, so as to maintain the status quo. But the old Black Belt planter and Big Mule industrialist types, represented by the Farm Bureau and Associated Industries, owned thousands of acres of farm or timber land. They were certain that as soon as blacks took control of county tax offices, they would initiate the highest rates possible as a way of not only funding increasingly all-black school systems, but also of simply exacting retribution from the old white power structure. As Sam Engelhardt had once asked rhetorically, “If you had a nigger tax assessor, what would he do to you?” The *Mobile Press-Register* more tactfully observed, “Senators representing some of these counties are considered fearful that the black political leaders, who also enjoy voting majorities, will exercise local options and set property taxes at the highest rates possible in order to raise additional funds for their governmental operations.” These taxes would be paid, the *Press-Register* continued, “by the property owners, considered by the

⁷⁰ Knight v. Alabama, 458 F.Supp.2d , 1273 (ND, AL, 2004), pp. 1286-97; for a pithy explanation of the lid bill and its history, see Complaint in Lynch v. Alabama, pp. 16-19, at Plaintiffs’ Knight & Sims vs. Alabama Website, <http://www.knightsims.com>, accessed May 16, 2013.

senators to be white owners of large farms and corporate interests with large timberland holdings.” With the Big Mule industrialists once more in bed with the old Bourbon planter elite, opposition mounted. The local option was similar enough to the provision struck down in *Weissinger* that it was vulnerable to a legal challenge. That part of the Lid Bill Amendment was, thus, subsequently attacked in federal court on nonracial, equal-protection grounds and found to be unconstitutional.⁷¹

It was for these reasons that Wallace came in the mid-1970s to support an amended Lid Bill provision which ultimately became Constitutional Amendment 373. Despite his physical limitations and his growing cadre of skeptics in the legislature, Wallace was reelected in 1974 and subsequently put his weight behind the new measure. Amendment 373 was approved by voters at the end of Wallace’s term in 1978. It eliminated the local option but retained the property classification system. It even lowered the maximum assessment rate for residential, agricultural, and timber land 10 percent and made that low ratio applicable to “current use” of the land, rather than fair market value. This meant that timber and agricultural land would end up being taxed at a rate substantially lower than the already absurdly low 10 percent.⁷²

By that time, Wallace no longer had to make the connection between the maintenance of Alabama’s historically low property taxes and funding for desegregated education. The state’s property tax system was itself a product of the Redemption Constitution of 1875 – which had first put caps on tax rates to shield white money from going to the education of freed persons – and the white supremacist Constitution of 1901 – which had mandated a local referendum for any proposed tax increases. When the latter was amended in 1971 via the first Lid Bill, Wallace had made the appeal as explicitly as he could. The federal government had mandated changes in the state which would allow black political leaders to extract money from wealthy whites for blacks in desegregated school systems lately

⁷¹ Knight v. Alabama, 458 F.Supp.2d , 1273 (ND, AL, 2004), pp. 1286-97, quoting the *Mobile Press-Register*, Dec. 12, 1971; McCarthy v. Jones, 449 F.Supp 480 (SD, AL, 1978).

⁷² Knight v. Alabama, 458 F.Supp.2d , 1273 (ND, AL, 2004), pp. 1286-97.

abandoned by those same whites. By 1978 white voters understood that this could not, would not, happen.⁷³

Like Wallace's segregationist rhetoric, white resistance in general had undergone a superficial transformation. A 20-year effort by activists in the federal courts had forced segregationists to find some solution within the law. They begrudgingly accepted that token desegregation, then compulsory pupil assignment desegregation, were the "law of the land." But by no means did they capitulate. They refashioned their resistance into a defense of their own constitutional rights, then they regrouped and mounted a counter-offensive. With a decade of experience in fighting legal decrees with legal strategies, they crafted a facially defensible, ostensibly colorblind strategy of resistance which would preserve white "freedom of association" while at the same time shielding white money from being used towards the advancement of increasingly black education. The endgame was the preservation of white privilege. The driving force was school desegregation litigation. And so it was that the Lid Bill became, in the words of one legal scholar, "the instrument preserving the status quo of Alabama's past."⁷⁴

⁷³ Knight v. Alabama, 458 F.Supp.2d , 1273 (ND, AL, 2004), pp. 1286-97.

⁷⁴ Knight v. Alabama, 458 F.Supp.2d , 1273 (ND, AL, 2004), pp. 1286-97; see, for "legal school" quotation, University of Alabama law professor and tax law expert Susan Pace Hamill, "A Chance to Build a New Path," Editorial reprinted in various state newspapers under various titles, retrieved from University of Alabama School of Law, Faculty Bio for Susan Pace Hamill, <http://www.law.ua.edu/susanhamill>, accessed May 12, 2013. For more on Hamill, see Epilogue, infra.

EPILOGUE: "IF EVER IS GOING TO HAPPEN"

On an unusually warm afternoon in February of 2012, eighty-one year-old Solomon Seay sat at his dining room table, looking pensively at a stack of boxed files in the corner by his personal computer. He thought back to 1995, when his health had temporarily failed him. At that time there had been some 30 *Lee v. Macon* cases still in the courts, and Seay had been representing the plaintiffs in all of them, trying to ensure that each system continued to work faithfully towards unitary status. He had concerned himself, especially, with safeguarding the rights of black teachers, administrators, and staff. They were still at risk of being passed over in hiring and promotion. Black students in predominantly white schools, too, were still disproportionately excluded from extracurricular activities in some systems and were sometimes singled out for harsher disciplinary measures than white students. Seay remembered continuing litigation in Opelika City, in Pickens County, in Decatur City, and in many other districts. He wore a Disney Mickey Mouse t-shirt – part of a collection of memorabilia he had begun compiling after Marengo County Superintendent Fred Ramsey derisively referred to the assiduous Montgomery attorney as “that Mickey Mouse lawyer.” In 1995 Seay had been forced to turn many of the remaining *Lee* cases over to junior partners at Fred Gray’s firm in Tuskegee. “For health reasons I couldn’t carry that load,” he said. “But I kept one case,” he added, as he looked back over to the stack of boxes, “I kept Randolph [County].”¹

Seay kept the Randolph County case, he said, because during prior negotiations, he had been able to obtain for the plaintiffs “the very best public school desegregation plan that [he] had gotten in any system,” a plan which “touched on every facet of education in a public school system.” Seay was proud of the consent decree which established the plan, and he wanted to “see that through.” The decree had been entered earlier that year, the result of motions for further relief filed in 1994 by the

¹ Seay Interview.

plaintiffs and the Civil Rights Division. The motions had been occasioned by the actions of part-time hog farmer and Randolph County High School principal Hulond Humphries. Humphries' racist outburst that year thrust Alabama back into the national civil rights spotlight and simultaneously revealed how far the state had come in race relations since the early 1970s, and how very far it still had to go.²

Making Mistakes: *Lee v. Randolph County*

Randolph County – on the Georgia border, just southeast of Calhoun County and the city of Anniston, and just north of the Black Belt fringe counties of Chambers and Tallapoosa – was a typical rural central-Alabama county. It was mostly farm land and forest, with a few small towns. Its population had hovered around 20,000 since the 1960s, and its racial demographics had changed little: approximately 75-25 percent white-to-black. Some white parents sent their children to segregationist academies or out of district, but the county schools were significantly integrated as of 1994. Randolph County High School had a student enrollment of around 700, 62 percent of whom were white, and nearly 48 percent of whom were black. Humphries had been the principal of the high school in the small town of Wedowee since 1969. He had been there when the court had ordered Randolph to adopt the HEW plan for the county system and when Seay had quickly obtained an additional temporary restraining order against the unwarranted dismissal or demotion of black teachers and administrators. The school board did not quickly achieve unitary status, and Humphries himself was cited by the U.S. Department of Education in the late 1980s for operating segregated buses and for continuing to mete out punishment to blacks more liberally than whites. Despite these facts, the local authorities operated the county's schools quite uneventfully under the 1970 consent decree and under the scrutiny of the court, the Justice Department, and Seay – that is, until 1994.³

² Seay Interview.

³ *Los Angeles Times*, Aug. 12, 1994; *Lee v. Macon County Board of Education*, Docket Report, in *Lee v. Macon Trial Record*, Federal District Courthouse, Montgomery, AL (see Terminal Order of June 16, 1970); see also

At an assembly in February, 1994, Humphries addressed his student body about something that had been deeply troubling him: interracial dating. It seems that students at Randolph County High, during 20 years of desegregated education, had come to understand that “miscegenation” would not, in fact, mongrelize the white race and destroy Western civilization. Interracial couples had become more and more common. Humphries, however, understood this development as an abomination to God, rather than a sign of improved race relations. He asked the assembled students how many planned on taking interracial dates to the upcoming prom. When a number of them raised their hands, Humphries became incredulous. He insisted that this would not happen on his watch and claimed that he was cancelling the prom if such was the case. Junior class president ReVonda Bowen – herself the legitimate child of a happily “mixed” marriage of 18 years – boldly raised her hand to ask, “Who should I bring?” Humphries responded that therein was the problem: Bowen’s parents had “made a mistake” by conceiving her, and he did not want to see any more of those mistakes being made at Randolph County High. Bowen began to weep. Humphries began backtracking as soon as the calls started coming in the next day. He announced that the prom was back on. He took a page from the early 1960s segregationist book and claimed that he was only concerned that interracial dating would lead to violence. It was too late.⁴

Seay and attorneys from the Civil Rights Division filed separate motions for further relief in the *Lee* case against Randolph. Bowen also filed a civil suit of her own, in which she was represented by Morris Deas of the Southern Poverty Law Center. In the *Lee* case, the plaintiffs and the CRD argued that the Randolph school board – which had one black member – had generally failed to operate the school system in a nondiscriminatory fashion per the 1970 consent decree. Each motion cited not just

Lee v. Randolph County Board of Education, 160 F.R.D. 642 (MD, AL, 1995) (amended Consent Decree), and 885 F.Supp. 1526 (MD, AL, 1995) (Order awarding attorneys’ fees to plaintiffs); 1960 and 1990 Censuses of Population and Housing, <http://www.census.gov>, accessed May 5, 2013.

⁴ *Los Angeles Times*, Aug. 12, 1994; *New York Times*, Jan. 11, 1995; see also Vickie Cox Edmondson, Ed., *No Mistakes, No More Tears: The ReVonda Bowen Story* (Author House, 2005).

Humphries' remarks and actions at the assembly, but a pattern of discriminatory school board actions in hiring, discipline, and curricular choices. It had come to light in the aftermath of the prom cancellation, too, that Humphries himself had a disturbing pattern of behavior relative to interracial dating, which some termed an obsession on Humphries part. He had, for example, periodically asked white students into his office to question their dating choices and to threaten to tell their parents, and he had reportedly told white girls that white boys would no longer "have them" after they had been with a black boy. The school board initially fought the actions and backed Humphries. A number of white teachers also backed the principal, with one saying publically that his words had been misconstrued and that Bowen had simply "gone overboard" in filing a lawsuit.⁵

In the weeks that followed, white parents organized motorcades in support of Humphries, while black parents initiated a boycott of the public school system and set up temporary "freedom schools" in local black churches. Unprecedented media attention fell upon the tiny town, and old wounds which many must have thought were closed for good began to rupture. The Southern Christian Leadership Conference cancelled a planned demonstration in Wedowee when Ku Klux Klansmen from nearby Georgia threatened to stage a counterdemonstration. Bowen began receiving death threats, and the FBI installed a guard at her home. The prom was ultimately held, but Bowen and her date were reportedly the only interracial couple there. Many of those boycotting the public schools attended a "protest prom" instead. After a mostly uneventful summer, someone burned down Randolph County High School in August. The school board ultimately settled the civil case filed by Bowen, agreeing to pay \$25,000 towards her college tuition. And Seay and the CRD attorneys, including Assistant Attorney General Deval Patrick, were able to obtain an amendment to the consent decree in Randolph's *Lee* case in December. This provided for the plan which Seay called the best he had ever secured and which

⁵ *Los Angeles Times*, Aug. 12, 1994; *New York Times*, Jan. 11, 1995; *Lee v. Randolph County Board of Education*, 885 F.Supp. 1526 (MD, AL, 1995).

Assistant Attorney General Patrick said would effectively “remove barriers to equality of educational opportunity” in Alabama. It touched every aspect of the schools’ operation, including student discipline, teacher and administrator hiring and firing, and extracurricular activities. As an example of the plan’s thoroughness, the school board was required to bring in cheerleading coaches from historically black Alabama State and Alabama A&M for its schools’ summer cheerleading tryouts.⁶

But the status of Hulond Humphries hung in the balance. Per the agreement between Seay, the CRD, and the school board, Humphries was reassigned to an administrative position overseeing the construction of the new high school and was barred from existing school grounds without expressed approval. Some black community leaders protested, arguing that Seay had not adequately represented the black community, which wanted Humphries fired. But District Judge Myron Thompson – the black Yale graduate from Tuskegee who had taken Frank Johnson’s seat – ruled in favor of Seay and entered the order approving the amended decree. In a move that dumbfounded many, Humphries subsequently won the county superintendent’s office, even carrying a few black precincts. Wedowee slowly fell out of the national spotlight. Seay remained on the case over the next 18 years, after which time the consent decree was again revised to include only requirements for personnel and discipline reporting. After Seay was able to recoup his attorneys’ fees for the preceding two decades of monitoring the case, it was closed administratively in the summer of 2012.⁷

The Vestiges of Segregation: *Knight v. Alabama*

The Randolph County case was not the only significant litigation involving discrimination and segregated education in Alabama to be filed in the years after 1973. A number of the *Lee* cases

⁶ *Los Angeles Times*, Aug. 12, 1994; *New York Times*, Jan. 11, 1995; *Tuscaloosa News*, Aug. 2, 1994; *Lee v. Randolph County Board of Education*, 885 F.Supp. 1526 (MD, AL, 1995).

⁷ *Los Angeles Times*, Aug. 12, 1994; *New York Times*, Jan. 11, 1995; *Tuscaloosa News*, Aug. 2, 1994; *Lee v. Randolph County Board of Education*, 885 F.Supp. 1526 (MD, AL, 1995); *Lee v. Randolph County Board of Education*, 2011 U.S. Dist. LEXIS 34645 (MD, AL, 2011), 2012 U.S. Dist. LEXIS 110774 (MD, AL, 2012), Lexis-Nexis Academic, <http://www.lexisnexis.com>, accessed May 15, 2013; Seay Interview.

remained open into the 21st century, and as of 2013, some school systems still had not attained unitary status. Some of the non-*Lee* school desegregation cases, including those of Jefferson County and Huntsville, remained open as well. In all, nearly half of the state's school systems were either under a permanent injunction or were still involved in active cases. The litigation which had the most far-reaching potential, though, was certainly the long-running case of *Knight v. Alabama*, whose progeny, *Lynch v. Alabama*, was pending appeal in 2013.⁸

The *Knight* case began as a suit aimed at public higher education. Despite court-ordered token desegregation in the 1960s, all of Alabama's public four-year colleges remained nearly all-black or nearly all-white in the 1980s. The Auburn University-Montgomery decision (*Alabama State Teachers Association v. Alabama Public School and College Authority*) had insured that satellite campuses of the state's two flagship historically-white universities (HWUs) – Auburn University and the University of Alabama – could be built in Montgomery, Birmingham, and Huntsville. Since that time, those schools had functioned to syphon off any potential white students who might have otherwise chosen to attend either of the state's two historically black universities (HBUs) – Alabama State and Alabama A&M. The mere existence of the satellite HWU campuses, along with a diverse and lengthy pattern of discriminatory state administration, ensured that the two HBUs remained virtually all-black, underdeveloped, and unattractive to white students. Montgomery state representative Joe Knight and a number of others associated with the two HBUs filed suit in 1981, contending that it was the intent of the state to “make sure the content, values and style of blacks' education prepared them for subordinate roles in society, and to ensure that white persons would never be forced to submit to the authority of black persons.”⁹

⁸ Author's Correspondence with Dr. Michael Sibley, Alabama Department of Education, including working document entitled “Status of Alabama School Systems under Lee v. Macon and Other Desegregation Cases.”

⁹ *Knight v. Alabama*, 787 F.Supp. 1030 (ND, AL, 1991) (Knight I); Susan Pace Hamill, “*Knight v. State of Alabama*,” *Encyclopedia of Alabama* (Alabama Humanities Foundation, a service of Auburn University, The University of Alabama, and the Alabama State Dept. of Education, 2008, 2013). *Alabama State Teachers*

Knight v. Alabama was initially assigned to none other than U.W. Clemon – who had become Alabama’s first black federal judge when Jimmy Carter appointed him District Judge for the Northern District in 1980. But the case was ultimately heard by Georgia’s Thomas Murphy. Judge Murphy was specially assigned on account of what the Eleventh Circuit Court of Appeals determined was Judge Clemon’s conflicting interest and potential impartiality as an attorney for plaintiffs in such litigation in the recent past. The appellate court felt that Clemon would be inclined to find for the plaintiffs. As it turned out, Murphy’s ruling in 1991 was something of a mixed bag. For example, he found that the ACT college admissions test was clearly adopted in Alabama as a means of preventing blacks from enrolling in HWUs, but he held that it had not had an impermissible impact on black students. On the principal issue, however, the court found for the plaintiffs. Murphy found that “vestiges of segregation” in higher education existed and that the state was under an obligation – via Title VI of the Civil Rights Act and the Equal Protection Clause of the Fourteenth Amendment – to eliminate those vestiges “root and branch.” On appeal the Eleventh Circuit appellate court found that Murphy had closely anticipated the standards articulated by the Supreme Court in the case of *United States v. Fordice*, (1992), and it upheld most of the trial court’s ruling.¹⁰

After a partial reversal and remand, another trial was held, and in 1995 Murphy entered a broad-ranging remedial decree not unlike the one issued in 1967 in *Lee v. Macon*. The court took the extraordinary step of enlisting the assistance of a panel of five neutral, higher education experts in fashioning the decree. The panel and Judge Murphy determined that the state’s four year institutions were, in fact, racially identifiable, and that the state was obligated to increase black access to white institutions and to encourage white attendance at black institutions. The more specific obligations of

Association v. Alabama Public School and College Authority, 289 F.Supp. 784 (MD, AL, 1969), affirmed 393 U.S. 400 (1969); see CH 15, supra, for a discussion of the case.

¹⁰ *Knight v. Alabama*, 787 F.Supp. 1030 (ND, AL, 1991) (*Knight I*), affirmed in part, 14 F.3d 1534 (11th CCA, 1994). Hamill, “*Knight v. State of Alabama*,” *Encyclopedia of Alabama*; *United States v. Fordice*, 505 U.S. 717 (1992).

the state included: increasing black representation on faculties and administrations at the state's HWUs, diversifying the curricula at the HBUs, eliminating some duplicate programs, increasing the funding of the HBUs, improving facilities at the HBUs, and unifying the agricultural cooperative extension system and research programs at the state's white and black land grant colleges (Auburn and Alabama A&M).¹¹ The court retained jurisdiction and established a monitoring system for a period of 10 years.¹²

Two years before this 10 year period expired, the plaintiffs in *Knight* entered a motion for further relief which took the case in a bold new direction. They argued that under-funding of not only higher education in the state, but also elementary and secondary education, had prevented the state from fulfilling its obligations under the 1995 remedial decree. More specifically, the plaintiffs contended that "constitutionally entrenched policies for raising revenues" to fund education continued to have "racially segregative and discriminatory effects," namely that of "shielding the property of whites from being taxed to support the education of blacks" and thereby "denying black citizens equal access to attend and to complete higher education" With the help of expert testimony from history professors Robert J. Norrell and J. Mills Thornton, the plaintiffs tied the 1971 and 1978 constitutional amendments, known collectively as the "Lid Bill" Amendments, to the state's 1901 and 1875 white supremacist, "Redemption" constitutions. The purpose of the property tax provisions in the archaic 1901 constitution and in the two amendments, simply put, was to prevent white money from going to

¹¹ The Alabama Cooperative Extension Service, under the control of Alabama's 1862 land grant university, Auburn, had itself been desegregated in the case of *Strain v. Philpott*, 331 F.Supp 836 (MD, AL, 1971), and it indeed remained under the supervision of the court in that active case in 1991; see Gray, *Bus Ride to Justice*, p. 197, and Seay Interview. But there remained a significant disparity in land grant funding and program management between Auburn and the state's 1890 land grant school, HBU Alabama A&M, and the benefits provided by the better-funded Auburn program continued to elude the state's poor, black farmers. The plaintiffs also contended that the number of black farmers in the state was dwindling as a result of the discriminatory effects of this particular vestige of segregation. For their part, the defendants claimed *res judicata* and *collateral estoppel* (civil doctrines of claim and issue preclusion similar to the criminal provision against double jeopardy), but the court was not persuaded. See *Knight v. Alabama*, 787 F.Supp. 1030 (ND, AL, 1991) (*Knight I*), pp. 1171-2; 900 F.Supp 272 (ND, AL, 1995) (*Knight II*), pp. 361-8; see also Seay interview.

¹² *Knight v. Alabama*, 900 F.Supp 272 (ND, AL, 1995) (*Knight II*); Hamill, "Knight v. State of Alabama," *Encyclopedia of Alabama*; Knight & Sims vs. Alabama, Website of the Plaintiffs, <http://www.knightsims.com>, accessed May 10, 2013.

black education. Ever since, Alabama's property tax rates and revenues had been far below national and regional averages. In fact the state's *per capita* property tax rates and revenue in the 2000s were significantly lower than those of any other state. Furthermore, local governments in majority black school districts continued to be especially adversely affected relative to majority white districts. In the Black Belt, for example, white individuals or corporations owned the vast majority of the land, which was in most cases protected by the classifications and "current use" provisions of the Lid Bill. If whites owned thousands of acres of farm or timber land, or even just hunting land, then the rate at which it could be taxed was restricted. The *Knight* plaintiffs felt that these restrictions choked off revenue from local school districts which had become all or nearly-all black as a result of white resistance to desegregation. This, they argued, was always the government's intention. The effect of "crippling" revenues was the crippling of per-pupil spending, which placed black students at a crippling disadvantage.¹³

The plaintiffs, the Civil Rights Division, and the U.S. Attorney's Office thus sought an injunction against the enforcement of the Lid Bill. They asked the court to have the state give itself and local authorities the power to raise state and local *ad valorem* tax revenues to an amount at or near regional or national averages; to ensure that property classifications and current use provisions did not adversely affect majority black districts; to raise state and local funding for K-12 schools to "a level of adequacy" determined by the state department of education; to raise per-pupil funding in majority-black districts to an amount at or near that of majority-white districts; to raise total funding for higher education to a regional standard as determined by the Alabama Commission on Higher Education; and to provide sufficient needs-based financial aid to offset the impact of impending tuition hikes on black students in low and middle-income districts. The state's attorneys argued that the state did not discriminate in

¹³ *Knight v. Alabama*, June 7, 2004, Plaintiffs' Post-Trial Proposed Findings of Fact and Conclusions of Law Regarding Vestiges of Segregation in Alabama's Property Tax System, at Knight & Sims Plaintiffs' Website, <http://www.knightsims.com>, accessed May 15, 2013; Hamill, "Knight v. State of Alabama," *Encyclopedia of Alabama*.

educational funding disbursement and that the state's limited tax capacity was a result, simply, of a historical antipathy to taxation traceable to Reconstruction and perhaps beyond.¹⁴

In a 2004 ruling, Judge Murphy agreed with the plaintiffs that the Lid Bill was part of a long tradition of enacting constitutional provisions to protect white landowners from having to pay for the education of black children. In his published opinion, he relied heavily on the testimony of professors Norrell and Thornton to explain how the state's *ad valorem* tax structure was "a vestige of discrimination inasmuch as the [state] constitutional provisions governing the taxation of property [were] traceable to, rooted in, and [had] their antecedents in an original segregative, discriminatory policy." Based in part on the testimony of University of Alabama law professor Susan Pace Hamill, Murphy also accepted the argument that the state's restrictive tax policy (income, sales, and property) served to "unfairly burden poor and lower-income Alabamians." Murphy argued that the Lid Bill, specifically, was the mechanism which kept the property tax base "at a mere fraction of the property's value" and guaranteed "that no level of millage rates [would] produce minimally adequate property taxes." For example, timber lands constituted 71 percent of all of Alabama land. They were also owned almost exclusively by wealthy whites, or in many cases, large corporations controlled by wealthy whites. The Lid Bill ensured that the tax revenues collected from such lands averaged less than \$1 per acre and therefore accounted for only two percent of all property tax revenue. Eighty-five percent came instead from commercial properties and residential homes. That, along with income and sales tax, was what constituted the bulk of educational funding in Alabama. Murphy agreed that the effect on poor, majority-black school districts was indeed "crippling."¹⁵

¹⁴ Knight v. Alabama, June 7, 2004, Plaintiffs' Post-Trial Proposed Findings of Fact and Conclusions of Law Regarding Vestiges of Segregation in Alabama's Property Tax System, at Knight & Sims Plaintiffs' Website, <http://www.knightsims.com>, accessed May 15, 2013; Hamill, "Knight v. State of Alabama," *Encyclopedia of Alabama*.

¹⁵ Knight v. Alabama, 458 F.Supp.2d 1273 (ND, AL, 2004) (Knight III), pp. 1286-1299, 1311; Hamill, "Knight v. State of Alabama," *Encyclopedia of Alabama*; see also Susan Pace Hamill, "Constitutional Reform in Alabama: A Necessary Step Toward Achieving a Fair and Efficient Tax Structure," *Cumberland Law Review* 33 (2003): p. 437.

Nonetheless, Murphy refused to hold that Alabama's tax laws were unconstitutional. He argued that discriminatory tax laws did not necessarily foster segregation, and that the plaintiffs had not proven that the tax laws were responsible for the inadequate higher education funding which was preventing poor black students from attending college. As to the tax laws' effect on K-12 education, Murphy ruled that the *Knight* case was not the proper venue for such a claim to be adjudicated. The plaintiffs had failed to convince the court that there was a meaningful connection between inadequate K-12 funding and the desegregation of higher education, which was the subject of the *Knight* litigation in the first place. The Eleventh Circuit Court of Appeals upheld Murphy, and the Supreme Court denied *certiorari*.¹⁶

A Vision Eviscerated: *Lynch v. Alabama*

The fact that the trial court in *Knight* had found the state's property tax restriction to be purposefully discriminatory was a promising impetus to further litigation. The plaintiffs in *Knight* regrouped, organized a new group of plaintiffs, and in March, 2008 filed a new claim under the styling of *Lynch v. Alabama*. The "sole purpose" of *Lynch* was to obtain a declaratory judgment that the tax structure was purposefully discriminatory, and to then obtain a prohibitory injunction against its future enforcement as such. The difference from the 2003 *Knight* motions was that, in this claim, the plaintiffs were school children in K-12 schools in Lawrence and Sumter counties and their parents (though it was, of course, brought as a class action). The claim was also carefully stated as to indicate that the plaintiffs did not seek court oversight of a reform or overhaul of the state's entire property tax system – the court surely would have held that this was the responsibility of the state's legislative branch alone. The plaintiffs thus sought only to enjoin the enforcement of the Lid Bill. They argued that the restrictions therein led to inadequate revenues, which in turn resulted in underfunded and hopelessly deficient K-12 education, particularly in rural and majority black school districts. They noted that Alabama had the

¹⁶ *Knight v. Alabama*, 458 F.Supp.2d 1273 (ND, AL, 2004), pp. 1311-14, affirmed 476 F.3d 1219 (11th CCA, 2007), cert. denied, 127 S.Ct. 3014 (2007); Hamill, "Knight v. State of Alabama," *Encyclopedia of Alabama*.

lowest property taxes of all the 50 states: three times lower than the national average and two times lower than the next lowest states. Property taxes only accounted for five percent of the state's tax revenues, over half of which came from regressive sales and income taxes. It was "neither just nor practical" to seek more revenue from sales or income tax. Merely raising the millage rates on property would not do either, when the average assessment of residential, forest, and agricultural lands was 8.33 percent of fair market value. The only solution to a system – born of segregation and discrimination – which disproportionately disadvantaged black school children, was to enjoin those elements which most directly led to the chronic underfunding.¹⁷

At the *Lynch* trial in April of 2011, the defendant state officials argued that the authors of the Lid Bill Amendments had no racial motivations and were animated solely by a fear of rising property assessments, not race or class. The plaintiffs supplemented the extensive expert testimony presented in the *Knight* trial with that of several other scholars, including Auburn University historian Wayne Flynt and Auburn graduate Jeffrey Frederick. The plaintiffs argued that the state's tax system was violative of Title VI and the Fourteenth Amendment. The case was not being heard by Judge Murphy or Judge Clemon, but District Judge Lynwood Smith, a Clinton appointee and University of Alabama graduate from Talladega. Unlike Murphy, Smith was not convinced that the inadequate funding of education disproportionately affected black children. He therefore held that the tax laws were not offensive to the Fourteenth Amendment. Smith did, however, issue what was accurately described as a "scorching denunciation" of not only the discriminatory background of the property tax scheme, but also of the current state of education in the state. In his 875-page opinion, the Judge cut to the heart of the matter, embedded as it were in the body of desegregation and resistance: "State powerbrokers perceive little benefit from investing in a quality statewide public school system, because the children of their most influential constituents are generally enrolled in exclusive suburban school systems, with large

¹⁷ Complaint in *Lynch v. Alabama*, pp. 19-24, Knight & Sims Plaintiffs' Website, <http://www.knightsims.com>, accessed May 15, 2013.

local tax bases, or in private schools.” Many of these schools, and school systems, had of course “sprouted following court-mandated integration.”¹⁸

But Smith refused to conclude that white flight to the suburbs or to private schools had “disproportionately harmed blacks.” Instead he argued, “It also punish[ed] many white students who remain[ed] in the public school systems.” The “children of the rural poor, whether black or white,” were “left to struggle” as best they could “in underfunded, dilapidated schools.” For Smith the issue was class, not race. The plaintiffs understood that in Alabama, the two were inextricably linked. Blacks were disproportionately represented among the ranks of the rural poor and almost exclusively represented the urban poor. The very history recounted in the plaintiffs’ briefs and in Smith’s own opinion was a testament to that fact. Smith was ultimately unconvinced or unwilling, though, to make the connection. Failing to observe any racially discriminatory effects, he argued that the court was thus constrained by Supreme Court jurisprudence, namely *San Antonio Independent School District v. Rodriguez* (1973).¹⁹ Smith decried the legacy of *Brown* but laid the case’s failures squarely at the feet of the Burger Court:

When massive resistance to the *Brown* mandates eventually was overcome, states grudgingly attempted to preserve their separate independence (“sovereignty”), while giving the appearance of complying with federal decrees, by providing a meager public education to white and black students, and allowing a parallel education system to evolve – one in which only the wealthy can access a quality education for their children, either by moving into exclusive suburbs with public schools well-funded by local tax revenues, or by paying for their children to attend private schools. In other words, because federal courts refused to permit states to focus limited public resources on the education of a chosen few, the states chose to not incur voter disapproval of increased tax levies for the support of an integrated public school system. In *Rodriguez*, the Court blessed this terrible choice and eviscerated the vision of *Brown*.²⁰

¹⁸ *Huntsville Times*, April 19, 24, 2011

¹⁹ *Lynch v. Alabama*, 2011 U.S. Dist. LEXIS 155012 (ND, AL, 2011), pp. 798-800, Lexis-Nexis Academic, <http://www.lexisnexus.com>, accessed May 16, 2013; *Huntsville Times*, April 19, 24, Oct. 22, 2011; *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973).

²⁰ *Lynch v. Alabama*, 2011 U.S. Dist. LEXIS 155012 (ND, AL, 2011), p. 802, Lexis-Nexis Academic, <http://www.lexisnexus.com>, accessed May 16, 2013.

Smith eloquently lamented the failures of education, nationally, to provide for those without the benefit of proper distinctions of “class, wealth, race, and place.” The country had allowed its prejudices to withhold from those of unfortunate birth the benefit of knowledge – a “commodity more precious than pearls” and “unlimited in its ability to provide an abundant life for those who are accorded the means to pursue it, and one that is essential to the functioning and continued existence of our still-young experiment in representative democracy.” Smith evoked the era of 1960s activism by ending his opinion with a quotation from the Bob Dylan song “Blowin’ in the Wind.”²¹

Veteran civil rights attorney James Blacksher, the lead attorney for the plaintiffs, could only call the decision “regrettable.” The judgment, he said, was “regrettable for the plaintiffs, schoolchildren in the Black Belt and other rural counties, who [would] continue to receive an inferior education relying on an inadequate tax base” and for “their brave parents and communities who wanted a better future for their children.” In the end, the condemnations and acknowledgments of injustice were moot without the proper judgment of the court on the central question. Blacksher announced an appeal to the Eleventh Circuit. Given just under two hours to appear before an appellate panel in December of 2012, Blacksher fielded pointed questions from Circuit Judges Adalberto Jordan and Senior Judge Lanier Anderson.²² The judges seemed to question the causal connection between the tax laws and disadvantaged education in certain districts.²³

As the *Lynch* appeal awaited the Circuit Court’s judgment in early 2013, Alabama lawmakers passed a supposedly colorblind law which, in effect, looked to even further erode support for schools in the state’s poorest communities. Republicans in the state legislature clandestinely tinkered with an education bill in committee and ultimately secured passage of the Alabama Accountability Act. The bill purported to hold “failing” schools “accountable” by giving \$3,500 income tax credits to students at

²¹ *Lynch v. Alabama*, 2011 U.S. Dist. LEXIS 155012 (ND, AL, 2011), pp. 800-3, Lexis-Nexis Academic, <http://www.lexisnexis.com>, accessed May 16, 2013.

²² The third Judge sitting was Maine’s Brock Hornby.

²³ *Huntsville Times*, Oct. 22, 2011, Dec. 6, 2012.

such schools who chose to attend a private school or a better-performing public school. In praising his fellow Republicans for passing the act, Governor Robert Bentley channeled Albert Brewer, avoiding any mention of race, even as he acknowledged class and residential geography. Bentley announced at a press conference, "I truly believe this is historic education reform and it will benefit students and families across Alabama regardless of their income and regardless of where they live." He added, "I'm so proud we have done this for the children of this state and especially the children who are in failing school systems and had no way out. Now, they have a way out."²⁴

While white Democrats focused their vitriolic criticism on the backroom nature of the Accountability Act's passage, black leaders across the state displayed their usual willingness to hold the act itself accountable for what it truly was. First, it was difficult to separate the act from the state's history of tuition grant legislation, in the same way the Lid Bill Amendments could not be understood apart from the state's historical antipathy to funding black education with white money. Additionally, it was difficult to understand how the bill would help students in poor, black communities. The money was made available as an income tax credit, not a voucher, which would have been a payment in advance. Most poor families would either be unable to front the money for private school tuition. They also might be unable to gain acceptance to a private school, or unable to provide transportation for themselves to either a private school or a more distant public school. The President of the Alabama NAACP, Benard Simelton, mockingly thanked the state legislature for discovering "the cure for our failing public schools," which was evidently "to cut the funding to public schools, and take away some of their resources and give it to the private schools," thereby "magically turn[ing] those failing public schools

²⁴ *Birmingham News*, Feb. 28, March 20, 2013. Though charter schools are a particularly thorny issue, with unique virtues and drawbacks, one might also point to the fact that in 2012 legislators wrangled over a proposed constitutional amendment to allow for the establishment of charter schools. It was proposed by the state representative from Pike Road, a community which has benefited from flight from Montgomery in recent years. In 2010 the town severed itself from Montgomery County Schools and established its first elementary school. Staunch opposition from the state's powerful teachers' lobby, the Alabama Education Association, prevented the charter measure from passing, but Republican lawmakers vowed to reintroduce it; see *Mobile Press-Register*, May 10, 2012.

into thriving academic powerhouses.” Simelton argued that the bill would leave failing schools “but a devastated piece of real estate” and would “leave students of color and poor children with little choice but to remain at [those] failing school[s] with no hopes of improving.” He added, “If this bill is allowed to stand, then . . . Alabama will return to the days of segregated schools where separate is not equal.”²⁵

When the list of “failing” schools was released in the summer of 2013, it revealed that 32 of the 77 schools were in Black Belt systems, and 41 were in the urban systems of the state’s four largest metropolitan areas – Huntsville City, Birmingham City, Jefferson County, Midfield City, Fairfield City, Montgomery County, and Mobile County. State Superintendent Tommy Bice admitted, “Almost all of the schools on the list are Title I schools that have high numbers of free and reduced lunch and are typically in school systems that have little local funding.” The effect of the tax credits looked to allow those families that could afford it – white or black – to transfer out of district or to private schools, provided they could gain entry into the latter. Since state funding was based on enrollment, critics argued that this would siphon off precious remaining dollars in the state’s most poorly funded systems. Proponents evoked the spirits of the battle over compulsory assignment and called it a victory for choice. Senate President Del Marsh, one of the bill’s sponsors, said, “It’s important to make sure parents in those schools know that they have a choice; they’ve never had a choice before.” The powerful teachers’ lobby the Alabama Education Association (AEA) challenged the act’s passage immediately and promised further litigation. AEA Executive Secretary Thomas Mabry called the law “absolutely wrong” and announced, “There is going to be lawsuit after lawsuit.”²⁶

When the inevitable first lawsuit was filed against the Accountability Act in August of 2013, it was the Southern Poverty Law Center (SPLC), and not the AEA, which had filed it. The organization represented eight students in Black Belt counties and sought an injunction against the act’s

²⁵ *Montgomery Advertiser*, March 21, 2013.

²⁶ Kim Chandler, “Alabama Accountability Act: 78 Schools Listed As Failing,” *al.com*, http://blog.al.com/wire/2013/06/alabama_failing_schools_list_2013.html#thelist, accessed June 19, 2013.

enforcement. Richard Cohen, SPLC President, contended that the law disadvantaged poor families which either could not afford private school tuition in advance of a reimbursement, or which did not have private school options in their vicinity, particularly private schools participating in the program. The suit acknowledged what the lawmakers did not – that the law’s discriminatory effect on the poor made it particularly damaging to black students. Cohen argued that the law’s promise to provide new opportunities for students was an “empty” one, adding, “The reality is just the opposite. Children in Alabama’s Black Belt, most of them African-Americans, are still trapped in failing schools, still being given the short end of the stick.”²⁷

“Sleepwalking back to *Plessy*”

In the 40 years since the entering of terminal orders in the 1970s, significant integration had become a reality in many of the state’s school systems. But prejudice and discrimination were clearly not erased in the process. They seemed quite prominent, in fact. Though events like the Wedowee controversy garnered much media attention, the descendants of the law-and-order generation of white Alabama power-brokers understood that the most promising path of resistance avoided outright displays of racism. The fight to preserve the state’s discriminatory tax structure was fought in this tradition, and the Alabama Accountability Act appeared to be, at best, half motivated by race and half by class. The tax struggle was easily characterized as a fight in the libertarian tradition, even the American revolutionary tradition. Alabama’s whites were not opposed to funding black education, they claimed. They were simply opposed to any increases in taxation, particularly those mandated by a federal court. The Accountability Act was being pitched as a victory for “choice,” even as the realities of school “failure” clearly showed that poor districts crippled by the tax structure would be made still poorer by the choosing. Litigation was pending in both cases in 2013, but it did not appear particularly

²⁷ Kim Chandler, “Southern Poverty Law Center Files Lawsuit Challenging Accountability Act,” *al.com*, August 19, 2013, <http://www.al.com>, accessed August 19, 2013.

promising for the plaintiffs in either. Since 1973, forty years of litigation on top of the 20 since *Brown* had brought black activists closer to the goal for which the plaintiffs in the original school desegregation cases had striven: equal educational opportunity. But as events continued to show even in 2013, it could not quite get them there.

Political scientist Gary Orfield has argued that interracial contact in schools is one of the necessary conditions for effecting the kinds of social transformations desegregation ought to achieve. Solomon Seay called it the “mixing bowl” theory. Economist and professor of law and public policy Charles Clotfelter has argued that while interracial contact in public schools increased dramatically as a result of *Brown* and subsequent litigation, white resistance significantly stunted its growth. If interracial contact was one of the principal goals of desegregation, then there have certainly been important examples of success in Alabama, even if many students in significantly desegregated schools continued to segregate themselves socially, at lunch, at assemblies, at sporting events, and away from school. More ominously, Orfield has warned that “once a district [has been] pronounced unitary” and freed from court oversight, “the historic constitutional debt to minority children is declared paid in full, and civil rights groups are told that they must rely on politicians.” Clotfelter has also identified a number of specific factors which have combined to limit interracial contact in desegregated schools, and most of them are relevant to Alabama: continuing white resistance in general, the availability of segregated private schools, cross district and metropolitan white flight, and the willingness of state and local officials to accommodate white resistance.²⁸

Like the Wedowee episode and the *Knight* and *Lynch* litigation, the results of continuing massive resistance in the style of law-and-order revealed in Alabama, from the vantage point of 2013, both how

²⁸ Bagley, *A Meaningful Reality*; Institute of Education Sciences, National Center for Education Statistics, <http://nces.ed.gov>, accessed Jan. 10, 2013; 2010 Census of Population, U.S. Census Bureau, www.census.gov, accessed Jan 10, 2013; Gary Orfield, *Dismantling Desegregation: The Quiet Reversal of Brown v. Board of Education* (New York: New Press (Norton), 1996), pp. 332, 346; Charles Clotfelter, *After Brown: The Rise and Retreat of School Desegregation* (Princeton: Princeton University Press, 2006); Seay Interview.

close blacks had come to genuine educational equality and how far from it they still remained. On the Black Belt's periphery, there were cases of meaningful integration. In the east Alabama city of Opelika, 15 miles north of Tuskegee, the continuing presence of a vibrant segregationist academy did not drain the public schools entirely of white students. This was partly because the City of Opelika had not had a majority black population at any point during or since the 1960s. What it did have was law-and-order style white leadership which fought to maintain the public system for the purpose, notably, of industrial recruitment. In 1970 the city had a racial breakdown of 69-31 white-to-black [13,067 white, 5,955 black]. Since then the black population in the city of Opelika had increased slightly, while the white population remained relatively stable. As of 2010-11, the city's population was 51-44, white-to-black. There was an initial drop in white enrollment in Opelika City Schools in the 1970s, occasioned by compulsory assignment and the opening of Opelika's Scott Academy and neighboring Auburn's Lee Academy. The two segregationist schools later merged to form Lee-Scott Academy, which became one of the state's most successful private schools. From the 1970s, however, the ratio of whites to blacks in the Opelika public system remained roughly 33-62 percent. Despite lingering reminders of discrimination – such as tracking and disproportionate discipline rates – Opelika achieved “unitary status” and freed itself from its *Lee v. Macon* consent decree in 2002.²⁹

Tellingly, the Interstate Highway which ran through Opelika, I-85, was named in the early 2000s for Lowndes County arch segregationist Ray Bass. Bass had gone on from his humble beginnings as a segregationist academy pioneer in Lowndes to become Highway Director under the latter Wallace Administrations. Fifty miles to the south of Opelika, I-85 became the Martin Luther King, Jr. Expressway in Montgomery. A massive sign proudly announced the Expressway to passing motorists, under which it read: “As Designated by the Alabama State Legislature, 1972.” The state's white lawmakers had wanted

²⁹ Bagley, *A Meaningful Reality*; Institute of Education Sciences, National Center for Education Statistics, <http://nces.ed.gov>, accessed Jan. 10, 2013; 2010 Census of Population, U.S. Census Bureau, www.census.gov, accessed Jan 10, 2013.

to assure that they got credit for their token recognition of a safely nonviolent black figure. Ironically, the public schools in the state's capitol remained in 2013 among the most segregated in the state.³⁰

Montgomery was 37 percent white as of 2010, but its city schools were over 90 percent black. Its two "magnet" program high schools were significantly integrated and offered some promise for continuing integrated education in the county. Excluding the magnet schools, the system's whitest school was the Halcyon Elementary School on the largely white eastern edge of town; it was 30 percent white as of 2010-11. Its whitest high school was Robert E. Lee High, which enrolled 18 percent white students in 2010-11. Jefferson Davis High School – built in an affluent white neighborhood in 1967 to provide a haven from desegregation – enrolled 42 white students out of more than 2,000 total. The majority of Montgomery's white families – those that could afford it at least – sent their children to one of the city's segregationist academies (for example, St. James School or Montgomery Academy) or to one of the city's racially exclusive sectarian schools (for example, Trinity Presbyterian). Each of these schools was desegregated, but each continued to control the number of black students it admitted, a number which would undoubtedly remain token. Montgomery Academy enrolled 27 black students among 819 total; St. James, 49 out of 996; and Trinity, 1 black student in 906. Perhaps the most telling example of desegregation's effect in Montgomery was Harrison Elementary. The school had been built in 1954 for white students on the city's southern fringe. It had stood in stark contrast to the Vineyard School just a few hundred yards away and had been the impetus for the state's first attempt at desegregation after *Brown*. In 2010-2011 it enrolled 229 black students and 1 white student.³¹

³⁰ Official state maps did not list the name of I-85 in Montgomery as the Martin Luther King Expressway until state representative Alvin Holmes forced the issue in 2006, though they identified other stretches of highway as Jefferson Davis or Robert E. Lee Highway prior to that time; see *Gadsden Times*, Aug. 1, 2006.

³¹ Institute of Education Sciences, National Center for Education Statistics, <http://nces.ed.gov>, accessed Jan. 10, 2013; 2010 Census of Population, U.S. Census Bureau, www.census.gov, accessed Jan 10, 2013. For the history of Jefferson Davis High School, see *United States and Carr v. Montgomery County Board of Education*, Opinion and Order 289 F.Supp. 647, 649-54; see also *Birmingham News*, Feb. 25, 1967. On magnet schools and the value of "'equity' choice" desegregation plans, see David J. Armour, *Forced Justice: School Desegregation and the Law* (New York: Oxford university Press, 1995).

In general, the number of white students in private schools in the state was not overwhelming. As of the 2010 Census, there were 833,270 students enrolled in K-12 education in Alabama, and only 93,815 of them were in private schools: just over 11 percent. Black students, though, were enrolled in private schools at less than half that rate. There were 220 private schools in the state in 2013, according to the state department of education. Blacks in many parts of the state – especially the major cities and the Black Belt – remained mired in poverty and could not afford them. In most Black Belt counties, the public schools had become nearly all black, while segregationist academies continued to serve as the primary educator of those counties’ white children. Since the invalidation of the last Alabama Tuition Grant Act, and since the *Coit v. Green* ruling upholding the IRS’s removal of tax exempt status from segregating private schools, some had struggled to maintain quality teachers or even adequate facilities. Many, if not most, had token desegregated, if for no other reason than to take on a few more students, particularly those who might help the schools’ athletics teams. All had nonetheless retained the demographic profile that proved most desirable to law-and-order whites: overwhelmingly white schools with a small enough black presence to avoid censure.³²

Leaving western Montgomery, the stretch of U.S. Highway 80 upon which the Selma-to-Montgomery marchers had once trod had subsequently been designated by the National Park Service as part of the “Selma to Montgomery National Voting Rights Trail.” Alabama lawmakers also designated it the Walter C. Givhan Highway – Givhan being one of the fathers of the White Citizens Council in Alabama and perhaps the most dedicated segregationist lawmaker in Alabama history. The highway penetrated Lowndes County, home of Ray Bass. In 2011 Givhan and Bass could take pride that Lowndes was a paradigm of rural white flight. Lowndes Academy enrolled 241 students in grades K-12, 239 of

³² 2000 and 2010 Census of Population, U.S. Census Bureau, www.census.gov, accessed Jan 10, 2013; Alabama State Board of Education, “Plan 2020,” and Alabama Education Directory, 2012-13, <https://www.alsde.edu>, accessed, Jan 26, 2013; see CH 17, *supra*, for *Green v. Connally*, 330 F.Supp 1150 (DC, 1971), affirmed sub nom *Coit v. Green*, 404 U.S. 997 (1971).

whom were white and 2 black. Lowndes County Central High School, meanwhile, enrolled 272 students, 268 of whom were black and 3 of whom were white.³³

The results were similar across the Black Belt. In Wilcox County, the public schools enrolled 1,440 students in 2010-11, all but 10 of whom were black, while Wilcox Academy enrolled 301 students, all white. In Tuskegee, where the *Lee v. Macon* suit began, Booker T. Washington High School enrolled 736 students in 2010-11, and none of them were white. Like many segregationist academies, Macon Academy struggled to remain in operation over the years with parents forced to pay all of the school's expenses out of pocket. This was exacerbated by the fact that whites simply abandoned the City of Tuskegee and Macon County altogether in the face of growing black political power. As of 2011, the City of Tuskegee was 96 percent black and less than 2 percent white. As Macon Academy's enrollment dipped (to 115 students in the 1990s), it moved into a new facility, farther west toward Montgomery. There the capitol city's eastward residential white flight pattern provided the school with a larger population base. The newly renamed Macon-East Montgomery Academy enrolled 409 students in 2010-11: 397 white and 2 black.³⁴

Further south, I-65 joined I-10 and carried drivers through the Mobile River via the George Corley Wallace Tunnel. There in Mobile, the situation was similar to that of Montgomery. The city of Mobile was 45 percent white, but many of those families sent their children to the city's private schools. Once all-white Vigor High School, scene of so much violent discord, enrolled 836 black students and 8 white students in 2010-11. The exodus was not as complete as it had been in Montgomery, though, as schools like formerly all-white Murphy High maintained substantially white student bodies (742 white out of 2,354). However, most children in affluent families attended either elite U.M.S. Wright

³³ Institute of Education Sciences, National Center for Education Statistics, <http://nces.ed.gov>, accessed Jan. 10, 2013; 2010 Census of Population, U.S. Census Bureau, www.census.gov, accessed Jan 10, 2013; *Birmingham News*, Oct. 27, 2002; *New York Times*, July 9, 2011.

³⁴ Institute of Education Sciences, National Center for Education Statistics, <http://nces.ed.gov>, accessed Jan. 10, 2013; 2010 Census of Population, U.S. Census Bureau, www.census.gov, accessed Jan 10, 2013; *Birmingham News*, Oct. 27, 2002; *New York Times*, July 9, 2011.

Preparatory or St. Paul's Episcopal School, two of the state's pre-*Brown*, opportunist segregation academies. In 2010-11 U.M.S. Wright had an enrollment of 1,150, with 24 black students, and St. Paul's had an enrollment of 1,405, with 39 black students.³⁵

In metropolitan Birmingham, where the Elton B. Stephens Expressway – named for the educational philanthropist and EBSCO founder – carried drivers through a cut in Red Mountain and into the southern suburbs, the situation was unique. There had been a nearly complete exodus of white families from the city itself into the over-the-mountain suburbs, along with more recently chic suburbs to the east of the city. None of the southern suburban municipalities was less than 75 percent white. Each either had its own school systems or was part of the mostly-white Shelby County system. The most prosperous of the eastern suburbs – the newly thriving and 90 percent white City of Trussville – severed from Jefferson County Schools and formed its own system in 2005. Jefferson County Schools remained among the most significantly integrated in the state, however, as a substantial number of families in rural parts of the county or in working class suburbs continued to choose public schools. Pleasant Grove and Hueytown had been forced to remain within the county system. And all of the successful post-1965 splinter systems remained tethered to the county's desegregation plan in some way, negligible though it may have been. With all of the exclusive suburban public options, there had not been the sort of rush to segregationist academies that had occurred in the rural Black Belt and in Montgomery and Mobile. White families seeking to avoid highly integrated schools had simply moved east or over the mountain.³⁶

The reasons for the more complete flight of whites from the City of Birmingham itself were myriad, bound up in the intricacies of municipal politics, the ability of whites to capitalize on the region's

³⁵ Institute of Education Sciences, National Center for Education Statistics, <http://nces.ed.gov>, accessed Jan. 10, 2013; 2010 Census of Population, U.S. Census Bureau, www.census.gov, accessed Jan 10, 2013; "The UMS-Wright Tradition," at UMS-Wright Preparatory School Official Website, <http://www.ums-wright.org>, accessed Jan.25, 2013; "History of the School," at St. Paul's Episcopal School Official Website, <http://www.stpaulsmobile.net>, accessed, Jan. 25, 2013.

³⁶ Institute of Education Sciences, National Center for Education Statistics, <http://nces.ed.gov>, accessed Jan. 10, 2013; 2010 Census of Population, U.S. Census Bureau, www.census.gov, accessed Jan 10, 2013; Alabama State Board of Education, "Plan 2020," and Alabama Education Directory, 2012-13, <https://www.alsde.edu>, accessed, Jan 26, 2013.

geography, and the economic decline of the once prosperous industrial city upon the departure of U.S. Steel.³⁷ Whites, in short, escaped because they could. Along with those families and with those students went precious funding, as sales and income tax and residential property tax revenues disappeared. Not only did Birmingham's city schools become the most racially exclusive of any system outside the Black Belt, the system was beset in 2013 with massive fiscal shortfalls, dreadfully underachieving schools, and the sort of violence and drug problems endemic in some of the city's poorer communities. It was threatened with a takeover by the state board of education in 2012-13 and was facing mass layoffs and school closures. Meanwhile, the suburban City of Hoover and Shelby County school districts boasted two of the most highly regarded systems in the state, if not the entire nation. As legal scholar James Ryan has argued, education policy, for a variety of reasons, remained "largely something that happen[ed] to urban districts, not something that [came] from them." According to Ryan, politics continued to matter as much as policy, and education politics continued to "[work] to protect suburban districts" rather than to "maximize the potential of urban education reform."³⁸

For all of the benefit that desegregation litigation had brought, then, it appeared that Alabama might have been, as Orfield described, "sleepwalking back to *Plessy*."³⁹ It was just the way the proponents of law and order would have had it. To have awakened the state and to have tried to drag it kicking and screaming back to *Plessy* would have been the old, defeatist way. Over the course of the last

³⁷ For a thorough discussion of this process, see Thornton, *Dividing Lines*, pp. 523-4. The departure of U.S. Steel and the rise to power of the ultimately corrupt, urban-machine regime of Mayor Richard Arrington are two notable reasons which Thornton gives for the city's particular development.

³⁸ Institute of Education Sciences, National Center for Education Statistics, <http://nces.ed.gov>, accessed Jan. 10, 2013; 2010 Census of Population, U.S. Census Bureau, www.census.gov, accessed Jan 10, 2013; *Birmingham News*, June 10, 2012, Feb. 26, 27, 2013; Hoover City Schools and Shelby County Schools, Adequate Yearly Progress Reports, <https://www.alsde.edu>, accessed, Jan 26, 2013; "News," at Hoover City Schools Online, <http://www.hoovercityschools.net>, accessed Feb. 1, 2013; "News and Community Links," at Shelby County Schools Online, <http://www.shelbyed.k12.al.us>, accessed Feb. 1, 2013; James E. Ryan, *Five Miles Away, A World Apart: One City, Two Schools, and the Story of Educational Opportunity in Modern America* (New York: Oxford University Press, 2010).

³⁹ Orfield, *Dismantling Desegregation*, p. 331.

60 years, whites had learned to be quiet. And they had learned to assert their claims in such a way as to make them unassailable. Even when they screamed, their message was pitched to resonate with the founding principles of a white nation which had come to sympathize and identify with the South in many ways, rather than isolate and condemn it. Neither Alabama, nor the South more generally, were exceptional, and southerners knew it better than anyone. They always had.⁴⁰

Efficacy and Social Justice

The realities of education in Alabama in 2013 were murky, as they were across the country. And it had been precisely the goal of those who championed law and order and freedom of association to muddy the waters. The Lid Bills, for example, were arguably colorblind enough that even a judge as seemingly disgusted with those waters as Lynwood Smith could not bring himself to conclude that the bills themselves were unequivocally dirty. The broader debate about the efficacy of *Brown* reflects some of this ambivalence apparent in Alabama's experience with school desegregation. Some have argued that *Brown* has been a failure or, at best, an accidental and only partial success. Legal scholar Gerald Rosenberg famously argued that the Supreme Court in general was too constrained and offered but a "*Hollow Hope*" to those seeking social justice. Rosenberg's work elicited widespread criticism and was alternatively condemned and acclaimed by proponents and opponents of rights-based litigation. Others subsequently took a similarly dim view of the *Brown* decision, specifically. For example, leading legal scholars Charles Ogletree and Derrick Bell have argued that the decision mostly failed to live up to its promise. Bell – a former CRD and LDF attorney – has even suggested, to the delight of segregationist-inclined conservatives, that perhaps the Court should have enforced the *Plessey* standard instead of overturning it. Michael Klarman has argued that *Brown* only mattered insofar as it mobilized direct

⁴⁰ See Joseph Crespino and Matthew Lassiter, Eds., *The Myth of Southern Exceptionalism* (New York: Oxford University Press, 2009).

action protest, which in turn sparked a violent backlash, which then accelerated the sort of reforms sought by the direct action movement.⁴¹

Legal historians have convincingly challenged all of these pessimistic conclusions. Brian Landsberg has argued that the *Lee v. Macon* case demonstrated the ability of the three branches of the federal government to overcome the “constraints” placed on the Court and to effectively enforce the *Brown* standard. Paul Finkelman has also argued that the *Brown* litigation achieved its modest goal – the elimination of the *de jure* dual school system. Finkelman maintains that *Brown* was also important because it was subsequently applied by the courts to other forms of legal segregation and that, as a bold statement by a branch of the federal government, it became a “cultural watershed.” He concludes that *Brown* “set into motion the forces that eliminated segregation” and that it remains “the greatest decision of the last century” and the “centerpiece of justice in America.” Martha Minow, the Dean of Harvard Law School, has also forcefully acknowledged *Brown*’s enduring symbolic and cultural impact. Minow, Finkelman, and Landsberg though, all have admitted that equal educational opportunity remained in 2013 “an unachieved goal,” and that the real irony of *Brown* was that it resulted in the effective desegregation of almost everything *but* schools.⁴²

Focusing on Alabama takes our gaze away from the Supreme Court and the *Brown* decision itself, but it provides us with a unique perspective on these broader debates. If the goal of black activist-litigants in Alabama was as modest as the application of *Brown*, then it was certainly achieved. Prior to

⁴¹ Charles Ogletree, *All Deliberate Speed: Reflections on the First Half-Century of Brown v. Board of Education* (New York: Norton, 2004); Derrick Bell, *Silent Covenants: Brown v. Board of Education and the Unfulfilled Hopes of Racial Reform* (New York: Oxford University Press, 2004); Derrick Bell, *And We Are Not Saved: The Elusive Quest for Racial Justice* (New York: Basic Books, 1987); Rosenberg, *Hollow Hope*; Klarman, *From Jim Crow to Civil Rights*.

⁴² Landsberg, “Reevaluating Rosenberg’s The Hollow Hope in Light of the Interactions of Executive, Judicial and Legislative Branches in Enforcement of Brown v. Board of Education, in *Lee v. Macon County Board of Education*,” Paper Delivered at the Midwest Political Science Association Conference, April 12, 2013, Chicago Illinois; Paul Finkelman, “The Centrality of Brown,” in Robert L. Hayman, Jr. and Leland Ware, Eds, *Choosing Equality: Essays and Narratives on the Desegregation Experience* (State College: Penn State University Press, 2009); see also Finkelman, “Civil Rights in Historical Context: In Defense of Brown,” *Harvard Law Review* 118 (2004-5): p. 917; Martha Minow, *In Brown’s Wake: Legacies of America’s Educational Landmark* (New York: Oxford University Press, 2010).

Brown there was widespread disregard for the law. After the 20 year fight to enforce the decision, there was widespread compliance. From a law enforcement standpoint, then, school desegregation litigation in Alabama was an almost unquestionable success. In the sustained drive which brought not only the litigious breakthrough, but the decades-long fight to ensure compliance, black activist-litigants found in their attorneys, in the LDF, in the CRD, and in the federal courts a measure of equal justice under the law which it is inconceivable that they could have attained any other way. Their success was not simply the product of violent resistance to direct action and a subsequent backlash. The breakthrough was as much the result of a sustained litigation campaign inspired by *Brown* and supported by changes in the composition of the courts within the Fifth Judicial Circuit.

At the same time, the tortured compliance years in the decades after that breakthrough revealed that litigation can only do so much. Continuing litigation in 2013 demonstrated that the goal of many advocates for racial justice in Alabama was more than simply the dismantling the dual school system. Equal educational opportunity was at stake in the pending *Lynch* litigation and had been the goal of some all along. Klarman and a number of his detractors have agreed that litigation cannot, by itself, effect social justice. But Finkelman's interpretation allows us to see what Klarman's does not: that the ability of segregationists to carefully craft a seemingly compliant strategy of massive resistance has been of far more consequence than the few instances of violent resistance to school desegregation.⁴³ It was their rearticulation of defiance which limited the effect of school desegregation litigation to *prima facie* enforcement of the law. And it was their newfound reliance on a narrative and legal strategy of defending constitutional rights which rendered their fortress of resistance ultimately unassailable.⁴⁴

⁴³ Although, Finkelman fails to acknowledge that school desegregation did, in fact, lead to violence in Alabama in at least a couple of important instances; see for example, Judge Aaron's castration (CH 3) and the 16th Street Baptist Church murders (CH 7), which I argue were as much or more of a response to the initial desegregation of Alabama's schools that fall as they were a response to the demonstrations from the previous spring.

⁴⁴ Klarman, *From Jim Crow to Civil Rights*; Finkelman, "The Centrality of Brown."

What they created in the litigious crucible, as a narrative which made sense of their resistance, they subsequently adopted as a mantra. A long series of disingenuous claims in the unspoken name of segregation and white supremacy gave way in Alabama to a genuine belief that whites who had avoided integration had simply exercised their Constitutionally-mandated and God-given individual rights. Those in elite white academies felt no pang of responsibility for the poor in “failing” schools. Rural whites in struggling segregationist academies refused to accept responsibility for the shoddy state of both public and private education in many parts of the Black Belt. Suburban whites did not acknowledge that what they enjoyed was the benefit of white privilege, buttressed by a state and federal government policies. They were all exonerated by choosing to maintain law and order, by choosing to attend a private school rather than shut the public schools down, by eschewing violent resistance, by acting through political channels to further their interests, and by asserting their right to freedom of association. Meanwhile, many of the voices of those who could perhaps have seen the situation more clearly remained silent – irrelevant since the initial triumph of massive resistance in the 1950s. The ultimate victory for resistance, though, was in convincing others that there was nothing against which to speak out. So-called massive resistance was easily condemnable. Rearticulated resistance was not, because it had the full strength of the law behind it. For many, the picture was clear enough: for all of Alabama’s disparities, the courts themselves had spoken. The resulting order was thus bolstered by the law of the land.

Still sitting at his dining room table, Solomon Seay began to tell another story. He began to describe an encounter he had in another one of the *Lee v. Macon* splinter cases – against Marengo County, which he had called the “most recalcitrant” school system in the state of Alabama. Seay remained passionate about the efficacy of litigation in enforcing the law and disturbed by the lack of

attention to the role of litigation in the civil rights movement generally. But the story he told pointed to the limits of litigation when it was up against the weight of history, the power of narrative, and the stubbornness of human nature. Near the conclusion of a particularly contentious court hearing in the Marengo case, Seay had found himself, as he sometimes did, on the witness stand. United States District Judge Brevard Hand asked him, “Seay, do you think we will ever get to the point in this country where race makes no difference?” Seay knew his answer but feigned introspection to blunt its effect. “Sure,” he finally said, “because ever is a long, long time, and it’s bound to happen ever.” He paused, then added, “But it will not happen in your lifetime or mine.” Hand wanted to know why Seay felt that way. “Judge, I’m really not sure,” he said, “but maybe it’s because I’ve been black too long, and you’ve been white too long.” Recounting the story years later, Seay mused, “If ever is going to happen, it’s going to be because these youngsters begin to communicate with each other. You and I can’t do it.”⁴⁵

⁴⁵ Seay Interview; see also, Seay, *Jim Crow and Me*, p. 97; the exchange between Seay and Judge Hand appears slightly differently in the book than it does in Seay’s recollection to me.

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