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"THE MAGNIFICENT FIGHT": CIVIL RIGHTS LITIGATION IN SOUTH CAROLINA FEDERAL COURTS, 1940-1970

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ABSTRACT

"THE MAGNIFICENT FIGHT": CIVIL RIGHTS LITIGATION IN SOUTH CAROLINA FEDERAL COURTS, 1940-1970

By

Stephen Harold Lowe

This work focuses principally on two groups of people: black South Carolinians who brought and argued civil rights cases in the federal courts of the state and a group of white citizens, mostly politicians and other officials, who struggled equally hard in the courts to forestall desegregation. Over the course of 30 years, blacks and whites in South Carolina contended in the courts of the state over the meanings of justice, equality and citizenship. In the form of civil rights cases, this contested ideological space reveals the nature of the relationship between blacks and whites during the Civil Rights years, roughly from 1940 to 1970. The legal challenge to segregation and discrimination remains an often-overlooked aspect of the movement, especially as it made a transition to direct action in 1960. This work uncovers that legal tradition in South Carolina.

Using court documents, especially transcripts of depositions, hearings and trials, the dissertation reveals the attitudes of the African Americans and whites who contested the cases toward law, rights and justice during the Civil Rights era. Judicial decisions trace the development of judges' attitudes as well as their application of Supreme Court doctrine to local situations. Case records are supported by the papers of the National Association for the Advancement of Colored People, as well as collections of manuscripts of important figures in the opposition to the civil rights struggle in South Carolina.

Together, the sources provide valuable insights not only into the history of the civil rights struggle, but into the mindsets of individuals on both sides of the civil rights equation.

The dissertation is organized thematically rather than chronologically. Early chapters explore the struggle to open the white Democratic primary to black voters, the struggle of teachers for equal pay and the right to engage in protest, the challenge to segregation in higher education and the fight to open public facilities to all South Carolinians regardless of race. Chapters five, six and seven focus on the most challenging aspect of desegregation in the state: public primary and secondary education. Despite having a key role in *Brown v. Board of Education of Topeka, Kansas*, decided by the Supreme Court in 1954, white South Carolina delayed even token desegregation until the fall of 1963 and managed to prevent the coming of complete desegregation for another seven years beyond that. These last three chapters explore the tactics of delay and obfuscation with which white South Carolina managed to forestall desegregation, and which black South Carolinians, supported after the middle of the 1960s by the federal government, challenged indefatigably.

For Bonnie and Mattie

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TABLE OF CONTENTS

INTRODUCTION

> It is time we stopped our blithe lip service to the guarantees of life, liberty, and pursuit of happiness. These fine sentiments are embodied in the Declaration of Independence, but that document was always a declaration of intent rather than of reality.
>
> -Martin Luther King, Jr.

> All the laws of Washington, and all the bayonets of the Army cannot force the negroes into [white southerners'] homes, their schools, their churches and their places of recreation and amusement.
>
> -Strom Thurmond

This dissertation focuses principally on two groups of people: black South Carolinians who brought and argued civil rights cases in the federal courts of the state and a group of white citizens, mostly politicians and other officials, who struggled equally hard in the courts to forestall desegregation. Over the course of 30 years, blacks and whites in South Carolina contended in the courts of the state over the meanings of justice, equality and citizenship. In the form of civil rights cases, this contested ideological space reveals the nature of the relationship between blacks and whites during the Civil Rights years, roughly from 1940 to 1970. Black South Carolinians endeavored to change their status as citizens of that state and of the United States in a variety of ways during this period, with sit-ins, marches, boycotts and other protests. Ultimately, South Carolina witnessed the same kind of racial violence that affected other Southern states—indeed, the country—during the 1960s. Yet, the legal challenge to segregation and discrimination remains an often-overlooked aspect of the movement, especially as it made a transition to direct action in 1960. With this work, I have uncovered that legal tradition in South Carolina.

Some have argued that black South Carolinians were more complacent than African Americans in other Southern states, yet they were responsible for bringing the first case to challenge school segregation in the nation, in 1950.[1] Others have argued that the legal challenges to segregation were outdated by the early 1960s, when direct action in the form of sit-ins and civil rights marches took the forefront of the movement, and images of violence were engraved into the national consciousness through television broadcasts. Yet civil rights demonstrators turned to the Legal Defense and Education Fund (LDF; sometimes referred to as the Inc., Fund) as a means of getting hundreds of protesters out of jail. (Not without some objection from within the civil rights hierarchy and among the grass roots: some wanted to stay in jail as a continuing symbol of protest.)[2] Too, the federal courts continued to be an important mainstay of the movement after passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965. Even though the Justice Department or the Department of Health, Education and Welfare often became involved in litigation in the mid- and late 1960s, individuals continued to be key participants in civil rights litigation.

The black plaintiffs in the South Carolina civil rights cases were often members of what is usually called the "black middle class": teachers, ministers and other professionals who were assisted by black lawyers (few though they were in the state). Nearly all were members of the National Association for the Advancement of Colored People (NAACP), an organization founded by wealthy whites and well-educated black

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[1]See Idus A. Newby, *Black Carolinians: A History of Blacks in South Carolina from 1895 to 1968* (Columbia: University of South Carolina Press, 1973), pp. 229-234, 287-288.

[2]Jack Greenberg, *Crusaders in the Courts: How a Dedicated Band of Lawyers Fought for the Civil Rights Revolution* (New York: Basic Books, 1994), pp. 272-273.

professionals. Members of the black middle class forged or strengthened connections through

membership in the NAACP.[3] While black professionals did not enjoy very high incomes, they did have the advantage of having a bit more freedom to maneuver in the Jim Crow society they inhabited. While still terribly circumscribed compared to their white counterparts, members of the black middle class maintained leadership positions in black society which enabled them to mobilize support. Even when their livelihoods were threatened, as they often were—especially teachers, who depended on renewable annual contracts—their position in black society made them ideal leaders of the movement.

The desire of free African Americans for equal rights and justice goes back to the colonial era, but it was only during Reconstruction that a large-scale movement toward true freedom took place. During the early 1870s, blacks were able to desegregate streetcars in several southern cities. Following the end of Reconstruction in 1877, the black freedom struggle succumbed to the Redemption of southern governments by white supremacist Democratic politicians, and the move toward re-segregation began. By the early 1900s, the modern reaction against African Americans already had developed a strong hold over the minds of white southerners, and similar attempts at desegregating streetcars in the first decade of this century met with utter failure.[4] Of course, the now-infamous Supreme Court decision in *Plessy v. Ferguson*, which legitimated segregation on railroads in an 1896 case from Louisiana, reflected the dominant white attitude toward

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[3]Aldon D. Morris, *The Origins of the Civil Rights Movement: Black Communities Organizing for Change* (New York: The Free Press, 1986), p. 15.

[4]Rhoda Lois Blumberg, *Civil Rights: the 1960s Freedom Struggle*, rev. ed. Social Movements Past and Present (Boston: Twayne Publishers, 1991), p. 3.

race relations, so there could be little expectation of success for some years following the decision.

The founding of the National Association for the Advancement of Colored People in 1909 marked a new beginning of efforts to achieve equal rights for black Americans. Organized specifically to fight for the rights of black people, but dominated in its early years by a predominantly white leadership, the NAACP quickly turned to legal action as its primary weapon in the war against discrimination. In 1915, the group participated as *amicus curiae* in its first Supreme Court case, helping to overturn Oklahoma's grandfather clause, which barred illiterates from voting unless their ancestors could vote in 1866.[5]

NAACP organization was limited to the north for several years following its founding, but by 1919 southern members outnumbered their northern counterparts. As a result, there developed a degree of tension between southern members and northern administrators: southern members often wanted to move faster than the northern bureaucratic leadership wanted or could. Because of this and other factors, including the attention to litigation rather than direct action, the NAACP never really became a mass movement: no more than 2 percent of the black population were members at any given time, and much of the membership's activity was limited to paying annual membership dues.[6]

South Carolina's branches of the NAACP came together in 1939 to form a state Conference that, under strong leadership, would work hard for the next three decades to

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[5]Morris, pp. 14, 294, note 28. *Guinn v. United States*, 238 U.S. 347 (1915).

[6]Morris, pp. 14-15.

achieve significant civil rights victories. While significant progress came only after the unification of the state's NAACP chapters, many of the leaders who came to prominence in the 1940s and 1950s first came into public view during the 1930s, during which the modern civil rights movement in South Carolina experienced its "genesis." Modjeska Simkins, who would become secretary of the state conference and an important civil rights agitator in Columbia, spoke out in favor of the federal anti-lynching bill in 1935 from her position as secretary of the State Negro Citizens Committee. John McCray, who later became the editor of the *Lighthouse and Informer* (which was essentially an NAACP paper) and leader of the South Carolina Progressive Democrats in the 1940s, expressed some reluctance to push for the anti-lynching bill, a stance that earned a strong rebuke from national NAACP Secretary Walter White. (In the 1960s, McCray came out against the sit-in movement, fearing that such action threatened the peaceful race relations in Columbia.)[7] In addition to individual leaders, several groups that helped to form the foundation for NAACP chapters later on also came into being during the 1930s. The Civic Welfare League of Columbia is one example: in 1938 the group formed to call for better surroundings and an end to police brutality. The next year the group published a list of employers who refused to hire black workers.[8] While no call for a boycott accompanied the list, it could certainly be inferred.

By 1940, South Carolina had an organized state conference of the NAACP, several prominent or soon-to-be-prominent black leaders, and several causes that earned

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[7]See Newby, p. 328.

[8]Edwin D. Hoffman, "The Genesis of the Modern Movement for Equal Rights in South Carolina, 1930-1939," *Journal of Negro History* 44:3 (July 1959): 363-365.

the attention of concerned black citizens—lynching, voting, and the equalization of teachers' salaries, among others. Black South Carolinians had seemingly turned a corner from mere accommodation of institutionalized and legalized racism to organized and determined resistance. Within three years, South Carolinians would be fighting in the courts for their right to vote in national elections. Indeed, the decade of the 1940s in many ways can be characterized as almost a "golden age" of legal activism by African Americans in South Carolina.

Filtered through the national office of the NAACP, and tempered by local black leaders who themselves were unwilling to go too far too fast, South Carolina became one of several laboratories for legal change in the South. When the NAACP challenged inequalities in teachers' salaries, South Carolina blacks participated. Following the Supreme Court's early decisions dealing with segregated education in law schools, black South Carolinians attempted to desegregate the state's white law school (though to no avail: see chapter three). When the NAACP turned its attention to desegregating education at all levels, black South Carolinians took the lead, initiating the first case to challenge segregation in primary and secondary education in the South. (See chapter five.)

The *Brown* decisions led to a lull of sorts in the litigation campaign as southern whites developed their responses—legal and otherwise—to the Supreme Court's decisions of 1954 and 1955.[9] Southern blacks as well began to develop new strategies, and during the last half of the 1950s both sides tried out new strategies and tactics. By 1959 and 1960, black activists began to increase their levels of activity. A new generation

[9] *Brown v. Board of Education*, 347 U.S. 483 (1954); 349 U.S. 294 (1955).

of activists—Bloom refers to them as "*new* New Negroes"—coming from high schools and colleges began to take direct action into the lunch counters of cities across the South. At the same time, the litigation campaign gained new strength as members of the NAACP coupled direct action with litigation by trying to desegregate facilities, and suing in court when their attempts failed. (See chapter four.)

From the time of the NAACP's first appearance in the South, however, whites began to fear the organization. Following the NAACP's victory in *Brown*, southern whites moved to an all-out attack on the group, which I discuss in more detail in chapter five. Briefly, when the Eisenhower administration refused to step in to enforce the Supreme Court's decision in *Brown*, the NAACP stood alone in the fight for black civil rights. Southern legislators then turned to a calculated strategy of attack against the NAACP involving new laws, court injunctions, and other legal strategies. Southern whites also started new organizations, such as the Citizens' Councils, which tried to intimidate black activists economically. They also revived old organizations such as the Ku Klux Klan, which intimidated African Americans through violence or threats of violence.[10]

The legal strategy attacking the NAACP was at least as well orchestrated as the NAACP's legal campaign against segregation. Within two years of the *Brown* decision, the organization was effectively weakened in a number of southern states, especially Alabama, where it suffered nearly a decade of decline. As Aldon Morris argues, the NAACP was largely ineffective in its defense against legal attacks because the legalistic orientation of the association prevented its leaders from thinking of alternative strategies.

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[10]Morris, pp. 26-30.

As a result, new grass-roots organizations came into being. It was the ironic result of the southern white attack on the NAACP that led to the creation of some of the more loosely organized grass-roots groups that took the lead in the modern civil rights movement. The result, according to Morris, was the development of a "turbulent but workable marriage" between the two strategies of civil rights action: litigation and mass protest.[11]

The appeal to the courts represents a significant element in the black freedom struggle for several reasons. Most obviously, it represented an attempt to force white America to acknowledge its own complicity in the status of most of the country's black population. More implicitly, the appeal to the courts represents the belief among many, if not most, black Americans that the United States was a nation of laws at its core. The fact that whites had subverted the law notwithstanding, African Americans believed that ultimately, more than justice was on their side: the rule of law was on their side as well. During the course of the black freedom struggle, justice and the rule of law coincided, principally in the 1954 Supreme Court decision in *Brown v. Board of Education*. Part of the dissertation, then, is devoted to a discussion of the role of the courts in the Civil Rights Movement, the appeals by black South Carolinians to the courts, and the nature of the African American belief in the rule of law.

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[11]Morris, pp. 31-39. See also Blumberg, pp. 17-37 for a discussion of the transition of the black struggle for civil rights from accommodation to protest, especially p. 37: the *Brown* decision represents the moment of transition from accommodation to direct action. Blumberg echoes Morris's emphasis on the attacks on the NAACP as an important reason for the development of other strategies to win civil rights. See also Jack M. Bloom, *Class, Race, and the Civil Rights Movement* Blacks in the Diaspora (Bloomington, Indiana: Indiana University Press, 1987), pp. 131-154 for a discussion of the role of *Brown* and subsequent events in the development of the "New Negro," one who was an activist rather than an accommodationist. Bloom focuses much of his attention on the role of Martin Luther King, Jr. in the Montgomery Bus Boycott and the growth of King's ideology during the boycott.

Much of the literature dealing with the civil rights movement minimizes the role of legal challenges to the system of white supremacy, focusing on *Brown v. Board of Education* as the fundamental case in civil rights law (which it is) but ignoring in large part or entirely much of the history of civil rights litigation.[12] Implicit in the lack of attention given to the litigation strategy of the NAACP in works dealing with the civil rights movement as a whole is the idea that the campaign to end segregation and discrimination was *not* a part of the civil rights movement. Because of events in Little Rock, Arkansas in the fall of 1957 as well as successful recalcitrance on the part of southern legislatures, the legal campaign seemed to have resulted in a stalemate soon after *Brown*.[13] Bus boycotts in Baton Rouge and Montgomery in 1953 and 1955 respectively had also led some to challenge the NAACP's style of leadership. Black southerners on the ground objected to directives from the northern-based NAACP increasingly after 1955, especially following the southern white attack against the organization that followed the *Brown* decision.[14] African Americans in Baton Rouge and Montgomery had demonstrated the possibilities that taking control of matters locally could entail. Ending the stalemate required more direct action, and thus by the end of decade the sit-ins and subsequent marches and freedom rides began.

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[12]See for example the following works on the movement: Blumberg, *op. cit.*; Aldon D. Morris, *The Origins of the Civil Rights Movement: Black Communities Organizing for Change* (New York: The Free Press, 1984); Harvard Sitkoff, *The Struggle for Black Equality, 1954-1980* American Century (New York: Hill and Wang, 1981); Robert Weisbrot, *Freedom Bound: A History of America's Civil Rights Movement* (New York: W.W. Norton, 1990).

[13]Weisbrot, p. 13.

[14]Morris, p. 38.

The white South Carolinians whom I have studied in this work have been called "neobourbons" by Numan V. Bartley, who coined the term because of the similarities between the bourbons who strove to destroy Reconstruction in the 1870s and the white authorities and activists who tried to destroy the Second Reconstruction in the 1950s and 1960s.[15] Neobourbons enjoyed support throughout the South, most especially in rural areas, but also in cities like Charleston that thrived on their Old South background. Of particular importance, especially in the Deep South, were political figures with ties to the Black Belt, defined generally as rural areas with a predominantly black population. In South Carolina, for example, state senators from four counties with no city above 10,000 held fifteen of thirty-three committee chair positions. Senators representing the five most populous counties did not control a single committee.[16] Leaders of the neobourbons, like most of their constituents, were "suspicious of 'progress,' liberal education [and] Yankees," they feared "the threat to state's rights, . . . 'creeping socialism' and the federal bureaucracy," and "sought to suppress the social and ideological aspects of southern change."[17]

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[15]Numan V. Bartley, *The Rise of Massive Resistance: Race and Politics in the South During the 1950's* (Baton Rouge: LSU Press, 1969), p. 17. The term "neobourbons" is descriptive of the group of white southerners to whom I will paying most attention in this work—"the politicians and political activists who led the massive resistance campaign" in the 1950s. Bartley's synthesis of the attitudes of white Southerners during this crucial decade is particularly helpful.

[16]Bartley, pp. 17-19.

[17]Bartley, p. 19, quoting Boyce Alexander Drummond, Jr., "Arkansas Politics: A Study of a One-Party System" (Ph.D. Dissertation, University of Chicago, 1957), p. 8. Bartley emphasized how the characteristics of the Arkansas elite could be carried over generally to a description of neobourbonism.

The core belief of neobourbonism was white supremacy. An outgrowth of traditional southern conservatism, neobourbon white supremacy stressed the naturalness of segregation and the corresponding inferiority of blacks. The fear of social contact on an equal basis—which would inevitably lead to racial amalgamation (sometimes referred to as "mongrelization")—drove the white majority to restrict blacks during Jim Crow, and to fight hard to resist the end of Jim Crow following the Supreme Court's decision in *Brown v. Board of Education.*[18]

In terms of political ideology, the neobourbons perhaps inconsistently expressed values of nationalism, sectionalism, states' rights, and local government. In the midst of any given issue, race could be expected to appear. Thus, in South Carolina, then-Lieutenant Governor Ernest F. Hollings could state: "We are not going to have labor unions, the NAACP and New England politicians blemish the Southern way of life." It was a combination of race and conservative economics that characterized the neobourbons.[19]

Constitutionally, the neobourbons with whom this dissertation is concerned believed in a particular kind of federalism. Harkening back to the ideals of John C. Calhoun, white Southerners believed that the Constitution allowed for the doctrine of interposition, which depended on the basic idea that it was the states, rather than the people, of the United States, who had come together to form the Constitutional government in 1787. As a result, if the national government violates what interpositionists see as the basic contract between the national and state governments, it is the

[18]Bartley, p. 237.

[19]Bartley, pp. 239-244.

state's right to interpose itself between the federal government and the enforcement of the law. White officials in South Carolina argued vigorously in opposition to nearly every attempt brought by African Americans to secure the rights that the Fourteenth Amendment supposedly guaranteed them.

White South Carolinians who resisted the course of integration and social justice in the courts shared with their black counterparts a significant trait: a belief in the rule of law. For these white resisters, however, the rule of law meant something far different than it did for the black plaintiffs they fought in the courts. For blacks, the rule of law meant equality and justice as established in the Fourteenth Amendment to the Constitution: due process of law, equal protection (and equal treatment) and a sense of fairness that went beyond the written words of the document. For whites, the rule of law required a strict reading of the constitution and, in some ways, it required one to ignore the Fourteenth Amendment—at least, as it was intended. An example might help to illustrate: In a case involving public accommodations—a waiting room, perhaps—black plaintiffs would argue that the Constitution and the rule of law required equal access by black individuals to the accommodation. Whites seeking to maintain segregation would argue that a black plaintiff seeking a desegregated waiting room was forcing himself on them in violation of *their* rights. (The latter idea harkens back to the Supreme Court's decision in *Plessy v. Ferguson*, which held that both sides must consent to the abrogation of segregation.)[20] In a way, then, the dissertation explores the dichotomous nature of the appeal to the rule of

[20]The example is based on the case of *Henry v. Greenville Airport Commission*, 175 F. Supp. 343 (1959), which I analyze in greater detail in chapter three. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

law by two groups with radically different objectives, both of which believed in the rightness of their own cause.

My analysis of the attitudes of black and white opponents in civil rights litigation and the process of litigation itself relies implicitly on works of jurisprudence and legal theory that support the main contentions I make. Many of the changes in the fundamental nature of the law coincided with the NAACP's litigation campaign against segregation. Especially after the Second World War, developments in legal theory supported advancements in civil rights. Beginning in 1937 with the Supreme Court's famous attitudinal switch regarding New Deal legislation, the legal culture of the United States began increasingly to support legislative restrictions on economic *laissez-faire* while simultaneously subjecting legislation concerning civil rights and civil liberties to "strict scrutiny." It is this transition that ultimately allowed the Supreme Court in 1954 to completely undermine the picture of social order that arose in the United States in the years following World War Two.[21] The High Court's decision in *Brown v. Board of Education* challenged what Horwitz has described as a Progressive consensus: the idea that preventing the constitutional dominance of propertied interests required absolute judicial restraint, even in the realm of individual rights.[22]

African American lawyers had successfully advanced the cause of civil rights for several years leading to the *Brown* decision. The result was a fundamental division over legal theory. Lawyers on both sides of the segregation question appealed to basic

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[21]Morton J. Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* (New York: Oxford University Press, 1992), pp. 252-258.

[22]Horwitz, p. 263.

constitutional values—but differing constitutional interpretations—to plead their cases in the courts. In short, black and white lawyers depended on the Rule of Law, and differed only on what the Rule of Law meant when it came to civil rights for African Americans.

The Rule of Law, as defined in the dissertation, derives from the practitioners of Critical Legal Studies, or CLS.[23] CLS adherents basically argue that modern society is circumscribed by a legal structure which has been built over time. The fundamental relationship of individuals to the state is defined by their relationship to the law. Having been brought up as part of this society, individuals are usually unable to think outside of the hegemonic structure that has informed their relationship to the state. African Americans in the South lived a dual life where the law was concerned. On one hand, they lived extremely circumscribed lives under Jim Crow. On the other hand, due largely to the Great Migration and the resulting growth of black communities outside the South, African Americans came to have an understanding of how the law could potentially be put to use. They were aware that the law was not consistent in its treatment of white and black citizens, but instead of trying to undermine the system, they strove to bring the law around so that it represented the ideals for which it stood. In the case of the Civil Rights Movement, the litigation campaign represents such a hegemonic relationship between citizens and the law. While on some occasions, African Americans had successfully protested for their rights, it was only after the Supreme Court's affirmation of the place of black citizens in American society in 1954 that they began to move to other methods of attacking segregation. Indeed, even after the Montgomery Bus Boycott (1955) and the

[23]Mark Kelman, *A Guide to Critical Legal Studies* (Cambridge: Harvard University Press, 1987), offers a useful introduction to the field.

sit-ins (1960), black activists depended on the courts to achieve their objectives, and not until the Black Power movement of the late 1960s did blacks begin to move beyond the idea of integration into white society—the hegemonic ideal. While African Americans in the South were able, therefore, to envision a life beyond their circumscribed existence, the law remained a key instrument of their struggle against segregation.

The Civil Rights Movement embodies both sides of the CLS argument. On one hand, African Americans demonstrated quite ably their ability to conceptualize a reality different from the one that controlled their lives. Social advances by African Americans outside the South—Joe Louis and Jesse Owens, for example—as well as support from non-Southern blacks, growing concern from the federal government toward the rights of black people, even the proliferation of publications like the NAACP's *Crisis* led black Southerners to the conclusion that their lives could be better. By fighting against ritualized omnipresent discrimination, African Americans clearly showed that they envisioned a society in which all men were, in the words of the Declaration of Independence, created equal. However, the very fact that they fought against discrimination through the federal courts rather than in the streets illustrated that they believed in the ideals of the Founders, even if some of them had been slaveowners. Those ideals embodied the concepts of the Rule of Law. African American lawyers for the NAACP cared deeply for the American Constitution. It had, perhaps, been misused or ignored, but it nevertheless was essential to their argument for equality in American society. It is this basic and unwavering belief in the Rule of Law that enabled men like Thurgood Marshall or South Carolina attorney Matthew Perry to maintain their willingness to fight in the face of enormous odds and great personal peril.

White Southerners believed in the Rule of Law as well, only their Rule of Law led them to vastly different conclusions than those reached by African American plaintiffs and their lawyers. For to many white Southerners, The Rule of Law implied, even required, the rule of white men. Their Constitution was the document that John C. Calhoun had interpreted during the Andrew Jackson administration. The states were the fountainhead for the constitutional order in American society, they argued, so it was no one else's business how "their" blacks were treated. If their schools were unequal, or their voting rights selectively enforced (at best), it was not the business of the federal government, through the courts or Congress, to interfere. The American South of the era of Jim Crow was both Democracy and Autocracy.

In this dissertation I examine the litigation campaign in South Carolina with several goals in mind. First, I argue that South Carolina's role in litigation prior to the *Brown* decision was significant in at least two ways. Black South Carolinians who participated in the litigation campaign formed a core of activists who kept interest in civil rights alive in years when it might otherwise have waned. At the same time, and more importantly, victories by black lawyers in civil rights cases forced the white establishment to devote more resources to the black community that it otherwise would have. From increasing black teachers' salaries to the creation of a separate black law school at South Carolina State College to the school equalization campaign of the early 1950s (initiated to forestall desegregation litigation), black success in court forced white South Carolinians to "equalize" the system, even if they did not recognize the equality of black people.

Recent work on the role of law in the civil rights movement has argued for the central role of law in achieving the ends of civil equality for African Americans. Robert

Glennon, in his 1991 study on the Montgomery Bus Boycott, offers a "revisionist interpretation" of that central event in the movement. Law, he argues, was "the dominant causal factor in the desegregation of the Montgomery bus system."[24] The bus boycott would not have succeeded without timely legal action, specifically the Supreme Court decision in *Gayle v. Browder*,[25] which effectively crippled white resistance to the boycott. The role of law in South Carolina's civil rights movement was equally important to that in Alabama. Without legal action—even when district court judges in the state were hostile to the movement's goals—the civil rights movement would not have achieved its objectives as quickly. Even Martin Luther King realized the importance of the legal system:

> Direct action is not a substitute for work in the courts and the halls of government. Bringing about passage of a new and broad law by a city council, state legislature, or the Congress, or pleading cases before the courts of the land, does not eliminate the necessity for bringing about the mass dramatization of injustice in front of a city hall. Indeed, direct action and legal action complement one another; when skillfully employed, each becomes more effective.[26]

My second goal is to move South Carolina from the periphery of civil rights historiography to a place nearer the center. South Carolina and several other states were not centers of direct action and its too-often-accompanying violence, but they were important in the litigation campaign. I believe that the strategy of litigation, especially when it coincided with direct action, was an effective, if time-consuming, means of

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[24]Robert Jerome Glennon, "The Role of Law in the Civil Rights Movement: The Montgomery Bus Boycott, 1955-1957," *Law and History Review* 9:1 (Spring 1991): 60-61.

[25]352 U.S. 903 (1956)

[26]Martin Luther King, Jr., *The Words of Martin Luther King, Jr.*, selected by Coretta Scott King (New York: Newmarket Press, 1987), p. 57.

winning the struggle for black rights. While direct action successfully involved the federal government in the civil rights movement within a few years—something the litigation campaign could not do in over twenty—litigation remained throughout the 1960s an acceptable and useful alternative when direct action failed. South Carolina serves as an example of how litigation fills this role.

Third, I argue that civil rights litigation is a laboratory for ideological conflict. Basic to the dissertation is the assumption that both whites and blacks believed in basic constitutional values, but that those values were fundamentally contradictory. Idus A. Newby in 1973 discussed the ideological differences between black and white South Carolinians, noting the formers' attachment to fundamental American ideals and the latter's belief that fundamental American ideals included white supremacy. Newby postulated that the belief in the ideals of the Declaration of Independence gave black activists ammunition in a "pragmatic" campaign to win limited rights in the decade leading to *Brown*. Whites, argued Newby, when confronted with black rhetoric built on the basic framework of the founding documents, were less apprehensive about allowing African Americans some rights while still believing in the basic value of white supremacy.[27]

My own examination of the evidence supports to a degree what Newby had to say twenty-five years ago.[28] African Americans believed in the ideals of freedom and equality

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[27]Newby, p. 288.

[28]In fact, when I first began the study, I reached many of the same conclusions before reading Newby's *Black Carolinians*. After some dismay at reading many of my ideas in a book published nearly 25 years earlier (at the time), I eventually came to realize that that fact that I had come to some of the same conclusions supported the basic idea behind the dissertation.

dating back to the Declaration of Independence and extended by the Fourteenth Amendment. Their constitutional values relied on the basic grants of due process and equal protection conveyed in that key amendment to the U.S. Constitution and enforced by the federal government. White South Carolinians—white southerners generally—believed that the Constitution required as little inference from the federal government as possible. When, after the Supreme Court's decision in the 1954 *Brown v. Board of Education* case (and earlier), it seemed that the courts were mandating a new role for themselves and limiting the rights of states to determine the status of their citizens, whites responded in a variety of ways. Those whom I discuss in this work responded by developing or affirming an ideological commitment to white supremacy that did not conflict with their own constitutional values. They combined in a sort of bizarre fusion the basic tenets of John C. Calhoun and "scientific" racism, creating an ideology in which the Constitution reigned, but not at the expense of white supremacy and states' rights. Newby argues, I think accurately, that "the great evolution in [white] racial thinking was from absolutism to tokenism. . . . In 1968 tokenism amounted to little more than black infiltration of white institutions."[29] Only after 1968 did large-scale integration begin, especially in 1970, when most of the state's schools began their first full-scale desegregation. Even then, however, white officials maintained their allegiance to white supremacy.

Finally, at a very basic level, the dissertation is an examination of the story of one aspect of the black freedom struggle in one southern state over three decades. Therefore, I have attempted to make the narrative as readable as possible, without inundating the reader with academic or legal jargon except when necessary.

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[29]Newby, p. 289.

On the eve of World War Two, the majority of black South Carolinians could not vote. Black teachers were significantly underpaid compared to their white counterparts. Aspiring black professionals lacked the range of training and employment opportunities that whites had. African Americans had limited—when they had any at all—access to public facilities, and the access they had was intended to remind them of its inferior status in society. Black children attended woefully inadequate schools. The position of black citizens in South Carolina was such that it effectively trained each generation for its inferior position in society. All that was about to undergo a profound, if prolonged, change.

A Note on Organization

The dissertation is organized in a rather unusual way: instead of following a strictly chronological pattern, I have divided the dissertation into chapters based on the type of litigation or the type of litigant. The rationale was at once practical and scholarly. On a practical level, the current organization allows one to follow the action, so to speak, without getting overly confused. Since many of the cases overlap chronologically, it seemed appropriate to divided the material by subject. Unfortunately, it has a negative effect on the overall "flow" of the manuscript which was unavoidable. On a more scholarly or intellectual level, it seemed appropriated to divide the litigation by subject matter or type of litigant because of the relationships I saw within those subjects. Thus, the chapter on the activities of black teachers in South Carolina, which covers over 20 years and jumps from salary equalization cases in the 1940s to anti-NAACP cases in the 1950s and then to allegations of unconstitutional firings in the 1960s, affords the reader

an opportunity to look at the activities of one group of black professionals and the ways in which they dealt with injustices they suffered. As another example, the chapter on the desegregation of higher education, which covers 16 years and focuses on just two major cases. The first, from 1947, led to the establishment of a separate and only nominally equal law school for African Americans in the state. The second case, 16 years later, led to the desegregation not only of higher education in South Carolina, but of public education in the state generally. Here, I have attempted to isolate cases dealing with one major issue—desegregation of higher education—to illustrate the development of legal and psychological change in South Carolina in the intervening years. Other chapters were organized as they were for similar reasons, with the exceptions of chapters five through seven, which trace in chronological fashion the development of desegregation litigation in public primary and secondary education.

CHAPTER ONE

"THIS COULDN'T HAVE BEEN IGNORANCE": THE BATTLE OVER THE WHITE PRIMARY IN SOUTH CAROLINA, 1940-1949

With the end of Reconstruction in South Carolina in 1877, white Democrats returned to power and soon began to accelerate the process of black disfranchisement that had begun during the waning years of Republican rule. Edgefield County ruled in 1878 that blacks could not participate in the county primaries that chose candidates for local offices. In 1882, the General Assembly passed registration laws that hurt black voters by requiring re-registration even if the voter moved within his own precinct. The registration law also gave local registrars a great deal of power to determine qualifications and to remove names with minimal reason. Election legislation also saw the establishment of the so-called Eight Box Law, which amounted to an effective literacy test by requiring separate boxes for different local, state and national offices. African-Americans were formally excluded from Democratic primaries under a party rule passed in 1890, which held that only those African-Americans who had voted Democratic in 1876 and since could vote in the party's primaries.[1]

Like other Southern states, South Carolina turned to the constitutional convention as a means to institutionalize black disfranchisement. South Carolina's convention, led by then-U.S. Senator "Pitchfork" Ben Tillman, was held between September and December 1895. The constitutional convention's "sole cause," as far as Tillman was concerned, was

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[1]George Brown Tindall, *South Carolina Negroes, 1877-1900.* (Columbia: University of South Carolina Press, 1952; reprinted Baton Rouge: Louisiana State University Press, 1966), pp. 26-27, 67.

to write a new franchise provision that would exclude African-Americans from politics. Tillman, as representative of large numbers of illiterate whites in the state, had promised that they would not be excluded from the ballot: a simple literacy test would therefore not have sufficed, though it would have eliminated over 58,000 African-Americans and given whites in the state a slim majority. The proposal championed by Tillman was modeled on the Mississippi constitution of 1890. Every adult male in South Carolina would be allowed to vote if he had lived in the state for two years, the county for one year, and the precinct for four months; if he had paid his poll tax at least six months prior to the election; if he was not guilty of certain crimes;[2] and if he could read or understand any section of the constitution. Anyone who met those qualifications by 1 January 1898 would be considered a lifetime voter; after that date, additional qualifications of property ownership were imposed, along with a requirement that the registration officer would choose the section of the constitution for the literacy/understanding test.

In a state that was already substantially Democratic due to the successful disfranchisement of potential Republican voters, it was the white primary, in Tindall's view, rather than the new constitution, that was more responsible for disfranchising African-Americans. Poll taxes, literacy tests, and convoluted registration requirements, as

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[2]The crimes which excluded one from voting were those to which whites believed black men were most prone, including thievery, arson, wife-beating, housebreaking, fornication, sodomy, assault with intent to ravish, miscegenation, and incest. Orville Vernon Burton points out the irony that the state's constitution theoretically allowed wife-killers to vote, while wife-beaters were disfranchised. Of course, unjustified uxoricide would lead to execution at any rate. See Francis Butler Simkins, *Pitchfork Ben Tillman: South Carolinian.* (Baton Rouge: Louisiana State University Press, 1944; reprinted Gloucester, MA: Peter Smith, 1964), p. 297 and Orville Vernon Burton, "'The Black Squint of the Law': Racism in South Carolina," in David R. Chesnutt and Clyde N. Wilson, eds., *The Meaning of South Carolina History: Essays in Honor of George C. Rogers, Jr.* (Columbia: University of South Carolina Press, 1991), p. 170.

well as fraud and violence, had already reduced African-American voting throughout the South to a mere trickle by the late 19th century and the measures enacted by the new Constitution did not have as significant an effect as earlier efforts. In fact, Republican voting in South Carolina was already in decline well before the 1895 convention, due to the numerous laws that had been passed limiting the voting rights of African Americans dating back to 1882. In 1896, however, the politically dominant Tillmanite faction institutionalized the primary system. Prevented from participation in the primary by party rules from 1890 (when Tillmanite forces "took over" the Democratic Party in the state), blacks were removed from the only election that mattered.[3]

(Intimidation, violence, and fraud continued to be effective means of disfranchising African-Americans in South Carolina. In Phoenix, in Greenwood County, several African-Americans who attempted to vote in 1898 were shot down, with no one ever being punished. Additional violence related to the franchise took place in Columbia and Charleston.[4])

Throughout the South, African Americans were effectively disfranchised from the late 1890s until the mid-twentieth century, giving rise to the idea of the "solid South," a Democratic bastion whose elected representatives used their seniority to oppose civil

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[3]Tindall, pp. 88-89. J. Morgan Kousser, *The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880-1910* (New Haven, CT: Yale University Press, 1974), p. 79.

[4]Harold Boulware, "Problem Presented by South Carolina: Brown v. Baskin," a report dealing with the historical background and some of the legal problems that *Brown v. Baskin* presented, p. 2. n.d. NAACP papers, Library of Congress. Referred to hereafter as Boulware memo. Harold Boulware was a black Columbia lawyer who represented the state chapter of the NAACP. Jack Greenberg states that Boulware was "probably" the only black lawyer in the state in *Crusaders in the Courts*, p. 39.

rights at the federal level while white supremacy was vigorously enforced through legal and extra-legal means at home. Few challenges to the system of white supremacy were attempted before the end of World War Two, but voting rights were the focus of most of the challenges that were attempted. The "Grandfather Clause" was found unconstitutional by the Supreme Court in a 1915 Oklahoma case, but that state instituted restrictions following the Court's decision that limited black registration to twelve days or not at all.[5]

Legal challenges to the white primary in the state of Texas laid the groundwork for, and eventually led to, the destruction of the white primary as an element of state action. As early as 1921, black Texans initiated suits against local officials to enjoin them from enforcing white primary legislation. Their efforts failed, however, because by the time the cases advanced very far, the primary had been held and the cause of action no longer existed.[6] When the Texas legislature enacted statewide white primary legislation, another case was filed. *Chandler v. Neff*[7] failed when the federal district court re-affirmed that the Fourteenth and Fifteenth Amendments only applied to state action, and that the Democratic Party was a voluntary association the actions of which could not be

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[5]*Guinn v. United States*, 238 U.S. 347 (1915); Steven F. Lawson, *Black Ballots: Voting Rights in the South, 1944-1969* (New York: Columbia University Press, 1976), p. 18. See also Lawson, pp. 1-22 for a brief outline of efforts by white southerners to disfranchise African Americans from Reconstruction to the mid-1940s. Darlene Clark Hine, in *Black Victory: The Rise and Fall of the White Primary in Texas* (Millwood, NY: kto Press, 1979), pp. 3-20, offers an overview of the period from Reconstruction to the *Guinn* case dealing with the role of the Supreme Court in upholding white supremacy, and then finally beginning, with *Guinn*, to re-think its doctrine toward matters of black voting rights. For a thorough analysis of black disfranchisement from the end of Reconstruction to 1910, see Kousser.

[6]Hine, pp. 59-61.

[7]*Chandler v. Neff*, 298 Fed. 515. Hine, pp. 72-73.

prohibited by appealing to those Amendments. Of course, the district court was only following Supreme Court precedent that went back to the late nineteenth century, when the Reconstruction Amendments were being explored and explained by the Court.[8] The case of *Nixon v. Herndon*,[9] however, brought some limited relief to black Texans when the Supreme Court held that the white primary laws violated the Fourteenth Amendment's guarantees of equal protection. Unfortunately, the issue of the Fifteenth Amendment, which many observers saw as more important for black voting rights, was left untouched.[10] The Court saw plainly the violations of the Fourteenth Amendment, but by focusing its attention on those violations, the Court left open the question of whether the primary was part of the election process. For that reason, *Nixon v. Herndon* had little impact on the actual voting rights of African-Americans in Texas, or anywhere else. Only in 1944 did the Supreme Court rule, in the Texas case *Smith v. Allwright*, that the white primary, because it bore the imprimatur of state action, violated the Fifteenth Amendment.[11]

In South Carolina, laws passed in the early twentieth century solidified the white primary. Nevertheless, blacks in parts of South Carolina endeavored to secure voting rights for themselves during the World War I years. In Columbia in 1915, a group calling

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[8]For example, the *Civil Rights Cases*, 109 U.S. 3 (1883), which established the doctrine of state action. Only action by a state in violating rights guaranteed under the constitution could be restricted by Congress. The case virtually strangled any attempts by African Americans at gaining their Fourteenth and Fifteenth Amendment rights for fifty years. See also *Plessy v. Ferguson*, 163 U.S. 537 (1896), which legitimated the doctrine of "separate but equal."

[9]*Nixon v. Herndon*, 273 U.S. 536 (1927).

[10]Hine, p. 80. See also Lawson, pp. 27-28.

itself the Capital City Civic League began attempts to gain access to the polls using petitions and persuasion as their tools. By1917, a new branch of the NAACP joined their efforts.[12]

In April 1932, a group of prosperous blacks associated with the NAACP challenged the white primary in Columbia. The city Democratic Executive Committee had met in February and decided to allow only those blacks who were "known to have voted the Democratic ticket continuously since 1876" to vote in the primary.[13] They were, of course, acting within the boundaries of the 1890 law to that effect. The request for an injunction was denied, and the subsequent appeal to the federal court was dismissed for being filed too late. Although attorney N.J. Frederick considered building a case to attack the state's Democratic primary, expectations that the state legislature would repeal all the laws relating to the primary led Frederick to delay acting.[14]

South Carolina's white newspapers reacted with fear to the prospects of ending the system of white supremacy that controlled voting in the state. Although in 1932 the Charleston *News and Courier* had complained that Southern Democratic parties "'put up' with party control by second rate men and sometimes by blackguards and thieves" because of their "mortal fear" of African-Americans entering the party, by 1936 the paper openly feared the admission of African-Americans to the voting ranks of South

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[11]*Smith v. Allwright*, 321 U.S. 649 (1944).

[12]Barbara Woods Aba-Mecha, "Black Woman Activist in Twentieth Century South Carolina: Modjeska Monteith Simkins," (Ph.D. dissertation, Emory University, 1978), p. 197.

[13]Complaint against the Board of Commissioners of Elections of Columbia, filed 22 April 1932, quoted in Woods, p. 161.

Carolina.[15] "For the present and probably for long years or centuries to come, the Southern negroes will be safer under the political guardianship of white people than they would be as guardians to themselves. Their *assent* the last half century to white government is convincing evidence that they believe this themselves. . . ."[16] Despite years of intimidation, fraud, and violence by whites, the Charleston *News and Courier*, among other southern newspapers, believed that the lack of black voting translated into their acceptance of disfranchisement. Of course, without the franchise, blacks were constitutionally prevented from voicing their dissatisfaction with the *status quo*.

The *News and Courier*, however, was not in the same school as the descendants of "Pitchfork" Ben:

> [W]ere the News and Courier a democratic newspaper, if it believed in democracy as President Roosevelt believes in it . . . it would demand that every white man and woman and every black man and woman in the South be protected in the right to vote. It would demand the abolition of all "Jim Crow" cars, of all drawing of the color line by law. That is "democracy." But the News and Courier is not a democrat. It fears and hates democratic government. The News and Courier believes in Democratic government—Democratic with a big "D," and that is another word for a measure of aristocratic government that ought to be more aristocratic than it is. All self-respecting white people in the South believe in aristocratic

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[14]Aba-Mecha, pp. 162-163.

[15]Editorial, Charleston (South Carolina) *News and Courier*, 6 May 1932, p. 4A, quoted in Rayford W. Logan, ed., *The Attitude of the Southern White Press Toward Negro Suffrage, 1932-1940* (Washington, DC: The Foundation Publishers, 1940) p. 58. This and other editorials cited by Logan primarily address the influence of Northern Democrats and the Roosevelt administration on the Southern political scene, specifically the desire outside the South to extend the right to vote to black Southerners. However, while the white primary cases are not addressed directly, they remain constantly in the background, with images of the NAACP as the main instigator of unrest.

[16]Editorial, Charleston *News and Courier*, 30 June 1936, p. 4. Quoted in Logan, pp. 66-67. Emphasis added.

> government and are opposed to democracy as defined and explained by President Roosevelt at Manteo [North Carolina].[17]

The paper followed this editorial with one further elaborating its views on black suffrage:

> We Southerners know that there are intelligent negroes. We know that in the South are negroes of character and information qualifying them for suffrage. But we know they are extremely few. We know that were the hordes of negroes voting in South Carolina, they would follow, not the white men upon whom the existence of the state in decency and civilization depends, but depraved white men cunningly able to equalize themselves and be beloved of them.[18]

In September 1938 the paper recorded its resentment at efforts from without "to influence the white primary, to control it, to destroy its white character. If they succeed in doing that South Carolina will be in worse shape than it was in 1875. . . ." "The maintenance of a white man's party in South Carolina is necessary for protection from unscrupulous whites who would corrupt the negro masses."[19] Regardless of the source of disfranchising sentiment, whether from Tillmanite demagogues who appealed to the baser instincts of the majority of white voters, or from allegedly moderate newspapers like the *News and Courier*, the goal and the result were the same: the maintenance of white supremacy in politics and the mass disfranchisement of nearly 400,000 African-Americans in South Carolina.

Following early cases in Texas, challenges to white control of voting proceeded in several states.[20] In South Carolina, a small number of white leaders, including David W.

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[17]Editorial, Charleston *News and Courier*, 26 August 1937, p. 4. Quoted in Logan, p. 69.

[18]Editorial, Charleston *News and Courier*, 3 September 1937, p. 4-A. Quoted in Logan, p. 69.

[19]Editorials, Charleston *News and Courier*, 3 August 1938, p. 4, 21 September 1938, p. 4. Quoted in Logan, pp. 72-73.

[20]See Hine, pp. 90-105 for an overview of cases from Virginia, Arkansas and Florida from 1928-1930. Hine argues that African-Americans in those states differed in attitude

Robinson, who would become a central figure in the fight to maintain segregation in the 1950s and 1960s, tried to get African-Americans into the political system by appealing to the Richland County executive committee, and even the legislature. Neither effort succeeded. As early as 1936, black leaders in South Carolina had attempted to gain entry into the party's primary voting. According to local NAACP attorney Harold Boulware, the "unofficial reply" was that it was illegal for African-Americans to vote in primaries. Some party leaders proposed that just the "'intelligent' Negroes be allowed to vote, which proposal was summarily and promptly rejected."[21]

African-Americans in South Carolina then began in 1942 to raise money for court action and, in 1944, to organize a new party—the Progressive Democratic Party—charged with instructing African-Americans in voting requirements and procedures.[22] Led by John McCray, editor of *The Lighthouse and Informer*, a black newspaper based in Columbia and the semi-official organ of the state NAACP, the Progressive Democrats began life as the Colored Democratic Party in March 1944, a few weeks prior to the Supreme Court's

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toward the fight against voting injustice as compared to African-Americans in Texas. "African-Americans in the lower socio-economic groups . . . did not identify with the struggle against the white primary. They viewed the campaign as being essentially a middle-class, politically oriented struggle, as opposed to a racially oriented one." p. 104. Texas, therefore, became more fertile ground for continuing the fight against voting discrimination.

[21]Black participation in the general election did, however, rise in 1936, primarily due to the presence of Franklin D. Roosevelt in the White House. For more on the efforts by black South Carolinians to vote in Democratic primaries prior to 1944, see Patricia Sullivan, *Days of Hope: Race and Democracy in the New Deal Era* (Chapel Hill: University of North Carolina Press, 1996), pp. 143-147.

[22]Boulware memo, p. 3.

decision in *Smith v. Allwright*. The name was changed so that whites would not be put off from joining the new party.[23]

One effort that went unnoticed in Boulware's memorandum, and continues to go unnoticed, was a 1942 federal criminal trial of election officials from Gaffney, a small textile town in the upstate. E.A. Dawkins, from the nearby town of Union, had written Walter White in 1939 requesting "specific instructions" on how to register and vote in the upcoming elections, "as there has never been any wholesale registration, or voting in the National [or] Municipal elections." When the registration season for 1940 came around, some African-Americans in Gaffney attempted to register. "When our turn came to be registered, a part of the board flatly refused to register us because 'Darkies have never registered in South Carolina and especially in Cherokee County.'" Even the County Attorney could not persuade the registration board to register the Gaffney blacks. They returned the next day, only to have the door slammed in their faces. On 25 August school teacher Lottie Gaffney requested the NAACP to refer the matter to the federal government and to "do whatever in your power to make it safe for us to register by that time [early September 1940, the registration period for the general election]."[24]

The NAACP referred the matter to the Justice Department, asking that the Attorney General's office look into the matter and take action to see that the town of Gaffney's African-Americans could register in early September. By 7 September, the

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[23]Aba-Mecha, p. 201.

[24]E.A. Dawkins to Walter White, 11 September 1939; Lottie P. Gaffney to NAACP, 25 August 1940. NAACP papers, Library of Congress. To avoid confusion between Lottie Gaffney and the town of Gaffney, whenever the lone "Gaffney" is used, I am referring to Lottie Gaffney. I shall refer to the town as "the town of Gaffney."

Attorney General's office had contacted Roy Wilkins to ask whether Gaffney and the other black citizens of the town of Gaffney had been permitted to register. They had not. Gaffney recalled what happened in an affidavit that she and Bernice Bonner submitted on 8 October 1940:

> The three members of the Board questioned us as to the reasons for our wanting to vote. They said that we wanted to stir up trouble for them and ourselves. One member said that some God damned son of a bitch Republican put us up to want to vote. If the board would register us it would be dangerous for us—that our houses would be burned; that our heads would be scalped, etc. That if they would register us their heads would be cut of [sic] before night. If we registered it would do no good.

The board members then left the room, even though several whites were waiting to register. The janitor came in and ordered everyone out of the room at 3:00 that afternoon. By 4:30, the board members had returned along with several whites, all of whom were let into the registration room by the janitor, who blocked the entrance to Gaffney and the others.[25]

In February 1942, the Department of Justice prosecuted F.E. Ellis, John E. Wright, and T.E. Meetze for conspiring to deprive Gaffney and three other women of their right to vote. Despite hard work by the U.S. attorneys, Ellis and the others were acquitted. Gaffney asked Thurgood Marshall for further assistance, even offering to begin "quietly setting up a committee" to supply needed funds for the struggle. Marshall informed her that since this was a criminal action resulting in acquittal, nothing more could be done other than "lay the groundwork for a civil suit for damages" by having people attempt to register to vote. Upon refusal, a civil suit could be filed. Marshall

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[25]Roy Wilkins to Lottie P. Gaffney, 28 August 1940; Roy Wilkins to Lottie P. Gaffney, 7 September, 1940; Affidavit of Lottie P. Gaffney and Bernice Bonner, 8 October, 1940. NAACP papers, Library of Congress.

added: "The reason we did not bring an action for damages on the first case was because we had every reason to believe that criminal prosecution would be successful." The white primary had yet to be ruled unconstitutional, but since the *Ellis* case dealt with registration for the general election, Marshall was convinced that the case would be won. He had, he wrote Gaffney, been "repeatedly assured of the whole-hearted support of the local U.S. attorney."[26]

Gaffney wrote the NAACP offices in June 1942, communicating that she had lost her job as a result of her participation as a witness for the government in the case. Suspicion runs through her desperate letter, as Gaffney cites a "frame up" and an "underworld ring" as being responsible for her firing. The NAACP referred the matter to the Justice Department, which in turn contacted O.H. Doyle, the U.S. Attorney who prosecuted the case. Doyle relayed that in his opinion Lottie Gaffney was responsible, because of her demeanor on the stand and in court, for the not guilty verdict. A.B. Caldwell of the Trial Section of the Criminal Division of the Justice Department, who assisted Doyle, concurred with Doyle's assessment of Gaffney's value as a witness. Caldwell believed that other teachers who had been involved in the case had been renewed in their annual contracts. Tellingly, however, both Doyle and Caldwell cited Gaffney's activities as an "agitator in the community" as reasons for wanting her severed from the case from the beginning. Doyle never wanted to go into court with her again.[27]

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[26]Gaffney to Thurgood Marshall, 28 February 1942; Marshall to Gaffney, 10 March 1942. NAACP papers, Library of Congress.

[27]Assistant Attorney General Wendell Berge to Marshall, 11 July 1942. NAACP papers, Library of Congress.

Of course, the struggle by African-Americans in South Carolina for voting rights does not end with the acquittal of Ellis and his compatriots. Only a couple of years after the *Ellis* case, the Supreme Court decided *Smith v. Allwright*, which supposedly killed the all-white primary. Since Texas excluded from the general election anyone who had lost in the primary, and since election officials were required not to give ballots to people who did not qualify to vote under Democratic convention rules, the Supreme Court ruled that the primary was an integral part of the election. As such, any restrictions on black voting violated the Fifteenth Amendment. The black participants thought that the case was a clear victory, but many observers were more cautious. Marshall wrote that "once and for all the question of the right of Negroes to participate in primary elections similar to those in Texas" was settled.[28] In South Carolina, however, the white governor and legislature had other ideas.

Within a few days of the decision in *Smith v. Allwright*, South Carolina governor Olin D. Johnston, who was then running for the U.S. Senate, called the state legislature into special session with the purpose of removing state control over the Democratic primaries. He declared that it was "absolutely necessary that we repeal all laws pertaining to primaries in order to maintain white supremacy in our Democratic primaries in South Carolina. . . . I know that the white Democrats in South Carolina will rally behind you in this matter . . . especially when the protection and the preservation of morals and decency in government is involved." Johnston went on to harken back to the days of Reconstruction, asking his listeners to recall the days of Republican government in the state:

[28]Marshall to Sam S. Minter, 10 May 1944. Quoted in Lawson, p. 46.

> The records will bear me out that fraud, corruption, immorality, and graft existing during that regime that has never been paralleled in the history of our State. They left a stench in the nostrils of the people of South Carolina that will exist for generations to come. The representatives of these agitators, scalawags and unscrupulous politicians that called themselves white men and used the colored race to further their own course are in our midst today, and history will repeat itself unless we protect ourselves against this new crop of carpetbaggers and scalawags, who would use the colored race to further their own economic and political gain. . . . History has taught us that we must keep our white Democratic primaries pure and unadulterated so that we might protect the welfare and homes of all the people of our state.

Johnston concluded with a challenge: "White supremacy will be maintained in our primaries. Let the chips fall where they may!"[29] Johnston's call to remember the past echoes the rhetoric of Ben Tillman. Fifty years later, Tillman's racist ideology still held sway over much of South Carolina's population. Further, Johnston's desire to "keep our white Democratic primaries pure and unadulterated" reminds one of the desire to maintain the purity of white womanhood in a culture in which lynching, while becoming less common, was still accepted as alternative justice.[30]

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[29]Exhibit "C" to plaintiff's original complaint, Proclamation and Speech by Governor Olin D. Johnston to South Carolina General Assembly, 12 and 14 April 1944, respectively. *George Elmore v. Clay Rice, et al.*, Civil Action Number 1702, Eastern District of South Carolina, Columbia Division, Record Group 21, Records of the District Courts of the United States, National Archives-Southeast Region, East Point, Georgia.

[30]In 1948, when South Carolina's Strom Thurmond ran for the presidency under the aegis of the States' Rights Democratic Party (also known as the Dixiecrat Party), Olin Johnston never specifically endorsed Thurmond's candidacy. His "loyalty" was rewarded, but he made it clear that he did not support Truman's stance on civil rights. Johnston and his wife, who was vice-chair of the Jefferson-Jackson Day event, refused to attend the reception in February 1949 after hearing that it would be integrated and trying unsuccessfully to ensure that none of the senator's group would be seated next to black guests. John E. Borsos, "Support for the National Democratic Party in South Carolina During the Dixiecrat Revolt of 1948," *The Southern Historian* 9 (1988): 11.

The legislature proceeded to remove from the books 150 laws pertaining to the primaries of the state in less than a week, including an act for repeal of the section of the state constitution that mentioned primary elections, re-creating the Democratic Party as a sort of private club that could control its own membership.[31] The 1944 primary took place without incident but in August 1946, George Elmore, an African American from Columbia, tried to vote in the Democratic primary. He and several other African-Americans requested ballots and were refused "solely because of race or color pursuant to instructions of defendant John I. Rice," the chairman of the Richland County Democratic Party.[32]

Thurgood Marshall and Harold Boulware filed suit against Rice and fifty-one other members of the Richland county Democratic Executive Committee along with the eight election managers of Elmore's precinct. The complaint brought forth, accurately, that the victors in the Democratic primary consistently won the general election, noting that that had been the case since 1875. Since 1880, and especially after 1895, when South Carolina's Reconstruction constitution was scuttled, the popular vote for president was overwhelmingly Democratic. After the passage of the 1895 constitution, in fact, only twice before 1944 did the number of votes cast for Republican candidates exceed 3,000. Vaster differences could be found in congressional and senatorial elections over the same period. Vote percentages for Democratic candidates for president beginning in 1916 ranged from 95.2 to 98.7 percent, the single exception being in 1928, when over 2,500 votes went to anti-Smith Democrats and nearly 3,200 to Republican Herbert Hoover. In

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[31]The constitution was amended by popular vote on 14 February 1945.

[32]Complaint, 21 February 1947, p. 4. *Elmore v. Rice*, C/A 1702.

presidential elections from 1880 to 1944, the closest race took place in 1880, when James Garfield received over a third of the vote. After 1896, when 9,313 Republicans voted for William McKinley, Republican numbers dropped off by two-thirds. Numbers for Republican House and Senate candidates were even worse. Since the general election was so lop-sidedly Democratic, argued Elmore's lawyers, echoing the successful arguments in the *Smith* case, it was essentially the only place in which a meaningful vote could be cast. Further, since the Democratic Party always had produced, and continued to produce the ballots for the general election, they were performing an essential state function that could be regulated. Judge J. Waties Waring would note later in his decision that, in 1946, 290,223 votes were cast in the first primary election for governor and 253,589 were cast in the second primary. Only 26,326 votes were cast in the general election. The primary was thus the only election that mattered in South Carolina.[33]

The complaint also analyzed Governor Johnston's message to the General Assembly in some detail, quoting at length and stating that the "sole purpose of [the] special session was to take legislative steps intended to evade and circumvent the decision of the Supreme Court."[34] The challenge to the Court's decision reveals the extent to which, in their desire to "retain white supremacy," white South Carolinians were willing to undermine the fundamental law of the land. This challenge to the Rule of Law, while not

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[33]Exhibit "B" of Plaintiff's Complaint; Complaint, p. 8. *Elmore v. Rice*, C/A 1702. Judge Waring was in his own right a key figure in the Civil Rights Movement in South Carolina. Descended from the earliest Charlestonians, Waring became an advocate for black rights following his second marriage, to a twice-divorced northerner named Elizabeth Avery Mills Hoffman. Waring's role and the price he paid personally for that role in the voting cases is ably covered in Tinsley E. Yarbrough's biography *A Passion for Justice: J. Waties Waring and Civil Rights* (New York: Oxford University Press, 1987), pp. 60-75.

[34]Complaint, p. 6. *Elmore v. Rice*, C/A 1702.

unprecedented, nevertheless indicates a mindset among some Southern politicians and their supporters that white supremacy was more important than the Constitution. Most arguments, however, stressed a different approach to the Rule of Law, rather than outright rejection of it.

The sixty defendants answered, predictably, that the primary was outside the boundaries of state law. The Democratic Party was "a private voluntary association of individuals, mutually acceptable to each other." Their response also denied the importance of the Democratic primary in deciding the eventual election, as well as the validity of the governor's speech to the legislature, saying that it was perfectly proper to deal with such issues in the special session. Interestingly, the defendants' answer avoids the use of the word "election," going so far as to deny the complaint's contention that the first eight defendants were "election managers." Instead, they were "managers of the primary." Any association of the defendants with an election gave them an air of official responsibility that they could not afford in light of the *Smith v. Allwright*. Of course, integral to the defense was the denial of Elmore's status as a qualified elector. His claim to be such was denied because he "was not qualified according to the rules of the Party and was not a White Democrat and not duly enrolled." Other denials followed: qualifications for electors laid out in the state constitution did not apply to the primaries, but only to the general election; the Democratic primary did not "control the choice" of eventual office-holders; *Smith v. Allwright* was not applicable to the case, given the facts; the primary was essentially different after 1944 than before; and the plaintiffs could just as easily organize their own political party, equally free from state statutory regulation.[35]

[35]Defendants' Answer, 11 April 1947, pp. 3-6. *Elmore v. Rice*, C/A 1702.

Differences between the old state-sanctioned party and the new private club were few; however, at the trial, the defense emphasized the differences between the pre-*Smith* Democratic Party and the post-*Smith* party. The 1942 party rules required the voter to "support the nominees of such party, state and national." The new rules for 1944 dropped only the reference to the electoral level, and still required voter support. The mechanism for selecting officers, committeemen and delegates, however, remained unchanged. The 1944 party convention, in fact, was held under the pre-existing 1942 rules of the party. The convention organized itself into the Democratic Party of South Carolina, and, using the 1942 rules as a template, wrote a new set of rules taking heed of the fact that there was no longer any statutory relationship between the state and the party. The new rules allowed for voting machines, changed municipal election guidelines, and changed the procedures for absentee balloting. The 1946 rules were substantially unchanged from those of 1944, except that they provided for eighteen-year olds to vote in the primary. Interestingly, under the old statutes, penalties for perjury and fraud were severe, but under the new rules, the only punishment was, by necessity, expulsion from the party. Finally, and perhaps most significantly, the new rules imposed an additional oath on national congressional candidates, requiring them to "support the political principles and policies of the Democratic party of South Carolina during the time of office, to which I may be elected."[36] These differences, argued the defendants, were substantial and material. Of

[36]Testimony of William P. Baskin, 3 June 1947, pp. 29, 50. *Elmore v. Rice*, C/A 1702. (Baskin, in addition to being the chairman of the state's Democratic Party, and future defendant in the follow-up to the *Elmore* case, was also one of the attorneys for the defense in this case. Judge Waring called him as an informational witness to testify regarding differences between the operations of the party before and after the legislature repealed state laws concerning the party.)

course, the "political principles and policies" that the candidate would be upholding included white supremacy and segregation. While that never entered the case, it is important to note that the state party seemed to add this requirement while under fire from within and without. The Democratic convention apparently found it necessary to ensure the loyalty of its candidates at a time when the party found itself challenged on one of its main platforms.

Differences between the party's 1942 rules and the 1944 and 1946 rules could partially be accounted for by the simple fact that every two years, the party abolished the old rules and re-wrote them. Usually they were practically the same. The argument that the rules were substantively different in 1944 and 1946, the years following the repeal of state primary laws, was essential to supporting the defense case in *Elmore v. Rice*. Had there been relatively few changes from 1942 to 1944, Elmore's argument bore more weight. However, if Judge Waring put more emphasis on the changes that were made, then perhaps the burden of proof for the plaintiff would prove too great. As it turned out, Waring did not place any great emphasis on the changes from the old rules to the new ones. Instead, he found that, despite allowing voting machines and lowering the voting age to eighteen (in 1946), "there has been no material change since April 1944 in the manner in which primary elections have been conducted in South Carolina from the manner in which they were conducted prior to April 1944."[37] The most important carry-over from the 1942 rules, in light of *Smith v. Allwright*, was that membership in the new Democratic Party, just as voting in the primaries in 1942 and before, was limited to whites only.

[37]Findings of Fact and Conclusions of Law, 12 July 1947. *Elmore v. Rice*, C/A 1702.

Denying the importance of the Democratic primary in picking the eventual office-holder was important to the defense because, if it could be proven that winning the primary was tantamount to winning the election, then the state would be bound to uphold the voting rights of everyone and allow African-Americans as well as whites to vote in the primary. After preparing his brief, Marshall wrote to Fred Folsom, an attorney in the Department of Justice's Civil Rights Section. The brief had been prepared by Marshall and a seminar of Columbia Law School students, and followed the Supreme Court's argument in *United States v. Classic*, which held that primaries, as part of the election machinery *in toto*, could be regulated. Folsom told Marshall: "if you can establish that the South Carolina primary is, in fact, the election, then by force of the *Classic* opinion, the Federally-secured right to vote for Federal officers attaches to that primary."[38] While Marshall ultimately relied on *Smith* as the foundation for the case, the historical evidence in favor of such a contention based on *Classic* was overwhelming, and Judge Waring, in deciding for Elmore, took note of it.

Despite a temporary stay issued by Judge Timmerman in late August, the Court of Appeals confirmed Elmore's victory on 30 December 1947. It seemed like "the lid . . . nailed down on the coffin of the white primary."[39] However, South Carolina's Democratic leaders had other plans. Since the party remained a private club, the 1948 convention decided only to allow African-Americans "qualified participation in the primary." In addition to requiring potential black voters to present their general election

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[38]Fred G. Folsom to Marshall, 17 January 1947. NAACP papers, Library of Congress. *United States v. Classic*, 313 U.S. 299 (1941).

[39]William H. Hastie to Marshall, 19 July 1947. NAACP papers, Library of Congress.

voting certificates (which white voters were not), the convention inserted the following oath:

> I further solemnly swear that I believe in and will support the principles of the Democratic Party of South Carolina, and that I believe in and will support the social and educational separation of races.
>
> I further solemnly swear that I believe in the principles of States' Rights, and that I am opposed to the proposed Federal so-called F.E.P.C. [Fair Employment Practices Committee] law.[40]

Obviously, the proposed oath undermined many of the goals of South Carolina's black population. The fact that different qualifications were in effect for black voters only exacerbated the situation.

The new rules did not make it any easier for African-Americans to obtain their general election voting certificates either. Boulware reported "a continuation of, but with more efficiency[,] of a hitherto established policy of holding to a bare minimum the number of qualified electors among Negro citizens [throughout the state]." He cited Dorchester and Berkeley county officials specifically for breaking state law by writing certificates for white party members from the roll books while potential black voters waited in silence. In Marion County a young black veteran and college graduate was turned down for a certificate for reading too fast, while a teacher with 13 years' experience was turned down for not reading well enough. In Clarendon County, the tax assessor began omitting the poll tax from the property tax bill. The audit books mysteriously disappeared when people went to pay their poll taxes, only to reappear in the

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[40]Complaint, p. 8, 8 July 1948. *David Brown v. W.P. Baskin, et al.*, Civil Action Number 1964, Eastern District of South Carolina, Charleston Division, Record Group 21, Records of the District Courts of the United States, National Archives-Southeast Region, East Point, Georgia.

wake of a lawsuit begun in that county. In Union county, registration board members were somehow unable to meet together on registration day, even though whites were still managing to get their certificates. In Jasper county, where both whites and African-Americans were required to have certificates to vote in the primary, the committee managed to run out of certificate forms after "about 25 or 50" African-Americans qualified on the first day of registration.[41] These methods of preventing African-Americans from voting were not new, of course, but Boulware saw a new devotion to such subterfuge in the wake of the *Elmore* case. White South Carolinians clearly were not willing to let African-Americans into the only election that mattered without a fight.

To prevent enforcement of the new rules for primary voting, the NAACP filed the case of ***Brown v. Baskin*** in July 1948, a month before the scheduled primary, after David Brown of Beaufort County was "purged" from the rolls of the county party. While technically Brown could still vote in the primary, he would have had to present his general election certificate and take the oath. He could not be a member of the Democratic Party. White South Carolinians could join the party and vote in the primary simply by taking the oath. Clearly, new and arbitrary conditions were being imposed to prevent African-Americans from voting easily.

Party membership was an important requisite for the exercise of power in the political universe of South Carolina. Membership in the Democratic Party "club" allowed one to vote for local and county party officers, attend the bi-annual party convention, and otherwise exert control over the machinery of the party. By being denied party membership, African-Americans were effectively excluded from all but the actual

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[41]Boulware memo, p. 5.

election. Even then, the existence of the oath made voting in the primary problematic for most African-Americans. Thus, despite court success, very little had changed.

Brown v. Baskin was more than a case of trying to get the right to vote in the primary elections. The case represented an attempt to desegregate the Democratic Party through the legal machinery of the nation. The hope was to make the Democratic Party South Carolina a tool of democracy rather than an instrument of white supremacy. The complaint is an appeal to basic American constitutional values embodied in the idea of the Rule of Law. The Rule of Law could make the South Carolina Democratic Party open to African-Americans on equal footing; white supremacy begged the question of how much equality there would be in reality.

The preliminary injunction hearing for *Brown v. Baskin* was held on 16 July 1948. At the same time, the Democratic national convention was being held, and southern white Democrats were walking out of the proceedings, led by South Carolina Governor J. Strom Thurmond. They were protesting the administration of Harry S Truman, whose integration of the armed forces, sponsorship of the panel that wrote *To Secure these Rights*, and growing vigor in supporting civil rights, was anathema to southern white Democrats. Thurmond stated at the time that "[a]ll the laws of Washington, and all the bayonets of the Army cannot force the negroes into [white southerners'] homes, their schools, their churches and their places of recreation and amusement."[42] White southerners were not yet ready to turn to the Republican party, and in fact Thurmond was elected

[42]Quoted in V.O. Key, Jr., *Southern Politics in State and Nation* (New York: Vintage Books, 1949), p. 333.

to the Senate in 1954 as a write-in Democrat, only declaring his allegiance to the Republican party in 1964 because of Democratic support for the Civil Rights Act of 1964.

Significantly, *Brown v. Baskin* led to several small-scale defections from the state Democratic Party. Party chairmen from several counties filed motions to be released from the lawsuit on the grounds that, contrary to the rules of the party, African-Americans were being enrolled as members in those counties. However, despite the defections of county operatives in Greenville, Pickens, Jasper, and Laurens counties, the vast majority of county committees remained loyal to the state convention's rules. (Only one of these counties—Jasper—was in the Lowcountry, where historically most black South Carolinians lived, and it was not dismissed from the case because the county's committee did not deal with the oath in its return to the rule to show cause.) The general response of most defendants was obviously to deny the allegations of Brown's attorneys and to contend that the ruling in *Elmore v. Rice* was being followed.

The defendants went so far as to assert that the requirement that black voters must present general election certificates to vote in the primary actually put them in "a position of advantage to that occupied by white democratic members." Whites were required to "enroll at particular places and within limited time," and had to pass literacy tests and be able to interpret the Constitution. As to the oath, the defense contended that it was

> in accordance with the political thinking of the majority of the people of South Carolina, and specifically, the members of the Democratic Party of South Carolina and is in accordance with an established principle of government of the State of South Carolina in reference to the separation of the races which is engrafted into the Constitution of the State of South Carolina and many of its laws, and is in accordance with recent decisions of this court recognizing the validity of such separation prescribed by state law in the educational institutions of the State of South Carolina.[43]

[43]Return to Rule to Show Cause, 16 July 1948, pp. 2, 4. *Brown v. Baskin*, C/A 1964.

The Constitution of the United States notwithstanding, South Carolina's leadership, embodied in the Democratic Party, asserted white supremacy as an "established principle of government" for the state.

The legal doctrine of *laches*, which holds that there should be a limited time for bringing civil suits, also figured into the defense's arguments. They contended that the delay on the part of Brown and his attorneys in bringing the case amounted to *laches*, and that the case should be dismissed on that basis. Marshall was unconcerned, however: he believed that he could prove that the real cause for the delay was the belief among many of South Carolina's African-Americans that "the good people in the party would prevail and that the rules would be changed." South Carolina African-Americans "wanted [the NAACP and its lawyers] to wait rather than to be accused of coming in from the outside and CRYSTALLIZING the opposition."[44]

The hearing held on 16 July began with the dismissals of county chairmen from Greenville, Pickens, and Laurens counties, because they were admitting African-Americans to the party and did not require them to swear to the oath. Judge Waring was "extremely gratif[ied]" that three counties at least had seen fit to follow the earlier decisions, but "quite ashamed" at the fact that only three of 46 county governing boards had "sense enough, . . . nerve enough, and . . . patriotism enough to make a true, fair, and just decision." Waring then thanked the attorney for the three counties "on behalf of the

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Waring had allowed segregation to continue in South Carolina's higher education, specifically mandating the establishment of a separate law school at the state's black South Carolina College. *Wrighten v. Board of Trustees* 72 F. Supp. 948 (1947).

[44]Memorandum to Messrs. Nabrit, Johnson and Ming from Marshall. 8 November 1948. NAACP papers, Library of Congress.

government—on behalf of the American people."[45] Waring then congratulated the committee of Jasper county for abandoning the state party by getting rid of enrollment books altogether, but kept them in the case to be sure that the county would be bound by whatever ruling was made regarding the oath.

Marshall called David Brown as his first witness, and he attested to the purging of his name from the party books in Beaufort prior to the 1948 primary. One of the issues in the case, Brown's alleged membership in the Progressive Democratic Party, came up early as Marshall tried to defuse the issue. Brown stated that he was not a member and had never voted for any candidate in the general election other than the nominee of the Democratic Party. The cross-examination established that Brown had participated in meetings of the Progressive Democrats, that he had voted for the Progressive candidate for U.S. Senate in 1944, and that he had given money to that party. Marshall's re-direct examination redeemed Brown, however. Marshall asked if the Democratic Party had ever asked Brown to participate in any of their meetings, and whether there was "any other Democratic organization that [he] could participate in other than the Progressive group?" The answer was no; when Marshall asked him why he went to enroll as a Democrat, Brown simply responded, "To be able to elect anyone I think is qualified towards running the city."[46]

Marshall's examination of W.P. Baskin echoed his earlier examination of Baskin in *Elmore v. Rice*. It explored the organization and functioning of the state Democratic Party, including the mechanism for the bi-annual changes in the party rules. No changes

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[45]Transcript of hearing for preliminary injunction, pp. 6-7. *Brown v. Baskin*, C/A 1964.

[46]Transcript of hearing for preliminary injunction, p. 19. *Brown v. Baskin*, C/A 1964.

in the rules for party membership had been made from 1946 to 1948: African-Americans were still not allowed to be members of the party, organized as clubs at the county level. Baskin admitted that, as Chairman of the state executive committee, he had changed some of the rules after the convention, striking out the word "understand" from the oath in regard to the principles of the party (so that the oath did not require the swearer to understand the principles, merely to believe in them and support them). Judge Waring and Baskin then argued over whether striking out the word was a substantive change in the oath—if it were, then the executive committee theoretically had the power to change the oath in other ways, such as removing the requirement to support segregation. Baskin consistently denied that removing the word "understand" from the oath meant anything more than a cosmetic change. In other words, Baskin argued that one could believe without understanding. Waring was skeptical.[47]

Essentially, however, the matter rested on whether the party was in compliance with the ruling in *Elmore v. Rice*, which entitled African-Americans to be enrolled on the party books. Judge Waring questioned Baskin at length regarding his role as chairman of the party in adopting a rule for 1948 that directly conflicted with the *Elmore* decision. Baskin claimed that the adoption of the rule was not unanimous, but Waring insisted, over the objections of Baskin's lawyer, Sidney S. Tison, on getting some response from Baskin on the question. Baskin claimed that he was overruled by the convention and then by the committee, and he had "never made a statement . . . that a Negro could not be enrolled, and I have never made a statement he should be purged. I have been requested

[47]Transcript of hearing for preliminary injunction, pp. 25-28. *Brown v. Baskin*, C/A 1964.

for statements along that line, but I have never made one. . . ."[48] Some African-Americans had even been enrolled and not subsequently purged in Baskin's own Lee county.

Again the issue of the Progressive Democratic Party came to the front. An important element of the defense's case held that the Progressive Party, which held meetings in African-American churches and attempted to seat delegates at the national Democratic convention in Philadelphia in 1948, was a separate entity from the Democratic Party. As such, its membership, consisting entirely of African-Americans, could be considered the same kind of private club as the (white) Democratic Party. Tison established Baskin's belief that the two parties were separate entities, but Marshall undermined the entire strain of argument by grilling Baskin on whether African-Americans had ever been invited to county Democratic meetings. He asked Baskin if it were true that members of the Progressive party attempted to join the Democratic Party after the ruling in *Elmore v. Rice*. In the only example Baskin could recall, Progressives were admitted to meetings in Dillon county, but had been excluded from the state convention because they were technically not allowed to be members of the Democratic Party—because they were black.[49] According to Boulware, however, the Dillon African-Americans who were elected to the state convention were ruled unqualified on the basis of race by Baskin himself.

Following all the testimony, Judge Waring asked Tison for an explanation of the mindset existing behind the party rule, but was disappointed that no witness stepped forward to explain it. Tison merely asked Waring to pass on matters of Brown's

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[48]Transcript of hearing for preliminary injunction, p. 32. *Brown v. Baskin*, C/A 1964.

[49]Transcript of hearing for preliminary injunction, pp. 39-42. *Brown v. Baskin*, C/A 1964.

membership in the Progressive party and the oath. Waring lectured Tison at length over the apparent attempt by the party bosses to "evade the spirit of the opinion [in *Elmore v. Rice*]." Waring complained that the leaders of the party merely followed the order in *Elmore*, rather than paying heed to the decision that accompanied it. "I think," he said, "they should have considered themselves bound by the opinion, not as a matter of law but as a matter of common sense, to know what the courts would do in the future."

> The leaders of the party, or a majority of the leaders apparently, choose to follow the order and not look in to the opinion, the rationale or the spirit. This couldn't have been ignorance. If it was ignorance, it was ignorance so crass as to seem unbelievable in a body of several hundred men who are practiced politicians and have been running the Democratic party in this state for many years. . . . It couldn't have been just immature, juvenile smartness, because I couldn't accuse them of that. And, therefore, it must have been deliberate. . . .

Waring granted the injunction and ordered the enrollment books to remain open. He declared that his opinion would "say to the people of South Carolina that the time has come when racial discrimination in political affairs has got to stop. . . . I say thank God for Pickens and Laurens and Greenville and Jasper [counties], some men that put their feet on the ground and stood up in public and said, 'We are Americans, we are going to obey the law.' Now the rest of the state is going to obey the law." He then made it clear that any violation of his order or the "letter and spirit" of the opinion would be considered contempt of court.[50]

Waring's injunction order, issued on 19 July, took note that "there have been no material changes in either the conduct of the Democratic Party of South Carolina or its effectiveness in controlling the choice of federal and state officers" from the time of

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[50]Transcript of hearing for preliminary injunction, pp. 52-55. *Brown v. Baskin*, C/A 1964.

Elmore v. Rice. Waring explicitly commanded the defendants to enroll African-Americans as members of the local clubs, and prevented them from requiring either the presentation of election certificates or the swearing of any oath other than that the voter will support the primary winners in the general election. Finally, in keeping with the original injunction, Waring ordered the enrollment books opened until the end of July 1948.[51]

The case was not yet over, of course. Only a preliminary injunction had been won by Brown's lawyers. The defendants' answer, filed on 29 July, reiterated several points that had been dealt with in the earlier hearing. Brown's alleged membership in the Progressive Democratic Party was an important element in the defense. The Progressives were "not in sympathy with the fundamental principles and governmental objectives of the Democratic Party of South Carolina," such as opposition to the FEPC law, "and other Federal laws usurping or encroaching upon the sovereignty of the States of the Union, . . . the principle of States Rights, [and] . . . the principle of the social and educational separation of the races." In short, the Progressive Party did not support white supremacy. The members of the Democratic Party, argued the defense, had every right to limit membership to "those who are in sympathy with its principles and the purpose of fostering and effectuating them." Further, the defense argued that "the Democratic Party and the Democratic Primary do not become the property of every person in the State simply because the members of that Party have been the only ones who have had the character, ability, vigor and community of interests to associate themselves together as

[51]Order, pp. 3-8. Quotation on p. 3. *Brown v. Baskin*, C/A 1964.

citizens. . . ."[52] Clearly, the "community of interests" among many of South Carolina's white population worked to keep most of South Carolina's black population out of politics.

Desperately, the defense tried to force Waring to recuse himself on grounds of bias in favor of the plaintiff. On 20 October, defense lawyers filed an affidavit by John Stansfield, one of the defendants, alleging personal bias by the judge on the basis of statements made during the hearing for the injunction (some of which are quoted above) and a newspaper report of a Waring speech at the black National Lawyers Guild. At that event, Waring had said, "The problem is to change the feeling, the sentiment, the creed, of the great body of white people of the South that a Negro is not an American citizen."[53]

Ultimately, however, Waring remained on the case. He said in a hearing on the matter held on 22 October, ". . . the address [to the Lawyers Guild] was to the effect that I was in favor of enforcing the law. I assume that if I had made a speech that I believed in enforcing the law against murder, I would have to disqualify myself from trying a murder case on this theory. . . . There is nothing to the motion." On 26 November, Waring issued his final order in the case, reiterating his earlier preliminary injunction, preventing the defendants from requiring an oath, keeping African-Americans off the enrollment books, or otherwise having different requirements for voting based on race or religion.[54] Once the Circuit Court affirmed the decision in 1949, the white primary came to an official end.

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[52]Defendants' Answer, p. 2. *Brown v. Baskin*, C/A 1964.

[53]Affidavit of John E. Stansfield, 20 October 1948. *Brown v. Baskin*, C/A 1964.

[54]Hearing on Motions, (filed) 26 October, 1948; Findings of Fact, Conclusions of Law, and Order, 26 November 1948. *Brown v. Baskin*, C/A 1964.

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Although African-Americans did begin to vote in the aftermath of the *Elmore* and *Brown* decisions, by August 1948 only about 35,000 African-Americans voted in the state primary. In 1950 the state legislature went back to its job of regulating primary elections, but did not act to protect the rights of black voters. As a result, fraud, physical and economic intimidation, and discrimination in registration continued. In areas of the state that were predominantly black, voting by African-Americans was very limited.[55]

Winning the white primary cases in Texas and South Carolina did not, unfortunately, pave the way for masses of African Americans to vote in primaries or elections. Southern states turned to other means of restricting the African American vote, such as the Mississippi plan, which managed to disfranchise most black voters and leave most white voters eligible, while ostensibly treating both equally in testing qualifications for voting. While most other Southern states refused to abandon legislative control over primaries, they did manage to develop strategies to prevent black participation. Alabamans by a narrow margin passed the so-called "Boswell amendment," which required a literacy test or property qualification for voting. In Georgia, the legislature attempted to resort to a South Carolina plan, but the plan failed when Herman Talmadge lost a legal challenge for the governorship to Melvin Thompson, who vetoed the legislation.[56]

After the passage of the 1957 Civil Rights Act, voting rights were no longer a target for NAACP litigation. The cases had been difficult all along, and southern states were adept at avoiding massive influxes of black voters. After passage of the 1957 act,

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[55]Idus A. Newby, *Black Carolinians*, pp. 286-287.

[56]Key, *Southern Politics*, pp. 632-643.

the Justice Department could directly involve itself in the protection of voting rights by suing to prevent the misuse of registration laws or investigating voting practices. The act also established the Commission on Civil Rights, which could investigate and publicize violations of civil rights. However, even after the 1957 law, there were only about 60,000 registered black voters prior to the 1958 election. Numbers more than doubled between 1958 and 1964; in 1960 black voters helped John F. Kennedy carry South Carolina, and in 1966 they helped to elect Ernest F. Hollings to the U.S. Senate. By 1970 there were 213,000 registered black voters in South Carolina, but that number was still less than a quarter of the state's voters.[57] Following passage of the 1965 Voting Rights Act, litigation ceased to be a useful, or much-used, strategy in achieving voting rights at the grass-roots level.

Idus Newby notes that the white primary struggle was an "instructive exercise for black Carolinians." They possessed "a consuming faith that the American system could be made to realize its professed ideals." The "rhetoric of American democracy" embodied in appeals to the Declaration of Independence, the Bill of Rights "and other statements of national ideals" enabled African-Americans to "attack white supremacy at vulnerable points without having to spell out their ultimate goals." Conversely, white South Carolinians also "had faith in the American system, which they equated with white supremacy."[58] They could conclude that the system of white supremacy had not been overturned by Emancipation or the Reconstruction Amendments, as interpretations such as *Plessy v. Ferguson* indicated. Indeed white South Carolinians could harken back to

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[57]Newby, *Black Carolinians*, p. 291.

[58]Newby, *Black Carolinians*, p. 287-288.

these same documents and point out that their framers were ardent in their support of white supremacy. Thus, despite more recent Supreme Court examinations of the Fourteenth and Fifteenth Amendments, Southerners remained comfortable with their late-nineteenth century versions of reality.

The legal fight over the white primary in South Carolina supports much of what Newby argued in 1973. However, where Newby saw a "pragmatic" approach by African-Americans rather than an ideological one, one could easily see the opposite. Indeed, the black "faith in the American system" contains an implicit ideological faith in the Rule of Law. After all, the United States was a nation of laws, not of men. White South Carolinians, on the other hand, had always been willing to flaunt a federal government that had imposed "Negro Rule" during Reconstruction. White supremacy remained the most important element of their political and social creed. It was one they could claim as an authentic American creed. The American system in which they had faith was decidedly Southern in its mindset.

CHAPTER TWO

"I HAVE NEVER BEEN ANYTHING ELSE": BLACK TEACHERS' CASES, 1944-1965

Smith v. Allwright signalled to southern whites that overtly race-based discrimination was beginning to lose its legal legitimacy. They began therefore to remove many of the identifiable markers of racial inequality. The actions of South Carolina's legislature to remove all references to the Democratic Party from the state's code of laws were but one example. The period from 1944 to 1965 was a period of intense transition in South Carolina as throughout the South. Black teachers like Gloria Rackley, an activist in Orangeburg who was fired from her position in 1964, embodied much of the civil rights movement. As leaders, they were as important and significant as the black ministry. Yet, they were more vulnerable than other black professionals when the ire of whites was aroused. In the 1940s, black teachers in various states, supported by NAACP attorneys, sued to equalize their salaries. By the early 1960s, teachers like Rackley were leading protests and boycotts and risking not only their jobs but also their lives in the cause of justice. When Rackley was fired from her teaching position in Orangeburg and sued to be reinstated, however, she had to prove that her firing was racially motivated. On the stand at the 1965 trial, she stated with characteristic directness:

> I don't know that anything has been said about color other than it was my race certainly that relegated me to the school in which I taught, to the particular type of pupil I taught, made me, as no one else, particularly attuned and sensitive to their problems and sensitive to the community in which I lived, that denied these students the future that I felt should be theirs. Now this was because I was a Negro, I suppose. I have never been anything else, so I don't know.[1]

[1]Transcript of Trial, Testimony of Gloria Rackley Fraser, 2 September 1965, p. 81.

Like Rackley, other black teachers who brought cases into the federal courts had never been anything else. They too believed that the injustices done to them in their professions were done "because [they were] Negro."

As part of the plan initiated by the NAACP in its challenge to Jim Crow, one of the main thrusts of the legal attack on segregation was the equalization of teachers' salaries. The large number of potential clients appealed to the LDF lawyers, and the cases were winnable, at least at first. Black teachers throughout the South were grossly underpaid relative to their white counterparts. Estimates in 1941 called for $26 million a year to equalize salaries in the region, plus an additional $9 million to bring teacher-student ratios in line. Early cases in North Carolina and Maryland met with mixed success. In North Carolina, blacks attempted to bring a case in 1933, but divisions in the black community weakened support for the case, and it went nowhere. Ultimately, North Carolina began to equalize salaries without having to deal with lawsuits in 1939. In Maryland, the legal recourse was more successful. The state began equalization efforts in July 1937 following the settlement of a case filed in October 1936. Not all was well in Maryland, however, as cases in Prince Georges and Anne Arundel counties dragged on. Ultimately, the Anne Arundel case provided Thurgood Marshall and the NAACP with the precedents they needed to carry the salary cases to other states. Cases were brought over the next few years throughout the South. However, as Southern states turned to merit-based salary systems, winning cases proved more difficult. By the mid-1940s, more than

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Gloria B. Rackley v. School District Number 5, Orangeburg County, South Carolina, et al., Civil Action Number 8458, Eastern District of South Carolina, Orangeburg Division, Record Group 21, Records of the District Courts of the United States, National Archives-Southeast Region, East Point, Georgia.

thirty cases were active in twelve states, including South Carolina. Some states equalized without litigation, but black teachers' salaries only rose to about 65 percent of whites' salaries, up from around 55 percent. Since the NAACP's resources were limited, only larger, more urban school districts came under their attack, leaving more rural districts free to continue discrimination.[2]

Teachers' salaries became an issue in South Carolina in 1938, when Thurgood Marshall began corresponding with the Palmetto State Teachers' Association. The State Conference of the NAACP, organized from the eight local branches of the state in 1939, became involved as well. State Conference meetings were scheduled in June so teachers could attend. Osceola McKaine, associate editor of *The Lighthouse and Informer* and a leader of the Sumter branch of the NAACP, began to put out feelers to build a case in 1940. He also attempted to raise money to finance a suit. The State Conference, led by James M. Hinton, agreed to offer its support, but refused financial assistance. Hinton thought that, since teachers were the best-paid black workers in the state, they should finance their own suit. Marshall, at a meeting of the State Conference Board of Directors, reaffirmed that NAACP money could not be used to support the case, but encouraged the group to scour support for a suit among the state's black teachers. Fund-raising continued, but it was not until three years later that a suitable plaintiff was found. However, she was replaced within a few months. When Viola Duvall agreed to be the plaintiff in October, the case went ahead. Ultimately, Duvall's case led to a consent decree in 1944 in Judge

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[2]Mark V. Tushnet, *Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936-1961*. New York: Oxford University Press, 1994, pp. 117-121; Tushnet, *The NAACP's Legal Strategy against Segregated Education, 1925-1950* (Chapel Hill: University of North Carolina Press, 1987), pp. 58-103.

Waring's court. Charleston schools agreed to equalize teacher pay over a three-year period. Following the consent decree in the Charleston case, the state legislature established a complex administrative system for challenging pay disparities, placing the county school board and the state board of education between the teacher and the first layer of state courts. Later that year in Columbia, Albert N. Thompson petitioned the county school board to enforce its own policy of equal pay for all teachers in the system. In February 1941, the school board had adopted a policy abolishing existing salary schedules and establishing "a uniform minimum salary for all teachers regardless of race" as a result of legislation resulting from the uproar that followed the consent decree. Because of this new policy, the school board denied Thompson's petition. All teachers, according to the board's decision, had had since 1941 "equal opportunity to advance both in pay and in position. Such advancement [was] based primarily on demonstrated teaching ability and efficiency and also upon worth to his or her superiors—not necessarily on length of service." State officials referred to the policy as the "worth-minimum plan."[3]

The worth-minimum plan had raised the salaries of black teachers in Columbia, according to the testimony of District One Superintendent A.C. Flora. The minimum salary had risen by 1944 to $900 per year. However, the salary tables for the fall of 1944 indicates that most white teachers at Wardlaw Junior High received $1089 for the academic year, while black teachers at Booker Washington High School were still being paid below the state minimum of $900. Most were to receive $882 for the year, while

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[3]Columbia *State*, 7 February 1945, p. 6. Decision of School Board, p. 2, *Thompson v. Gibbes*, C/A 1273; Tushnet, *Legal Strategy*, p. 92; Tinsley E. Yarbrough, *A Passion for Justice*, pp. 43-44.

some received as little as $623.25. None was paid more than $882 for the year, making that amount the effective maximum pay for black teachers in Columbia's School District One. A list of new teachers submitted by the school district in the case reveals that the average salary in 1944-45 for new black teachers in Columbia was $1026.25, while the average salary for new white teachers was $1425.85. The white teachers, on average, had more experience, but nearly all of the teachers, black and white, came to their jobs with college degrees. Figures for earlier years, beginning in 1941, reveal similar disparities in average salaries.[4]

The school board's decision regarding Thompson's petition admitted that salary disparities still existed. The board maintained, however, that any remaining disparity was due simply to differences in qualifications, rather than race. The school board's decision came down to the basic issue of whether the present disparities represented "a direct reflection of the relative value of the work and accomplishment of the white and Negro teachers. If it is not, the remaining differential is illegally discriminatory under some Court decisions. If it is, the reverse is equally true—the disparity still exists but is based on worth and not on race and, as such, is not illegal." The school board's position was that it was not a matter of equal pay for equal work: it was a matter of "performing essentially the same duties *with equal proficiency* to that of the white teachers." The defense did not believe that black teachers as a rule performed their duties with the same

[4]Plaintiff's exhibit 3, Facts About Schools and Teachers; Defense exhibits A-D. *Thompson v. Gibbes*, C/A 1273.

proficiency as white teachers. The school board supported that decision and on 18 November 1944 denied Thompson's petition.[5]

Thompson, supported by the state NAACP, took his case from the school board directly to federal court, despite the state law requiring salary appeals to be taken through intervening levels.[6] The complaint sought to avoid the law requiring appeals to the state Superintendent of Education and other state venues by arguing that "any other remedy to which the plaintiff . . . could be remitted would be attended by such uncertainties and delays as to deny substantial relief . . . and occasion damage, vexation, and inconvenience not only to the plaintiff . . . but to the defendants as governmental agencies." Since local whites controlled all other avenues of appeal, any effort to petition those agencies would have been a waste of time and energy, a fact that was lost on neither side in the matter to be sure.[7]

The complaint, filed on 6 February 1945 by Thompson's attorney S. Morgan and joined by Thurgood Marshall, alleged that white teachers received higher minimum and maximum salaries, that intermediate salaries were higher for white teachers, and that salary increases for white teachers were consistently higher than those offered black teachers. The complaint avoided mentioning the efficiency or proficiency of black teachers, instead concentrating on qualifications and experience. The difference, due to the "policy, custom and usage of paying Negro teachers and principals in School District

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[5]Decision of School Board, p. 4. Emphasis in original. *Thompson v. Gibbes*, C/A 1273.

[6]Columbia *State*, 7 February 1945, p. 6; see Yarbrough, p. 44.

[7]Complaint, p. 10. *Thompson v. Gibbes*, C/A 1273.

Number 1 less salary than that paid white teachers and principals of equivalent qualifications and experience," was due solely to race.[8]

The legal issues laid out in the complaint depended on the due process and equal protection clauses of the Fourteenth Amendments. Obviously, the violation of due process and equal protection could be attached to the disparity in salaries, and the enforcement of unequal pay by state agents brought the controversy under color of state sanction. An additional Fourteenth Amendment argument alleged that, since Thompson paid taxes in South Carolina, and since teachers' salaries were paid exclusively from state taxes, Thompson suffered a further violation of his equal protection privilege. Finally, the complaint asked the court to issue an injunction to prevent the defendants from paying black teachers and principals "a less salary than they pay any white teacher or principal employed by them with equal qualifications, certification, experience and filling an equivalent position."[9]

The defense, predictably, depended on the state law dictating appeals to render the matter *res judicata*.[10] If the matter had been closed by the School Board, and no appeal taken in accord with state law, no controversy could exist. More significantly, the defense noted that a new system of certification and recertification, along with a race-neutral salary scale, was scheduled to be put into effect on 1 July 1945. New teachers with a

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[8]Complaint, pp. 7-8. *Thompson v. Gibbes*, C/A 1273.

[9]Complaint, p. 11. *Thompson v. Gibbes*, C/A 1273.

[10]Literally, a matter adjudged; in this case, the doctrine would have upheld the decision of the School Board as final arbiter of the case. The state statute that decreed the path of appeal also would have prevented Thompson from seeking a remedy in federal court, at least so early in the proceedings.

bachelor's degree would receive $105 per month at the highest grade level, to be determined by one's score on the National Teacher's Exam. A teacher with 14 years experience and a master's degree would receive $185 per month.

Marshall and Morgan responded to the defense argument for *res judicata* with a detailed brief outlining the faulty reasoning of the defense. On the two major points, that the case was *res judicata* and that the state court alternatives had not been exhausted, Morgan and Marshall argued that the opinion of the School Board was inadequate to define the matter as concluded and that state law could not restrict access to the federal courts where a constitutional matter was at stake. The future also did not figure into the case, they argued. Future acts of the legislature, the school board, or any other agency of the state could not be a determining factor in the existence of present discrimination. Morgan and Marshall wanted the court to address the issue of the present, without regard to the proposed future teacher certification and recertification plans.[11]

In April, the dispute over the facts of the case began, as both sides sought to force the other to admit various points. Morgan and Marshall sought for admissions that from 1941 to the present new black teachers had been paid the minimum salaries for their positions, while "all white teachers new to the system [were paid] higher than the minimum set out in the salary schedule existing at the time the appointments were made." They also sought to elicit an admission that black teachers with the same training, certification, and experience as white teachers received less pay. The defense, predictably, refused to admit any of these points, while attempting to elicit admissions from the

[11]Pre-trial memorandum for respondents; Memorandum Brief on Behalf of Plaintiff. *Thompson v. Gibbes*, C/A 1273.

plaintiff that would be similarly damaging to that side. Among the points that the defense sought to make was that District One "paid salaries to teachers and principals in excess of the minimum based on individual qualifications, capacities and abilities." Interestingly, the defense elaborated upon the teacher recertification plan by noting that the qualifications for a new teacher included "the evaluation of personal and professional qualities . . . [which would] be determined by the College or Institution from which the new teacher or principal graduates or leaves." Clearly, the way had been paved to continue discriminating against black teachers by holding their college ties against them. Since most black teachers at this time graduated from predominantly black colleges, the alleged inferiority of those institutions could be used to prevent black teachers from being paid the higher-than-minimum salaries. Ultimately, however, the defense promised that the salary scale for the upcoming academic year would be based on experience and that all teachers would be paid equivalently.[12]

On 26 May Judge Waring gave Thompson the injunction he had requested. "Subsequent to [1941], the Board has made a study and has alleviated the condition to a certain extent, but there is still a disparity between white and negro teachers of equal education and experience." As to the future, Waring noted that despite the Board's assurances that the disparities would be remedied, the new state law only applied to money coming from the state for teachers' pay. It did not apply to the county portion. Therefore, one could surmise that the county could continue its discrimination while still operating well within state law. Waring enjoined the Columbia District One school

[12]Request for Admission of Facts by Defendants, 11 April 1945, pp. 2, 5. *Thompson v. Gibbes*, C/A 1273.

commissioners from paying black teachers and principals "less than the salary paid white teachers and/or principals of the same qualifications and experience and performing substantially the same duties, on account of race or color." Waring left open the door, however, by concluding that

> this court is not determining what particular amounts of salaries must be paid in said public school system either to white or negro teachers individually; nor are defendants in any way to be prohibited by this judgment from exercising their judgment as to the respective amounts to be paid to individual teachers based on their individual qualifications, capacities, and abilities; but they are enjoined only from discrimination in salaries on account of race or color.

Waring's unintentional invitation to develop new means of discriminating in teacher salaries allowed state officials to tinker with teacher certification plans. New qualification requirements led to new difficulties for black teachers, and a cheating controversy concerning the National Teachers Examination (NTE).[13]

As part of the recertification plan, the state required teachers to take the NTE, the results of which would lead to a four-tiered salary scale based on performance on the test. Those in the top 25 percent would get an A, those in the middle 50 percent would get a B, those in the next 15 percent would get a C, and the bottom 10 percent would get a D. Pre-testing indicated that 90 percent of white teachers and only 27 percent of black teachers would receive the higher two grades on the test.[14] In February 1949, approximately 5,000 people took the National Teachers' Exam in South Carolina, of whom around 2,400 were black. Around 600 black teachers who took the test were subsequently accused of

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[13]Findings of Fact and Conclusions of Law, pp. 2-3; Order, p. 2. *Thompson v. Gibbes*, C/A 1273.

[14]Tushnet, *Making Civil Rights Law*, p. 121. See also Tushnet, *Legal Strategy*, pp. 92-93.

cheating. The accusations were based on reports from several Columbia area schools, where a number of room examiners had confiscated materials that had allegedly been used for cheating. These materials were used to make a composite, or master, key, which was used by the Educational Testing Service in Princeton to compare to the South Carolina exams, yielding the figure of 801 tests that "compared to a substantial extent" with the master key that had been compiled from the various keys that had been confiscated.[15]

Among those who were accused of cheating was Pearl Green Shirer, a teacher from Charleston with twelve years experience. Shirer had not been caught with the answers, but the investigation by the Educational Testing Service had revealed her to be among the 600 or so teachers whose answers corresponded to the master fraudulent key that had been assembled. Shirer was summoned to a hearing before an investigating committee of the state Board of Education, where evidence of the cheating was presented. While no evidence beyond the correlation of Shirer's answers to the fraudulent key was offered, the circumstantial evidence was apparently enough to justify the board in revoking her teacher's license. As a result of that revocation, Shirer filed a complaint against Jesse T. Anderson, the state superintendent of education, along with the rest of the state education board and Charleston superintendent G. Creighton Frampton. She alleged that, since the decision of the two-member investigating committee amounted to a finding

[15]Hearing before the State Board of Education, 24 October 1949. The figure of 801 comes from the defense answer, p. 7. The answer also puts the number of keys discovered at various testing sites at seven. *Shirer v. Anderson*, Civil Action Number 2392, Eastern District of South Carolina, Charleston Division, Record Group 21, Records of the District Courts of the United States, National Archives-Southeast Region, East Point, Georgia.

of fact from which there was no appeal, she had been denied due process and equal protection.[16]

A key allegation of Shirer's complaint included the charge that many of the black teachers who had been accused of cheating had been offered "short term 'Permits' at smaller salaries." This amounted, the complaint alleged, to "a subtle form of discrimination against Plaintiff and all other Teachers in her class." Shirer contended that her "conviction" had been based on circumstantial evidence, and that such evidence was "insufficient and unsafe upon which to deprive Plaintiff and others of the means of gathering the fruits of their labors and blast their future." Shirer further alleged that she had been offered a lower-salary permit in exchange for an admission of wrongdoing and information on who had given her the fraudulent key. Since Shirer knew nothing of the cheating, she alleged, there could be no way for her to join the *quid pro quo*. Finally, Shirer appealed to *Thompson v. Gibbes* as the controlling precedent, arguing that the defendants had violated the letter and spirit of the decision in that case in discharging Shirer and the other teachers.[17]

The defense countered by alleging that Shirer's dismissal came only after a full hearing, and further that 188 individuals (of those the Board of Education had had time to interview in the aftermath of the scandal) had confessed to cheating on the test. Additionally, 18 of the accused teachers admitted cheating during the Rule to Show Cause hearings held by the Board of Education the previous year; 59 teachers subsequently admitted their cheating after having had their teaching certificates revoked. Two

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[16]Complaint, p. 8. *Shirer v. Anderson*, C/A 2392.

[17]Complaint, p. 8. *Shirer v. Anderson*, C/A 2392.

hundred thirty-two of the accused teachers continued to deny their guilt up to the date the answer was filed. An additional 76 who had taken the test while still college students admitted cheating. Finally, 32 individuals admitted preparing or disseminating the fraudulent keys. The evidence against Pearl Shirer, while circumstantial at best, was nevertheless powerful.

The trial for Pearl Shirer's request for an injunction was held on 23 January 1950 before a three-judge panel of Circuit Judge John J. Parker and District Judges Waring and George Bell Timmerman. The hearing concerned the constitutionality of the state statute that allowed the state Board of Education to terminate teachers who had acted immorally or unprofessionally, without any specific right of appeal. The state contended that the lack of a specific stipulation of the right of appeal did not necessarily mean that all legal recourses had been exhausted with the Board of Education hearing. In fact, one teacher had been granted a writ of certiorari from the state courts. That case, *Pettiford v. State Board of Education*, had been decided by the Richland County Circuit Court and was now pending appeal in the State Supreme Court.[18]

Shirer testified that upon receiving letters asking her to appear before the State Department of Education, she went to Columbia to confer with Ellison D. Smith, the Chair of the state recertification program. Smith allegedly asked Shirer to admit cheating, in return for which he would let her continue teaching with a permit, which meant a greatly reduced salary. If she would not admit cheating, Smith told her, she would not be allowed to teach in any city or state for the rest of her life. On cross examination, J.

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[18]Testimony at Trial, 23 January 1950, pp. 3-4. *Shirer v. Anderson*, C/A 2392. *Pettiford v. State Board of Education*, 62 S.E. 2d 780 (Supreme Court of South Carolina 1950).

Means McFadden, attorney for the state, asked Shirer why she wanted the results of the 1949 test thrown out and the results of her 1947 test counted. Shirer had previously taken the test twice, scoring first a D and subsequently a C. Her score on the 1949 test was a B. When asked the question, Shirer responded, "I would rather have that than nothing at all."[19]

Shirer's attorneys then called John A. McHugh, a teacher at Booker Washington High School who had voluntarily appeared before the State Board of Education and admitted having a fraudulent key to the NTE. While he had never received a temporary permit, McHugh testified that his salary had been reduced as a result of his admission of guilt. However, the State Board had never called McHugh to testify; his reduced salary was the product of the local school board's efforts to anticipate later action by the State Board of Education. McHugh did testify as to the origin of the fraudulent key, however. He had been approached before the examination and offered the key for "a certain fee." Later, several teachers met at his house and copied the key, and McHugh was to pay part of the fee for the correct answers.[20] At no time did McHugh implicate Shirer.

Shirer then brought four teachers before the court. In an effort to show that the accusations of cheating were little more than an effort to lower salaries of black teachers, her attorneys questioned them on the specifics of their present employment. One, Daisy Louise Greenlee, consistently denied ever using a key in the examination, up to and including the hearing before the State Board of Education. Greenlee claimed that Smith

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[19]Trial Transcript, Testimony of Pearl Green Shirer. pp. 9-10, 16. *Shirer v. Anderson*, C/A 2392.

[20]Trial transcript, p. 21, Testimony of John A. McHugh. *Shirer v. Anderson*, C/A 2392.

had offered her promises similar to those that Shirer alleged. "He said if I would tell him who was selling the examination key and admit it, he would help me, but if I didn't admit it I would be out of a job because my certificate would be revoked." Greenlee denied using the key in the meeting with Smith and subsequently was called before the State Board, which revoked her teaching certificate on 18 November 1949. Samuel Williams and McHugh both had admitted using the key and continued to work; Williams, in fact, had not even suffered a reduction in salary. His superintendent, G.C. Frampton, had advised him to write a letter asking to remain in his job as principal of the Baptist Hill High School until the matter was cleared up, and he had done so. This, apparently, was enough to keep Williams employed, at least for the time being.[21]

When the defense put on its case, Ellison Smith denied ever having offered anyone a permit to teach in exchange for an admission of guilt. In fact, Smith argued, neither he nor the State Board could promise a permit without a request from the local school board. Every permit that had been issued, including those for teachers who had testified for the plaintiff, was issued at the request of the local school board.[22]

The unanimous decision in the case held that Shirer had "answered the examination questions substantially as did the fraudulent key in 6 of 10 sections of the examination." "The evidence before [them] amply sustain[ed] the action of the Board in her case." There was, in short, no meaningful constitutional issue in the case, and Shirer's fate was left in the hands of the school board.[23] What is important in the case is not the

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[21]Trial transcript, pp. 27, 29-33. *Shirer v. Anderson*, C/A 2392.

[22]Trial Transcript, p. 37. *Shirer v. Anderson*, C/A 2392.

[23]*Shirer v. Anderson*, 88 F. Supp. 858, p. 861.

deep constitutional issues (for there were none), but the fact that Pearl Green Shirer fought back when her job had been taken from her. She perceived an injustice, and may very well have been innocent of cheating on the teachers' exam, and she challenged the white establishment in an ultimately futile attempt to win back her job. Such a challenge would have been unheard of just a decade earlier.

One of the most important elements in the legal struggle over civil rights in the South was the retaliation against members of the NAACP for their involvement in the freedom struggle. In Alabama, for example, the organization was virtually shut down from 1956 to 1964. Using a variety of state laws requiring organizations doing business in their states to register, Arkansas, Louisiana, and Alabama all tried to force the NAACP to pay taxes, to register as a corporation, and most importantly, to provide access to membership lists. Alabama's efforts to thwart the NAACP were the most successful in the South, requiring four trips to the Supreme Court between 1956 and 1964. In South Carolina, however, less-successful attempts to undermine the organization nevertheless had a deleterious effect on the organization in the state.[24]

On 8 February 1956 state Representative Charles G. Garrett of Greenville county introduced a bill that, if passed, would bar members of the NAACP from holding any state, county, or city job in the state. The Columbia *State* printed the brief bill in its entirety. Garrett's measure inflamed the issues from the outset, levelling several charges against the organization:

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[24]For an extensive contemporary analysis of anti-NAACP laws throughout the South, see Walter F. Murphy, "The South Counterattacks: The Anti-NAACP Laws," *The Western Political Quarterly* 12:2 (June 1959): 371-390. For Alabama, see Tushnet, *Making Civil Rights Law*, pp. 283-289.

> . . . [T]he National Association for the Advancement of Colored People has, through its program and leaders in the State of South Carolina, disturbed the peace and tranquility which has long existed between the White and Negro races, and has threatened the progress and increased understanding between Negroes and Whites; and
> . . . the [NAACP] has encouraged and agitated the members of the Negro race in the belief that their children were not receiving educational opportunities equal to those accorded White children, and has urged the members of the Negro race to exert every effort to break down all racial barriers existing between the two races in schools, public transportation facilities and society in general, and
> . . . the [NAACP] has made a strenuous effort to imbue the members of the Negro race with the belief that they are the subject of economic and social strangulation which will forever bar Negroes from improving their station in life and raising their standard of living to that enjoyed by the White race, and
> . . . the General Assembly believes that in view of the known teachings of the [NAACP] and the constant pressure exerted on its members contrary to the principles upon which the economic and social life of our State rests, and that the [NAACP] is so insidious in its propaganda and the fostering of those ideas designed to produce a constant state of turmoil between the race, that membership in such an organization is wholly incompatible with the peace, tranquility and progress that all citizens have a right to enjoy.[25]

Two weeks later, the state House sent the bill to the state Senate, and both houses jointly resolved to petition the Attorney General of the United States to put the NAACP on the list of subversive organizations. The joint resolution cited 53 members of the NAACP who had come to the attention of the House Committee on Un-American Activities. Allegations of communism, of course, were not new for the NAACP. State representative Hart of Union, the author of the joint resolution, argued that the only reason the Attorney General had not already placed the NAACP on the subversive list was "political expediency," but Roy Wilkins, the national executive secretary of the organization, countered those accusations with appeals to history. The NAACP, he said, had a record of "constitutional procedure," and any action to deny it was "designed to

[25]Columbia *State*, 9 February 1956 p. 1-D.

confuse the people on the racial issue facing the South. That issue is whether the politicians of [the South] will recognize the authority of the U.S. government or join the communists in efforts to subvert our constitutional system."[26]

The General Assembly passed the law in March, and the NAACP lost little time in preparing to file a lawsuit to prevent enforcement of the law, and to have it declared unconstitutional. James M. Hinton, the state NAACP president since 1941, confidently asserted that 1944—when Judge Waring overturned the state's continued efforts to maintain the white primary—would be repeated in this case.[27] Indeed, the NAACP did not have to wait long for the case they needed. In the fall of 1956, officials fired 24 teachers at Elloree Training School in Orangeburg county when they refused to sign statements concerning their membership (or non-membership) in the NAACP. Eighteen of those teachers brought suit in federal court, represented by Columbia lawyer Lincoln C. Jenkins and Thurgood Marshall.

The teachers' targets were M.G. Austin, the District Superintendent of Orangeburg county District 7; W.B. Bookhardt, the Chairman of the State Board of Education; and the members of the District Board of Trustees. Austin had distributed to one of the plaintiffs, Charles E. Davis, application forms that the teachers had to fill out before their employment could continue. The application asked, "Do you belong to the NAACP?" "Does any member of your immediate family belong to the NAACP?" "Do you support the NAACP in any way (money or attendance at meetings)?" "Do you favor integration of races in school?" as well as other questions along the same line. When confronted with

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[26]Columbia *State*, 23 February 1956, p. 3-A.

[27]Columbia *State*, 22 March 1956, p. 8-B.

the questionnaires, the plaintiffs refused to fill them out, "for the reason that these questions inquired concerning matters constitutionally beyond the competence of the state to inquire into and infringed upon their rights as a citizen of the United States . . . to freely associate with others for the purpose of securing rights conferred by the Constitution. . . ."[28]

A subsequent interview on 15 May between Austin and 12 of the plaintiffs led to the same results, and he immediately required them to sign a resignation form. Other plaintiffs answered some of the questions when confronted by Austin, but continued to refuse to answer the most inflammatory questions, which in addition to the questions quoted above, included the following:

> Are you satisfied with your work and the schools as they are now maintained? Yes _____ No_____ If yes, comment on back
> Do you feel that you would be happy in an integrated school system, knowing that parents and students do not favor this system? Yes_____ No_____ (Check one and give reason for answer).
> Do you feel that an integrated school system would better fit the colored race in their life's work? Yes_____ No_____ (Check one and give reason for answer).
> Do you think that you are qualified to teach an integrated class in a satisfactory manner? Yes_____ No_____ (Check one and give reason for answer).
> Do you feel that the parents of your school know that no public schools will be operated if they are integrated? Yes_____ No_____
> Do you believe in the aims of the NAACP?
> If you should join the NAACP while employed in this school, please notify the Superintendent and Chairman of the Board of Trustees.
> Yes_____ No_____[29]

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[28]Complaint, pp.4-5. *Bryan v. Austin*, Civil Action Number 5792, Eastern District of South Carolina, Charleston Division Record Group 21, Records of the District Courts of the United States, National Archives-Southeast Region, East Point, Georgia.

[29]Complaint, p. 6. *Bryan v. Austin*, C/A 5792.

Other plaintiffs refused both to answer the questions and to sign the resignation form. However, they did tell Austin that they wished to keep working. Regardless, they were all summarily fired.

The defendants responded to the complaint by alleging that none of the plaintiffs ever claimed that constitutional questions had concerned them when they refused to sign the application form. Further, only one of the plaintiffs—Luther Lucas—ever stated a desire to remain in his position. None asked to be reinstated through official channels, and since the act of refusing to sign the NAACP questionnaire amounted to asking not to be rehired for the next academic year, the school board was under no obligation to rehire them. The plaintiffs had also failed to use the remedies that were properly available to them, such as a review by the School District trustees, the county Board of Education, and the state Circuit Court for the First Circuit.[30]

The defense ultimately argued that "the maintenance of a system of public schools in South Carolina has been made extremely difficult by the holding of the United States Supreme Court in *Briggs v. Elliott*," and the NAACP had not helped the situation any since that decision. Alluding to Judge Parker's 1955 *Briggs* decision, the defendants claimed that the decision "does not prohibit the school officials from operating racially segregated schools so long as they do not deny to any qualified applicant the right to admittance to any school because of race."[31]

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[30]Answer, pp. 4-6. *Bryan v. Austin*, C/A 5792.

[31]Answer, p. 6. *Bryan v. Austin*, C/A 5792. Refer to the Briggs decision from 55, unless this ends up getting moved from one place to another.

Defense lawyers then launched into a diatribe against the NAACP, in which they claimed that "the parents of [238,000 Negro pupils and 550,000 white pupils] were and are satisfied with the education of their children on this [segregated] basis, and there has been no effort by any parent to have his child transferred from a school operated for one race to that operated for the other." It was the NAACP, they claimed, that bore responsibility for "causing serious deterioration of the friendly relations between the races, causing tension and unrest, . . . disturbing the peace, tranquility and progress of the State, . . . seriously interfering with the duties of school trustees to elucidate, assess, and solve their respective problems, [and] jeopardizing the very existence to public education in this State and violat[ing] the public policy of the State." The defense called attention to *Clark* v. *Flory*, which had resulted in the closure of the Edisto Beach State Park, as a warning of the dire circumstances which were bound to follow any order to desegregate the schools. It was the NAACP's fault, claimed the defense, for "stirring up and encouraging litigation" that required the General Assembly to restrict employment for members of the organization.[32]

Marshall questioned the arbitrariness of the dismissals on constitutional grounds. Citing earlier cases, he averred that "public servants have a constitutional right not to be deprived of their jobs arbitrarily." Recent cases tended to support Marshall. In *Wieman* v. *Updegraff*, the Supreme Court had struck down a statute that required "teachers who failed to take an expurgatory oath which did not meet due process requirements" be fired. *Slochower* v. *Board of Higher Education* held that New York city could not automatically dismiss a municipal college teacher simply because he pleaded the fifth amendment

[32]Answer, pp. 7-8. *Bryan v. Austin*, C/A 5792.

before a congressional committee. Quoting the decision in *Slochower*, Marshall continued: "To state that a person does not have a constitutional right to Government employment is only to say that he must comply with *reasonable*, *lawful*, and *nondiscriminatory* terms laid down by the proper authorities." In short, continued Marshall, South Carolina was requiring the relinquishment of a constitutional right as a pre-requisite to service. That, clearly, was a violation of a "well-established principle": that "a regulation which would violate the Constitution if directly imposed will violate it if sought to be imposed indirectly as a condition to the grant of a privilege." Marshall continued the parallel, making it clear that he believed that the law requiring teachers to relinquish their membership in the NAACP to keep their jobs was tantamount to making membership in the organization itself illegal, which indeed was the point.[33]

Marshall placed his argument squarely on the foundation of the reasonableness of the anti-NAACP law. A substantial body of law existed that had established the precedent that any state law that violated the rights of free speech "must show some paramount public interest which the exercise of these rights gravely endangers." Quoting Supreme Court Justice Felix Frankfurter's concurring opinion in *Wieman v. Updegraff*, Marshall strongly argued for the rights even of state employees—teachers were the subjects of the *Wieman* case as well—to peaceably assemble. Restrictions like the prohibition on NAACP membership have "an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate; it makes for caution and timidity in their associations by potential teachers." "Contention and controversy" may indeed result from

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[33]Memorandum of Points and Authorities. pp. 5-7. *Wieman* v. *Updegraff*, 344 U.S. 183 (1952); *Slochower* v. *Board of Higher Education*, 350 U.S. 551 (1956). In the quotation from *Slochower*, the emphasis was added by Marshall. *Bryan v. Austin*, C/A 5792.

teachers' joining the NAACP, but that did not justify the anti-NAACP legislation. No "paramount public interest" had been "gravely endangered" to justify the law, and there was no valid legislative purpose behind it. "The aim of preservation of the peace—or, as in this case preservation of quiet on the question of racial segregation—does not justify laws which deny rights protected by the Constitution."[34]

Marshall argued that state law also violated the equal protection clause of the 14th Amendment because of its dependence on an arbitrary racial classification. Additionally, the law made classifications based on political beliefs, which the Supreme Court from the earliest years of the 14th Amendment has implied was suspect.[35] Since the law covered only members of the NAACP, and not those who were members of any political organization, the law failed on equal protection grounds. For example, the law did not apply to white teachers who were members of Citizens Councils. Someone who therefore believed in white supremacy could teach, while someone who believed in equal justice could not.

Marshall's final point was that, since it punished people legislatively for acts that were legal when they took place, the law amounted to a bill of attainder. The Supreme Court had ruled on several occasions that government could not impose oaths under the threat of being prevented from practicing one's profession.[36] In *United States* v. *Lovett*,

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[34]Memorandum of Points and Authorities. pp. 7-9. Excerpt from Frankfurter's opinion in *Wieman* from pp. 195-196 of that case. *Bryan v. Austin*, C/A 5792.

[35]*American Sugar Refining Co. v. Louisiana*, 179 US 89, p. 92; *Kotch v. River Port Pilot Commissioners*, 330 US 552, p. 556. Cited by Marshall in Memorandum of Points and Authorities, p. 13. *Bryan v. Austin*, C/A 5792.

[36]*Cummings v. Missouri*, 4 Wall 277; *Ex Parte Garland*, 4 Wall 333.

the Court had held that Congress could not command the executive branch to withhold salaries of employees simply because of alleged subversive activities. The Court had said "that legislative acts ... that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution."[37] Since the members of the NAACP were indeed "easily ascertainable members of a group" who were being punished by having their jobs taken from them because of their membership in a legal organization, the law was an unconstitutional bill of attainder.

A three-judge court made up of Parker, Timmerman, and Ashton H. Williams heard the case on 22 October. Jack Greenberg argued for the plaintiffs that their right of freedom of association had been violated, while defense attorneys David Robinson and Robert McC. Figg argued that the case was not properly before the court in the first place. Parker noted during the hearing that "South Carolina has passed a law affecting these rights [of speech and association]. These are the basis of our constitutional liberties."[38] Their decision was mixed: Parker and Williams both agreed that the federal courts should have jurisdiction of the case, but could not agree on when. Williams and Timmerman argued that the state courts should have first crack at the case. Ola Bryan and her co-plaintiffs were forced to exhaust their state remedies before the case would be revived on the federal docket. Parker saw the law as "clearly unconstitutional . . . : The fact that organizations may render themselves unpopular with the majority in a community is no

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[37]*United States* v. *Lovett*, 328 U.S. 303, 315-316. Cited by Marshall in Memorandum of Points and Authorities, p. 13. *Bryan v. Austin*, C/A 5792.

[38]Quoted in "Two S.C. Lawsuits Hold Spotlight During Month," *Southern School News* 3:5 (November 1956): 13. Brackets in article.

reason why the majority may use its power to enact legislation denying to their members the fundamental rights of constitutional liberty." Timmerman saw things differently: the statute did not, he argued, outlaw membership in the NAACP, it merely "prevent[ed] its members from carrying their programs into the classrooms of public schools where it is deemed against the public interest to have them do so." In short, Timmerman believed the state had not only the interest, but also the right "to protect young minds from the poisonous effects of NAACP propaganda."[39] When the case was appealed to the Supreme Court, the state legislature repealed the law, replacing it with a more innocent one. The new law only required individuals to list the organizations to which they belonged, and did not carry a dismissal clause. As a result, black teachers could be dismissed for their membership in the NAACP, but would be unable to prove it.[40]

As the Civil Rights Movement matured in the late 1950s, the NAACP's lawyers, especially Thurgood Marshall, had to reevaluate their role in the movement. Increasingly, the LDF was called upon to defend clients in criminal prosecutions, clients who had broken the law by trying to accelerate the pace of racial change. As community activists in places like Montgomery, Alabama or Greensboro, North Carolina or any number of other Southern cities and towns started to challenge the Jim Crow system more directly, the role of LDF lawyers seemed to diminish. After all, with the *Brown* decision, the basic

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[39]"New Legislation on Schools, Court Tests Occupy South Carolina," *Southern School News* 3:8 (February 1957): 10.

[40]"S.C. Legislature Weights More School Bills, Repeals Earlier One," *Southern School News* 3:11 (May 1957): 3; Numan V. Bartley, *The Rise of Massive Resistance*, pp. 217-218; Tushnet, *Making Civil Rights Law*, p. 293.

foundation of all civil rights litigation had been laid. Now, all that was required was to implement the Supreme Court's decision.[41]

That proved difficult, however, and by 1960 many African Americans grew tired of waiting for the "deliberate speed" mentioned by the Court in *Brown II*. Increasingly, they took matters into their own hands. In Montgomery, the bus boycott that began when Rosa Parks was arrested for not vacating her seat for a white passenger led to a national awareness of the continuing realities of the Jim Crow South. However, even though the Montgomery bus boycott eventually ended up before the Supreme Court, the legal aspects of the case remained in the background. Instead, it was the heroism of people like Rosa Parks and Martin Luther King, Jr.—at the time a young minister coaxed into taking a leading role in the boycott—and hundreds of others in Montgomery that struck people's consciousness. Marshall said later that he "thought [he'd] kind of outlived [his] usefulness. . . ."[42]

Marshall, who in 1961 stepped down from the LDF to become United States Solicitor-General, was premature. Though the Civil Rights Movement had turned in a different direction from the one Marshall and the others had started it on, there was still a real and pressing need for litigation. Southern school districts were—to say the least—slow to implement desegregation plans: some did not integrate until the late 1960s or early 1970s. Southern businesses, even after the passage of the Civil Rights Act of 1964, did not all hurry to open their doors to all customers. Many southern parks, hospitals,

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[41]For a discussion of the waning role of NAACP attorneys in initiating litigation, see Tushnet, *Making Civil Rights Law*, pp. 301-306.

[42]Quoted in Tushnet, *Making Civil Rights Law*, p. 301.

theaters, and other public areas did not immediately desegregate their facilities. In these instances and many others, Southern white recalcitrance necessitated either litigation or the threat of litigation before doors would open to African Americans.

The cases involving two teachers from South Carolina illustrate both the changes in the nature of the civil rights struggle and the continued necessity of fighting in the courts. Irene Williams and Gloria Rackley were dismissed from their jobs in Sumter and Orangeburg, respectively, for engaging in civil rights demonstrations. Following their dismissals, they brought suit in federal court.

Williams was "an active member of the Sumter Movement, a local civil rights organization dedicated to ending all vestiges of racial separation and segregation in her community." In the course of her activities Williams picketed and engaged in peaceful demonstrations. Nevertheless, Williams had been arrested for breach of the peace. Other incidents mounted up over the years. Finally, in May 1964, without informing Williams of the reasons, Hugh Stoddard, the Superintendent of Sumter School District 2, told her that her contract would not be renewed for the 1964-65 school year. Subsequent meetings between Williams and the Board of Trustees for the district failed to reveal any reason for her dismissal. Even when Williams appealed to the County Board of Education, no reason for her dismissal was forthcoming. Williams, a ten-year veteran teacher at Sumter county's Manchester School who had received an "A" grade on the National Teachers Exam, faced the prospect of having her professional career torn from her. She sought justice in the federal district court in Columbia.[43]

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[43]Complaint, pp. 2-7. *Irene Williams* v. *Sumter School District Number 2, et al.*, Civil Action Number AC-1534, Eastern District of South Carolina, Columbia Division, Record Group 21, Records of the District Courts of the United States, National Archives-Southeast

Williams believed Stoddard had removed her from her position because of her civil rights activities, specifically her attempt to have her students participate in the American Woolen Contest. The contest itself was innocuous: a "Make it Yourself with Wool" contest designed for Home Economics classes, and sponsored by the Women's Auxiliary to the National Wool Growers Association, the American Wool Council and by the Southern States Sheep Council in South Carolina. Williams worked with members of her classes on the projects for several weeks, only to be informed by Superintendent Stoddard in early November that "In the 'Make It Yourself With Wool' contest . . . there will not be participants from Manchester High School of this School District."[44]

Although they never offered Williams a reason for not renewing her contract, the school board's defense rested on the fact that she missed the first teachers' meeting of the year without receiving permission from her principal. Relying heavily on what they perceived as distortions of the facts, the defense contended that the issue of the wool contest was moot, since Williams had not followed the correct procedure in entering her students. (Only one student from each county was eligible, and Williams had six contestants, with no time remaining to have an elimination.) The defense weakened Williams' contention that she was required to provide information about her membership in organizations by using her own testimony against her. Williams had admitted during the trial that the Board had simply asked about memberships in organizations related to her teaching. However, her principal, Benjamin Robinson, had said in his deposition that in his experience, the school board had rehired every teacher whose rehiring had been

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Region, East Point, Georgia.

[44]Plaintiff's exhibits 1, 2, 3. *Williams* v. *Sumter School District Number 2*, C/A AC-1534.

recommended. He gave Irene Williams his highest accolade, calling her "the best [teacher] that we had."[45] Further, Robinson had not been told himself of any reason for Williams' dismissal. Williams, he said, was well-respected by her students and colleagues.

The School Board's attorneys contended that Williams' leadership role in the Sumter Movement, especially her activities associated with the "Selective Buying" campaign and the arrests of local school children for various offenses connected with the movement, made her an unfit role model. "As a member of the governing body of the Sumter Movement, we suggest she was responsible for the mis-direction of these children and for their arrest and being placed on probation." A total of 112 children ranging in age from 10 to 16 had been taken before Juvenile Court for various offenses ranging from parading without a permit to "conducting themselves in a manner . . . dangerous to their welfare and the welfare of those around them."[46]

Defense attorney Shepard K. Nash offered his share of precedents as justification for keeping the courts out of the question of Williams' employment. Unfortunately, one of the cases he cited to support his argument, *Sarratt v. Cash*, did not help much. That case only held that courts could not interfere with school boards if their interference was not arbitrary or unreasonable. Williams' case was built around the idea that her dismissal was arbitrary. Ultimately, however, the defense case rested on the idea that Williams was not unlawfully dismissed because she had simply not been renewed as a teacher for the

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[45]Brief in Behalf of Defendants, pp. 2-3; Deposition of Benjamin Robinson, p. 1. *Williams* v. *Sumter School District Number 2*, C/A AC-1534.

[46]Brief in Behalf of Defendants, p. 3; Deposition of Pitts Delorme, pp. 2-3. *Williams* v. *Sumter School District Number 2*, C/A AC-1534.

state. Since her job was based on a year-to-year contract, failure to renew did not amount to a dismissal or firing.[47]

When Stoddard was on the stand, he addressed a number of the factors that Williams said led to her not being renewed for 1964. The wool contest, which the defense had not given much weight in their brief, reflected "on her mature and professional judgment." Her picketing of stores in Sumter "reflected poor professional judgment and did not dignify the position which she held in the schools and in the eyes of the community." Stoddard admitted that Williams in fact had permission from the principal of her school to miss the first meeting of teachers, "but not permission from the office of the superintendent or other personnel." He also admitted that, in the aftermath of her arrest in September 1963, he did nothing in the way of disciplining Williams. Williams' record as a teacher was never questioned. She had never been reprimanded for in-class or personal conduct, had never mishandled school funds, and had never been questioned about her teaching. In short, Irene Williams was an exemplary teacher in all respects.[48]

After agreeing with the defense on several points, including the power of local school boards, Judge Hemphill declared that "this court *is* prepared to protect, interpret, insist upon the securing to plaintiff of all of her constitutional rights." Citing the North Carolina case of *Willa Johnson* v. *Joseph Branch*, a case bearing some remarkable similarities to the *Williams* case, Hemphill declared that "'however wide the discretion of

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[47]Brief in Behalf of Defendants, pp. 4-6. *Williams* v. *Sumter School District Number 2*, C/A AC-1534. *Sarratt v. Cash*, 88 S.E. 256 (1916).

[48]Opinion of Judge Robert W. Hemphill, pp. 6-7; Plaintiff's exhibit 9, transcript of 16 June 1964 Sumter County School Board Meeting, pp. 7 ff. *Williams* v. *Sumter School District Number 2*, C/A AC-1534.

the School Boards, it cannot be exercised so as to arbitrarily deprive persons of their constitutional rights.' The action of the Sumter Board was, is, arbitrary, capricious, without constitutional foundation, and beyond constitutional authority. . . . The refusal of the Board to specify [a reason for not renewing Williams' contract] is silent witness to the discrimination."[49]

Hemphill expressed unusual eloquence as he acknowledged the existence of the civil rights movement and its influence on the modern South. "In the revolutionary processes now in and about our great country seeking definition, preservation of men's rights, their civil rights, color is the key, the causa sine qua non of a trouble[d] society." Since the School Board did not have "objective standards for the employment and retention of teachers" that were applied "to all teachers alike in a manner compatible with the requirements of the Due Process and Equal Protection Clauses of the Constitution," Williams was entitled to the writ of mandamus for which she had asked.[50]

In 1959, Gloria Rackley had started working in the schools of Orangeburg District Five. She had a Bachelor's Degree from Claflin College and a Master's Degree from South Carolina State College, both in Orangeburg. During her first year of employment, she worked as a substitute, and began full-time work the following year teaching under-achieving third graders, usually much older than ordinary third graders. Her short career in the Orangeburg schools was spent in that assignment. Her conduct in class was always exemplary, and in the legal events that followed, her classroom skills and behavior were

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[49]Opinion of Judge Robert W. Hemphill, pp. 9-12. Quotation from *Johnson v. Branch*, 364 F. 2d 177 (1966). *Williams* v. *Sumter School District Number 2*, C/A AC-1534.

[50]Opinion of Judge Robert W. Hemphill, pp. 12-13. *Williams* v. *Sumter School District Number 2*, C/A AC-1534.

never questioned by the defense. She even took some of her students to church with her if they were unable to go, which was relatively frequently, given the disadvantages suffered by many of her charges.

Rackley was also a member of the Orangeburg chapter of the NAACP, at first working to increase membership, and then working to undermine "the strict pattern of segregation here in Orangeburg." She also served as First Vice President of the state chapter. Rackley worked to desegregate lunch counters and restaurants, and to get some of the white-owned businesses to hire black clerks. She also attempted, as a plaintiff, to desegregate the public hospital in Orangeburg (see chapter four). Rackley and others also encouraged Orangeburg's black community to engage in a selective buying campaign which included picketing some of the local establishments. Eventually, there were even mass demonstrations.[51] Rackley acted as one of the directors of the pickets, and among the picketers were some of her students from Whitaker Elementary, although she denied any attempt to recruit students directly out of her classes.

In 1963, when the Civil Rights Movement began to have real success in South Carolina, Rackley and the Orangeburg NAACP re-doubled their efforts to end segregation in the city.[52] Nevertheless, Rackley never missed a day of class unexcused. On 28 September, a mass meeting that began at Rackley's church, Trinity Methodist ("the headquarters for the movement in Orangeburg"), wound its way through town with the intent of returning to the church. As the approximately 200 marchers moved through the

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[51]Transcript of Trial, Testimony of Gloria Rackley Fraser, 2 September 1965, pp. 14 ff, p. 60. *Rackley v. School District 5,* C/A 8458.

[52]The desegregation of Clemson College in January and schools in Charleston in August of that year represent the first tangible successes since the 1940s.

city, however, police officers split them into smaller groups, and finally began to arrest them. Rackley was arrested when a group across the street from hers was threatened with fire hoses from city trucks; she ran across the street to ask why such a thing had to be done. The marchers, faced with the alternatives of giving up their march or going to jail, chose the latter. Some of the marchers were later tried for trespass and convicted.[53]

Members of the Orangeburg NAACP did not stop their activities, however, and neither did Gloria Rackley. In summer 1963 Rackley was scheduled to speak at a mass meeting in Charleston. She and other members of the state NAACP, including state National Field Secretary I. DeQuincey Newman, tried to have lunch at the Fort Sumter Hotel, where they were not only refused service but also accused of trespassing. Rackley was found guilty and the case was still under appeal as she testified in her suit against the school district. She was arrested once in the Orangeburg county courthouse for going to the white bathroom. Rackley was also arrested on 7 September 1963 for distributing announcements of a mass meeting in violation of a city ordinance. (However, whites who were nearby distributing religious materials were not arrested.) A month later, she received a letter from the school superintendent suspending her from her duties. For a year, Rackley lived in Orangeburg with no job save a brief stint working with the NAACP in memberships. In September 1964 she moved to Norfolk, Virginia to teach English at Virginia State College in Norfolk. Nevertheless, despite the higher salary in

[53]Transcript of Trial, Testimony of Gloria Rackley Fraser, 2 September 1965, pp. 23 ff. *Rackley v. School District 5*, C/A 8458.

Virginia, Rackley expressed her desire to return to Orangeburg to teach: "South Carolina is my State, Orangeburg is my home, my work is here, and I want to work here."[54]

Nevertheless, on 7 October 1963 district school superintendent Henry Marshall gave Rackley a letter of dismissal. While formal action still had to be taken by the school board, Marshall's letter essentially ended Rackley's teaching career in South Carolina. The reasons noted in the letter included Rackley's leadership of a mass demonstration that September. Her "conduct [as leader and spokesperson for the demonstration] was such that it encouraged juveniles to break the law, jeer at policemen, promote violence, and disturb good order and public tranquility." Marshall cited her arrests for trespassing in Orangeburg and Charleston, and the arrest in Orangeburg for distributing handbills. Marshall concluded:

> It would appear that you have become so rabid in your desire for social reform that you are advocating breaking the law as a means of calling attention to what you consider your grievances. A teacher in the public schools cannot advocate lawlessness without destroying her usefulness in teaching young people.[55]

A key element of Rackley's case arose under cross-examination by Henry Sims, the school district's attorney. When asked whether she thought she had been discriminated against because of her race, Rackley argued that she had brought suit because she had been denied a chance to teach. Sims asked her if she thought a white teacher would have been dismissed for similar actions. Rackley, predictably, had never thought about it. All along, of course, the issue of racial discrimination lurked in the background. But

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[54]Transcript of Trial, Testimony of Gloria Rackley Fraser, 2 September 1965, pp. 29-41, 49-53. Quotation on 53. *Rackley v. School District 5*, C/A 8458.

[55]Defendants' Brief, pp. 1-2, quotations on p. 2. *Rackley v. School District 5*, C/A 8458.

Rackley handled Sims' attempts to bring race into the trial well: Sims asked, incredulously, "The only way that the School District is discriminating against you is because they won't allow you to teach?" Rackley replied: "My salary has been held up and I am not allowed to teach. That is what this is all about. Of course while I was working, I was segregated to Negro schools. I feel this is discrimination, but I guess we will talk about that after I am back in the school system." Unfortunately, however, her answer allowed Sims the opening for which he was looking. Rackley, he argued as he continued his questioning, had been active in the NAACP for a number of years, and clearly the school district authorities knew of her opinions. It was only after a number of arrests that Rackley was fired. Rackley, though was well aware of the part that race played in her dismissal, as well as the surrounding events. While on the stand, she offered an eloquent defense of her actions:

> I don't know that anything has been said about color other than it was my race certainly that relegated me to the school in which I taught, to the particular type of pupil I taught, made me, as no one else, particularly attuned and sensitive to their problems and sensitive to the community in which I lived, that denied these students the future that I felt should be theirs. Now this was because I was a Negro, I suppose. I have never been anything else, so I don't know.[56]

However, the school district's representatives, William Clark and Harris Marshall, insisted that Rackley was fired because her numerous arrests were "a demoralizing factor in our school system, that one of our teachers would go to these great extremes . . . and creat[e] a disturbance that would bring a bad image . . . to our profession." Marshall apparently felt vindicated in his actions against Rackley because of boycotts of the school

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[56]Transcript of Trial, Testimony of Gloria Rackley Fraser, 2 September 1965, pp. 78-79, 81. *Rackley v. School District 5*, C/A 8458.

itself that began after his initial letter (of 7 October) to her. Attendance at the schools in the district dropped by almost two-thirds, which Marshall regarded as disruptive. In addition, the following February, after Rackley had been fired for four months, students at Wilkinson High School again boycotted the school following the arrest of a number of them in downtown Orangeburg. To Marshall, was evidence of how "the influence of this type of leadership extended itself over into other activities, affecting our schools."[57]

In response, Matthew Perry recalled Rackley to ask her impressions of the 1962 meeting between her and Harris Marshall. At the meeting, Marshall had intimated that Rackley's actions—specifically her penchant for getting arrested—could prove embarrassing, and Rackley had replied that "these arrests were peculiar to the racial issue and the system in which I worked and the system under which Negroes in this community lived and that I was in direct opposition to these customs, and I felt it was imperative . . . that this system be changed." When, after this meeting, Rackley was reappointed for the 1963-64 school year, she understood it to mean that her arrests for protesting the racial situation were "not the same as a drunk teacher being arrested in the street, or if I was arrested for beating my wife, or something. . . . I was arrested simply because I was a Negro in the community, that these arrests would not have been in any other situation or at any other time."[58] She interpreted her renewal for that year, if not as board approval of her activities, as an indication that she was not being asked to stop.

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[57]Testimony of Harris Marshall, pp. 124, 130. *Rackley v. School District 5*, C/A 8458.

[58]Testimony in Reply for Plaintiff, testimony of Rackley, pp. 136, 138. *Rackley v. School District 5*, C/A 8458.

Judge Simons found that Rackley's dismissal grew directly out of her participation in civil rights activities in Orangeburg. While school boards were justified in considering "a broad range of factors other than classroom conduct" in deciding whether to keep or fire teachers, "such discretionary power must not be exercised in an arbitrary, capricious, or discriminatory manner. . . . [T]he discretion exercised by the school boards must be within reasonable limits, so as not to curtail, impinge or infringe upon the freedom of political expression or association, or any other constitutionally protected rights." Citing *Johnson v. Branch*, Simons ordered that Rackley was entitled to back pay from the time of her dismissal through May 1964, plus interest. In addition, Rackley was "entitled to be reemployed as a teacher in defendant school system in the same teaching position which she formerly held, or in a position of equal status and pay range as she enjoyed at the time of her discharge." If she accepted (which she did not), "such employment . . . shall be continued by defendants without regard to plaintiff's exercise of constitutionally protected activities in the civil rights field."[59]

The activities of South Carolina teachers as activists, as members of the NAACP, and as citizens striving for their rights represent a key force in the Civil Rights Struggle. As members of the elite within black culture, teachers were able to take leadership positions in the movement, but not without peril. As teachers in a white-dominated system, their jobs were always at risk whenever they spoke out. Even the relatively benign actions of Viola Duvall and Albert Thompson in demanding that their salaries be equal to those of their white counterparts could lead to action by state authorities to

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[59] *Rackley v. School District Number 5, Orangeburg County, S.C.*, 258 F. Supp. 676 (1966), pp. 684, 686.

undermine the very legal decisions for which black teachers fought so hard. Whites were able to make the teachers' salary system more complex and seemingly more equitable, but not less discriminatory in the end.

As the Civil Rights Movement gained momentum in the late 1950s and early 1960s, white responses to the activities of teachers became more severe. As black teachers joined the NAACP—and as that organization became more aggressive, spurred on by its legal victories—white officials targeted teachers' membership in the organization. Thus, in an attempt to stifle dissent against the system of white supremacy with which blacks were increasingly protesting, white South Carolinians were willing to violate essential Constitutional and human rights. As teachers began to take to the streets when the struggle moved into the direct action phase, white officials escalated their responses as well. When Gloria Rackley and Irene Williams were fired from their jobs for civil rights organizing, it represented the ultimate attempt by white authority to quiet the voices of those who were most at the mercy of state officials, namely state employees.

What we see, however, is that despite the most serious official efforts of white South Carolina, black South Carolinians were unwilling to be quiet. When civil rights activities cost them their jobs, blacks were more than willing to turn to the tried and trusted alternative that had served so well in the early stages of the movement: the courts. Thus, even as the Civil Rights Movement moved into the more confrontational stage of direct action, the courts remained a viable means of securing the rights for which so many people were fighting in the streets.

CHAPTER THREE

"WE MUST MAINTAIN LAW AND ORDER": DESEGREGATING HIGHER EDUCATION, 1947-1963

In states throughout the South prior to 1935, African Americans were unable to attend post-baccalaureate institutions. Southern legislatures appropriated money for undergraduate institutions, but although state-supported schools developed graduate and professional programs for whites, there were no programs at black schools, and of course blacks were not admitted to white post-graduate programs. Only two states developed graduate programs for African Americans prior to the Supreme Court's decision in *Missouri ex rel. Gaines v. Canada* in 1938. In Maryland this came about because of the case of *Murray v. Pearson* (sometimes referred to as *Murray v. Maryland*), which integrated the University of Maryland Law School in 1935. In 1936 Virginia authorized Virginia State College to offer graduate education. Following the *Gaines* case, North Carolina, Texas, Louisiana, Tennessee and Alabama—but not South Carolina—followed Missouri in authorizing public funding of graduate programs for blacks.[1]

South Carolina's educational institutions, from elementary through professional schools, were segregated by law under the state's 1895 constitution. The University of South Carolina, founded in 1801 as South Carolina College, was white-only under an 1887 Act of the state legislature. Black South Carolinians therefore suffered from drastically unequal facilities which undermined their efforts to achieve educational equality.

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[1]Rufus E. Clement, "The Impact of the War Upon Negro Graduate and Professional Schools," *Journal of Negro Education* 11:3 (July 1942): 366. *Missouri ex rel. Gaines v. Canada* 305 U.S. 337 (1938); *Murray v. Maryland* 182 A. 590 (1936), 169 Md. 478 (1937).

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The only public institution of higher education for African Americans, the Colored Normal Industrial, Agricultural & Mechanical College of South Carolina, in Orangeburg, opened its doors in 1896.[2] (Previously, but not for long, the state had given money to Claflin College, a Methodist-supported school for African Americans also in Orangeburg.) In addition to South Carolina State and Claflin, there were three other four-year colleges for black students. There were no facilities for professional or graduate education for blacks in the state, while Clemson College and the University of South Carolina offered graduate degrees, and USC offered a law school for whites. By 1945, South Carolina State enrolled 35 percent of the black college enrollment in the state, while the six public colleges for white enrolled over half the white college students in the state. Most students at South Carolina State trained for the teaching profession, though less than half of the school's graduates received teaching certificates for 1947-1948.[3] In the fall of 1947, South Carolina State opened the doors to a law school for the black students after a legal battle that built on precedents set during the legal struggles of the previous decade.

The first NAACP attack on segregated education challenged the law school at the University of Maryland. In December 1934, while Thurgood Marshall was still in private practice, Donald Murray applied for admission to the school, and was summarily rejected. Like the states of West Virginia and Missouri, Maryland provided scholarships to African

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[2]It is now South Carolina State University. I will refer to the school throughout as South Carolina State, or State College.

[3]Frank A. DeCosta, "The Education of Negroes in South Carolina," *Journal of Negro Education* 16:3 (Summer 1947): 411; DeCosta, "Negro Higher and Professional Education in South Carolina," *Journal of Negro Education* 17:3 (Summer 1948): 351.

Americans who wished to pursue their graduate studies so that they could attend northern schools. When the case came to Marshall's attention, he eagerly took part, beginning what would become a long career of attacking segregation and discrimination. The case moved quickly through the Maryland courts in the spring and summer of 1935, and Murray emerged victorious. Despite attempts by the state to accelerate the appeal in the hope that the trial court would be overturned, Murray was admitted to the university's law school in September. Ultimately, the state Court of Appeals agreed that Murray would be denied a substantially equal legal education since the scholarship aid only covered tuition and, more importantly, since Murray would not be able to study the law of the state in which he planned to practice.[4]

Murray's case, since it ended with the Maryland Court of Appeals, had no legal authority outside that state. However, Thurgood Marshall and the NAACP would have an opportunity to test the legality of segregated legal education before long. Marshall had joined the NAACP as Assistant Special Counsel in late 1936, but took up more of the workload after Charles Hamilton Houston moved away from New York for personal reasons. In May 1939 Marshall became Special Counsel in title as well as in reality, and the next year the NAACP split off its legal activities from its propaganda activities and formed the Legal Defense and Educational Fund, Inc.[5]

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[4]Tushnet, *Legal Strategy*, 56-58; Jonathan L. Entin, "*Sweatt v. Painter*, the End of Segregation, and the Transformation of Education Law," *Review of Litigation* 5:1 (June 1986): 7-9, 32. See also Genna Rae McNeill, *Groundwork: Charles Hamilton Houston and the Struggle for Civil Rights* (Philadelphia: University of Pennsylvania Press, 1983), pp. 137-139.

[5]Tushnet, *Making*, pp. 26-27. See also McNeill, pp. 145-149.

Meanwhile, Lloyd Gaines, a Missouri native and a graduate of that state's all-black Lincoln University who wanted to go to law school, applied to the law school of the University of Missouri in 1936. His application was rejected and he was offered two options: he could go out of state under Missouri's scholarship plan or he could go to law school at Lincoln University, where a law school would be built if he chose that option. He refused both options, choosing instead to sue the university. Charles Houston, in his last major case for the NAACP, argued that the scholarship program was unconstitutional, and that the state must build the new law school. (The new school would then be challenged on the basis that it was not equal to the main law school at the University of Missouri.) The U.S. Supreme Court ruled that Missouri must admit Gaines to the white law school or build a separate one. The state chose the latter option, leading to further legal action on the issue of equality. However, by the time the hearing on equality came up, Gaines had disappeared, and the NAACP had to accept the half-victory of the Supreme Court's decision.[6] The issue stood there until the late 1940s. Legally, all any state was required to do, if a black college graduate desired to pursue a legal education, would be to build a separate law school for African-Americans.

Late in 1945, Ada Lois Sipuel, an Oklahoma native and a graduate of Langston University, decided to sue the University of Oklahoma, which had rejected her application to the law school because of her race. Thurgood Marshall was already involved in the most significant of the post-baccalaureate cases, *Sweatt v. Painter* in Texas, but divided his attention to deal with the Oklahoma case as well. By the time

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[6]Tushnet, *Legal Strategy*, pp. 71-72.

Sipuel v. Board of Regents was concluded, however, South Carolina would add its own case to the precedents.[7]

White South Carolina's response to the *Gaines* and *Sipuel* cases was to establish its own out-of-state scholarship program, in addition to setting in motion the process of creating a graduate school for African Americans. Six years after *Gaines* the state legislature authorized South Carolina State to establish graduate programs in law and medicine, but appropriated no money for the new programs. In 1946 the legislature authorized $20,000 for the graduate school and $5,000 for tuition grants.[8]

In June 1946, Charleston native John H. Wrighten applied for admission to the University of South Carolina's law school, and was like Donald Murray at the University of Maryland, summarily rejected. Wrighten appealed to the state NAACP for help, and in turn South Carolina NAACP president James M. Hinton appealed to the national organization. By November Hinton was desperate, writing to Marshall in New York:

> Is it possible to get some action on our 'Graduate and Professional[']case? Attorney H.R. Bouleware [sic] claims to have done everything, requested of him, and this matter has been hanging since about May of this year. . . . Our State Conference is losing ground in South Carolina because we cannot get action on anything. We felt that the graduate suit would save our face, since we can get nothing on the voting case. . . . It is becoming embarrassing to us.

Robert Carter, the NAACP's Assistant Special Counsel, apologized for the delay and accepted the blame, since Marshall was out for a while recovering from an illness. Carter promised to write the complaint for South Carolina as soon as possible, since he was preparing to go to Birmingham for several trials there. Hinton remained nervous,

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[7]*Sweatt v. Painter* 339 U.S. 629 (1950), *Sipuel v. Board of Regents of the University of Oklahoma* 332 U.S. 631 (1948).

[8]Newby, *Black Carolinians*, p. 350.

however, because the state NAACP desired to file the case before 4 January, when the state legislature met, and because the Palmetto State Teachers' Association was beginning to feel let down by the NAACP in the case. In addition, Wrighten was getting "jittery" himself; he would later cause a number of headaches for Marshall and others associated with the case.[9]

Wrighten's suit against the board of trustees, the president, and the registrar of the University of South Carolina and the Dean of the University law school was filed in January of 1947, although not until the 8th. The complaint asked the court to declare that the policy of not admitting blacks to the University law school was unconstitutional. Wrighten, represented by Robert L. Carter of the NAACP because of Thurgood Marshall's continuing illness, argued that since "there is no other law school maintained by public funds of the State of South Carolina where plaintiff can study law to the same extent and on an equal level of scholarship and intensity as in the School of Law of the University of South Carolina," he had suffered "an irreparable injury." The complaint asked the court to enjoin the University to admit Wrighten and to declare that the policy of refusing to admit blacks to the law school was an unconstitutional violation of the Fourteenth Amendment.[10]

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[9]James M. Hinton to Thurgood Marshall, 29 November 1946; Robert L. Carter to Hinton, 2 December 1946; Hinton to Carter, 21 December 1946. NAACP papers, Library of Congress.

[10]Complaint, n.d. (filed 8 January 1947), pp. 4-7. *John H. Wrighten v. Board of Trustees of the University of South Carolina, et al.*, Civil Action Number 1670, Eastern District of South Carolina, Columbia Division, Record Group 21, Records of the District Courts of the United States, National Archives-Southeast Region, East Point, Georgia.

The state responded that South Carolina State was the institution of higher education for black South Carolinians, and that the state constitution forbade Wrighten from entering the University. They were thus required by law "to enforce the requirement that any applicant for admission to the Law School . . . must be of the white race." The restriction against blacks at the University was not, they argued, the result of "any policy, custom [or] usage established and maintained by [the] defendants," but was required under the state constitution. Further, the defendants argued that they did not deny black South Carolinians equal protection because the "plaintiff and others similarly situate[d] may, if qualified therefor and if due demand therefor is made, obtain a legal education at [South Carolina State] substantially equal to that afforded to white students at the University of South Carolina."[11] The Supreme Court's ruling in *Gaines* was therefore one of the main points of defense for the state in Wrighten's case.

The South Carolina legislature had, in its 1946 session, passed a law requiring South Carolina State "to establish a graduate law department, ample appropriation being in the same Act made for that purpose." (A similar law had passed in the 1945 session as well.) Had Wrighten applied to State's non-existent law school, therefore, a law school would have been created there. Since Wrighten had a chance to go to law school, the state argued, there could be no injury done to him, and his rights had not been violated.[12]

The state also argued that Wrighten's suit was not in good faith.

> [The] true purpose of the present suit is not the seeking of a legal education by the plaintiff . . . but is rather an attempt by the plaintiff and those associated with him in the maintenance of the present suit, to break down and disrupt the established

[11]Answer, pp. 2-3. *Wrighten v. Board of Trustees*, C/A 1670.

[12]Answer, p. 4. *Wrighten v. Board of Trustees*, C/A 1670.

> policy of the State . . . and of its people to provide a separation of the races in the educational institutions of the State for the mutual benefit of both races. [The] policy [of segregated education] has been sanctioned, recognized and approved for a long period of time by both the white and Negro citizens of the State and has been adhered to by both races with the knowledge that it is the best system under which peace and good order can be maintained, the reciprocal rights and friendly relationships between the races preserved, and their honored traditions perpetuated.[13]

Of course, black "approval" of the segregated system was merely inferred from the lack of protest regarding the situation—which in turn resulted from the obvious physical or economic consequences of complaining about segregation.

At the pre-trial conference held on 15 May 1947, Judge Waring, who heard the case because of Judge George Bell Timmerman's close association with the University, immediately brought up the issue of the law school—or lack thereof—at South Carolina State. Both sides had brought up the issue, with differing interpretations, and Waring wanted some evidence to support one side or the other. Lead counsel for the state David W. Robinson discussed a few minor issues then brought up the key question in the case: was this a case about the lack of a "comparable law school," or in fact about the constitutionality of segregation in education. Robinson and Judge Waring both thought that the case revolved around the narrower issue.[14]

Robert Carter, of the NAACP Legal Defense Fund, argued that "we haven't as yet brought into issue the question of segregation. This case can be decided . . . on the doctrine . . . that with qualifications, education for Negroes must be equal or comparable—as it is for white. We don't feel in this suit it's necessary to go further . . . if

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[13]Answer, p. 6. *Wrighten v. Board of Trustees*, C/A 1670.

[14]Transcript of Pre-Trial Conference, p. 6. *Wrighten v. Board of Trustees*, C/A 1670.

you're asking merely how we feel about it, our contention is segregation is discriminatory." Carter was quick, however, to ensure that the question went much farther than just the provision of a law school for blacks—he reserved the right to address the issue of the equality of the school. He noted that "segregation itself can [not] be maintained at this time unless a school is provided for Negroes." Waring responded by asking whether an "adequate" school, even if not at the University, would satisfy the plaintiffs, but Carter demurred, saying that it would come down to an issue of fact—whether the schools were in fact equal. Waring agreed, noting that "[t]he mere fact there's a declaration that there's a law school in Moncks Corner or Jedburg doesn't mean it ends this case." Carter reiterated this point in a letter to Judge Waring later in May. He argued that "even under a theory of segregation full protection of plaintiff's constitutional rights would require his admission to the Law School at the University of South Carolina." Waring responded that the only issues he would allow into the trial were those of sufficiency and quality.[15]

On the last day of May 1947, attorneys and deponents in the case met at the Richland County Court House in Columbia. Scheduled to give depositions were Miller F. Whittaker, the president of South Carolina State; Norman M. Smith, the president of the University and a defendant in the case; and Samuel Prince, Dean of the University Law School and also a defendant. Whittaker's was the first statement taken, and after a few preliminary questions, Thurgood Marshall asked whether there were any law school facilities at State College at that time. Of course, since the school had only just been required to create the law school, there were no such facilities. Whittaker also testified

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[15]Transcript of Pre-trial conference, 15 May 1947, pp. 6-8. *Wrighten v. Board of Trustees*, C/A 1670; Carter to J.W. Waring, 22 May 1947; Waring to Carter, 26 May 1947. NAACP papers, Library of Congress.

that the College's budget of $364,909 for 1946-47 had already been substantially used up, without the creation of a law school, with one more month left in the fiscal year. There were no buildings available for use as a law school, no area outside the main library for law students to study—in fact the campus was already overcrowded—and no offices for law professors.[16]

The budget for fiscal 1948, however, was substantially larger ($545,000) and the college was required to establish law, medicine, and other professional programs. Of course, $180,000 to create a law school and a medical school was not going to be sufficient, and Marshall tried to bring that out by informing Whittaker that a minimum of ten thousand books would be required to form an effective law library. Marshall pressed on: Whittaker had estimated that $50,000 would be required to establish a law school, but Marshall challenged the figure. "Do you think you could set up a law school with four full-time professors, a library, building, equipment, and a library of at least ten thousand carefully selected law books on fifty thousand dollars?" Marshall asked. Whittaker had to answer that he did not think so. In fact, of the additional money in the budget, only $60,000 was set aside for both law and medicine, and that had to cover all additional graduate training as well. Marshall also established that the only progress that had been made toward the establishment of a law school was the formation of a committee to study the problem of creating a law school at the campus, though the committee had not yet reported to the Board of Trustees.[17]

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[16]Deposition of Miller F. Whittaker, 31 May 1947, pp. 6-8. *Wrighten v. Board of Trustees*, C/A 1670.

[17]Deposition of Miller F. Whittaker, 31 May 1947, pp. 10-12. *Wrighten v. Board of Trustees*, C/A 1670.

Norman Smith did not add much to the record, except to further establish that it was a requirement of the state constitution, rather than a University policy, to exclude African Americans from USC. Samuel Prince, under questioning from Marshall, admitted that it took two years for the Association of American Law Schools to approve a school for accreditation. James H. Price, co-counsel for the state, objected on the grounds that the new law school would provide a "reasonably comparable" legal education for black South Carolinians. Thus, whether the school was accredited or not was of no consequence. Nevertheless, Marshall hammered the question home, noting that credits could transfer from one accredited school to another without an examination. When Marshall asked if an "unaccredited law school [was] equal to an accredited law school," Prince tried to deflect the question: "You mean, is comparable to a . . ." at which point Marshall reminded him that the question was not about comparability but equality. Prince recovered well, arguing that the quality of the legal education one might receive could be equal, even without accreditation. The discussion continued along the same line for several minutes; Prince even once argued that rather than going to an accredited school, he would "go where [he] knew some professor that [he] wanted to follow." Marshall followed up with a series of questions regarding the expense of acquiring the books necessary for the new law school, then ended his questioning.[18]

A few days later, Marshall and his co-counsel filed a Memorandum of Law to support their case against the University's Board. Appealing to the precedent of the *Gaines* case and citing *Pearson v. Murray*, Wrighten's team of lawyers argued that, since

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[18]Deposition of Norman M. Smith; Deposition of Samuel L. Prince, 31 May 1947, pp. 16, 19-30. *Wrighten v. Board of Trustees*, C/A 1670.

South Carolina only offered one law school, it must allow blacks to matriculate: "Compliance with the Constitution cannot be deferred at the will of the state. Whatever system it adopts for legal education now must furnish equality of treatment now." In Maryland, since there was only one law school, Donald Murray had to be admitted to the white school. In Missouri, the state argued that since it had declared its intent to create a law school at Lincoln University, the Maryland precedent did not apply. The Supreme Court disagreed: "the policy of establishing a law school at Lincoln University had not yet ripened into an actual establishment, and it cannot be said that a mere declaration of purpose . . . is enough."[19] The South Carolina case, Wrighten's lawyers argued, was similar to the Missouri case since there was no law school for blacks in the state when Wrighten applied to the University. The facts of the case were the same. Two men, both qualified for admission to the white law school of their respective states, had been denied the right to a legal education at a segregated law school.

The trial was held over two days in early June 1947 in Columbia. Marshall's first witness was Miller F. Whittaker, who testified briefly to the effect that no law school existed at State College at the current time or when Wrighten was applying to law school at the University, nor was there any other facility where blacks could receive a legal education in the state. On cross-examination by Robinson, Whittaker told the court of John Wrighten's expressed interest in a law school at State. Wrighten had written Whittaker in February 1947, after initiating the lawsuit, to inquire about the existence of a law school at State College, and Whittaker had responded that there was none. Later that

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[19] *Pearson v. Murray*, 169 Md. 478; *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938), quoted in quoted in Plaintiff's Memorandum of Law, pp. 3-4. *Wrighten v. Board of Trustees*, C/A 1670.

month Whittaker wrote Wrighten to inform him of the state legislature's appropriations for a law school at State. Whittaker asked if he could consider Wrighten's initial letter a letter of application, since the establishment of a law school was still contingent on having student interest. Wrighten told him no, since he had not yet consulted with his attorney, Harold Boulware.[20]

Robinson questioned Whittaker about Wrighten's interests as well, asking whether Wrighten had ever expressed an interest in the law while a student at State. Whittaker testified that he had not, and under further questioning averred that Wrighten seemed more interested in the ministry than in the law, though Judge Waring found the line of questioning irrelevant following an objection by Marshall.[21]

Several other graduates of State College and other black South Carolinians studying out of state had written Whittaker about the possibilities of receiving state aid on the basis that there was no graduate training available to African Americans in the state. Whittaker had replied to each that no money was currently available, but that in the next appropriation, the legislature had set aside money for the establishment of a law school at state, and that he would correspond further with them. Thus the $60,000 appropriation for the law school and other graduate programs in 1947-48 was also to fund aid for black South Carolinians studying out of state.[22]

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[20]Transcript of Trial, 5-6 June 1947, Testimony of Miller F. Whittaker, pp. 12-13. *Wrighten v. Board of Trustees*, C/A 1670.

[21]Transcript of Trial, 5-6 June 1947, Testimony of Miller F. Whittaker, p. 14. *Wrighten v. Board of Trustees*, C/A 1670.

[22]Transcript of Trial, 5-6 June 1947, Testimony of Miller F. Whittaker, pp. 14-19, 33. *Wrighten v. Board of Trustees*, C/A 1670.

When Robinson questioned Whittaker on the possible creation of a law school at State College in September, Marshall vigorously objected.

> I don't think there's any material evidence, any evidence material as to what might be done—if something is done concerning the right of this plaintiff to get a law school education today. It's the exact same point that came up in the University of Maryland and Missouri case[s]. This is that the plaintiff is not interested in what is going to be done in the future. He's interested in getting himself the same education. . . .

Judge Waring interjected, asking, "Suppose they came in and showed there was a law school running now that would satisfy the requirements?" Waring had hinted at his ultimate decision: he was not going to be the judge who forced the first Southern state to desegregate its schools, and he was looking for a way to avoid doing just that. Marshall insisted that the state had to show it had a law school for blacks right then, but Waring argued that "the Court has power to admit them to a law school and fix the time. . . . I think a Court of equity has a right to make a reasonable time to do anything of that sort." Waring's thinking was going along the lines of the *Gaines* precedent rather than the non-binding Maryland case.[23]

On further examination from Marshall, Whittaker noted that plans for a law school at State included $100,000 for a new building, but that that much money was not available: again, the only money that was currently available was the $60,000 set aside for the establishment of graduate education and out-of-state scholarships for black South Carolinians. When asked about the difficulties of establishing a law school—buying books, hiring faculty, setting aside building space, etc.—Whittaker had to admit that he

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[23]Transcript of Trial, 5-6 June 1947, Testimony of Miller F. Whittaker, pp. 23-24. *Wrighten v. Board of Trustees*, C/A 1670.

did not believe a law school that was equal to the University's could be created by September.

Robinson returned to his examination of Whittaker to establish that money had in fact been appropriated to the law school—at least technically. In 1945-46, the state appropriation for State College was a lump sum, and the legislature had authorized the establishment of a law school, so some of the money could technically have been used for the creation of a law school. In 1946-47, $25,000 had been set aside for graduate and law programs, but the lack of law school applications caused the money to be diverted to the graduate program. An additional appropriation for $350,000 as part of a surplus appropriation bill was on the governor's desk awaiting his action, and part of that money was earmarked for a new graduate building at State. Of course, Marshall noted before Whittaker was dismissed that "this is a theoretical building."[24]

After calling Norman Smith, who in short order established that his race was the only reason the Wrighten had been excluded from the University, Marshall rested his case. Price called John Wrighten as his first witness. Within a couple of minutes, Price's first substantive question asked whether Wrighten would attend a law school at State College if it provided a "reasonably and substantially . . . comparable legal education." Marshall immediately objected: Price was asking about what might possibly happen in the future, and in addition was missing the whole issue of the defense's case. The law school at State must be "completely equal," not "substantially comparable." Waring

[24]Transcript of Trial, 5-6 June 1947, Testimony of Miller F. Whittaker, pp. 35-38. *Wrighten v. Board of Trustees*, C/A 1670.

agreed, but gave Price some wiggle room by allowing him to use "substantially equivalent—on a parity."

Wrighten balked. It was "a question [he could] not answer." Price was incredulous, and when Wrighten said it would take him some time to answer the question, Price offered to "wait right now for a minute or two and let [Wrighten] think." Wrighten finally responded that "if it's equal in all respects to the University of South Carolina, I'll attend [a separate law school]. That is, if it's equal in all respects. . . ." Wrighten probably damaged his own case by admitting that he would attend a separate school. Marshall tried to object, but in the absence of a jury, Waring was willing to allow the answer to stand.[25] The fictions which white South Carolinians were willing to believe—or propose for others to believe—often defy understanding. The idea that a hastily put-together law school at an under-funded school could be the equal of an established law school like that at USC (under-funded though it was itself) is an example of such a fiction. Even Judge Waring, whose desire for justice for black South Carolinians could not be questioned, succumbed to the idea, though clearly at the time the *Gaines* precedent was the only one he had to work with.

W.C. Bethea, the secretary of the all-white State College Board of Trustees and a member of the committee studying the establishment of a law school, testified that even if only one student attended, State College would open a law school in September. He testified that President Whittaker had already been searching for a dean for the law school, and that Dean Prince of the University's law school was advising South Carolina

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[25]Transcript of Trial, 5-6 June 1947, Testimony of John H. Wrighten, pp. 49-51. *Wrighten v. Board of Trustees*, C/A 1670.

State regarding stocking a law library for the new school. Bethea also testified that if Wrighten had applied for admission to State College for February 1947 rather than to the University for September 1946, he could have been accommodated easily. Not only would Wrighten have access to a law school at State, argued Bethea, but the Board of Trustees would also "strive to make it better [than the University Law School]." On Marshall's cross-examination, Bethea admitted that it would have been impossible to build a new building in such a short time, but that space—while limited—was available. Faculty members could have been assembled; the question of law books was one he could not answer. Bethea hoped to have a dean on board the week following the trial: "one of our old students. He'll be all right, I believe, if he'll accept."[26]

David Robinson examined University Law School Dean S.L. Prince. His testimony probably weakened Wrighten's case because his descriptions of the realities of the law school made it easy to imagine that a comparable school could be set up on just about any campus in the state. The only office was the dean's; faculty had no separate offices. Students had no lounge space and no study area. Two or three thousand of the library's 25,000 books were stacked on floors due to insufficient space for the volumes they had. The only testimony Prince offered on direct examination that could have been helpful to Wrighten was that the law school's budget was over $53,000, with receipts surpassing $65,000. Clearly, the new law school at State could not be expected to meet its goals with less than $60,000. However, Prince had studied the problem of acquiring books for the new library, and had come up with a price of $24,289 for 7,500 secondhand

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[26]Transcript of Trial, 5-6 June 1947, Testimony of W.C. Bethea, pp. 56-57, 60-61. *Wrighten v. Board of Trustees*, C/A 1670.

volumes, giving Judge Waring something to think about. Robinson also asked Prince his opinions on class size and education quality as well, in an attempt to portray the inevitably smaller classes at State as better than the classes at the University.[27]

Marshall's cross was quickly to the point. Graduates of the University law school were automatically admitted to the state bar, so Marshall asked Prince if admission to the bar should be a requirement for equality of the law school at State. Prince, a former member of the board of bar examiners, argued that admission to the bar right out of law school was in fact a detriment, since he believed that law graduates should take the bar exam. Marshall then elicited admissions from Prince that he was not at all familiar with the literature dealing with law school size. Prince was "largely" speaking from opinion rather than from knowledge.

Marshall then turned to the question of accreditation. South Carolina law automatically admitted to the bar not just graduates of the University's law school, but graduates of any law school accredited by the Association of American Law Schools. Marshall moved to admit the Association's standards into evidence, but attorney Price objected: "We don't care what some crowd of professors in New York or Massachusetts have ruled about . . . but which do not affect the question of the proper legal education, which is all the State of South Carolina will be required to give this plaintiff. . . ." However, since the state admitted graduates of accredited law schools to the bar, Judge Waring admitted the Association's standards into evidence.[28]

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[27]Transcript of Trial, 5-6 June 1947, Testimony of S.L. Prince, pp. 66-67, 72-73, 76. *Wrighten v. Board of Trustees*, C/A 1670.

[28]Transcript of Trial, 5-6 June 1947, Testimony of S.L. Prince, pp. 77-85. *Wrighten v. Board of Trustees*, C/A 1670.

When the defense began its case, the first witness was South Carolina native Jack Lott, former dean of the law school at the University of Louisville. Robinson's line of questioning explored the relative merits of small versus large classes. Marshall soon objected to the line of questioning, given that it dealt with a matter that was outside the current dispute: small classes might be an issue, if there had been a small law school in the state, and Marshall was prepared to assemble witnesses on the point of small versus large classes, if it came to that. Judge Waring agreed with Marshall: "Unless you are endeavoring to show that the University of South Carolina law school is a very poor law school" the line of questioning was irrelevant. Nevertheless, Waring allowed Lott to answer to establish a record. J.W. Hicks, former dean of Furman University's law school, which had closed its doors in 1930, testified on the same basis, that small classes were better for law students. Following Marshall's brief cross-examination of Hicks, the defense rested. Judge Waring gave each side ten days to prepare briefs, with findings of facts and conclusions of law attached.[29]

Waring's order, filed on 12 July 1947, found that Wrighten was

> entitled to a legal education . . . furnished by the state of South Carolina on a complete equality and parity with any other citizens and residents of the State. . . . The defendants . . . are enjoined from excluding from admission to the Law School of the University of South Carolina the plaintiff and any persons by reason of race or color, unless legal education on a complete equality and parity is offered . . . upon the same terms and conditions by some other institution established, operated, and maintained by the State . . . within its borders.

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[29]Transcript of Trial, 5-6 June 1947, Testimony of Jack Lott, pp. 90-95. *Wrighten v. Board of Trustees*, C/A 1670.

If the state opened a law school which Wrighten could attend by 15 September (the first day of classes for South Carolina State), then the order would be void.[30]

Wrighten almost immediately found himself in a difficult situation. Following the conclusion of the trial, he wrote Carter. "The case is won, but what shall I do? I was told to enter the law school at S.C. State College, and I was told not to enter, because it is not equal to that of the University of S.C." Carter's response was simply to wait; the NAACP had not yet received a copy of the judge's final order. By September, Wrighten had decided to enter the law school at State College and been dissuaded from doing so by Marshall. "When I returned to S.C. and told the people here that I was not going to the law school, and the reasons why I was not going they almost curse[d] me out, and thats [sic] the opinion of some of the members and officials of the N.A.A.C.P. here." Wrighten was desperate. He had been advised to go to the new law school, and gave up a job teaching at the Avery Institute. Then he had been advised not to go to the new law school, and found himself out of a job. "I haven't done anything since I have been here [back in South Carolina], and I can't get any help from these people. I am asking you to please explain your reasons to them for telling me to withdraw from the law school, and see if you can get some help for me until I can fin[d] something to do." Marshall angrily replied, saying that he would "personally file charges against [any] member or officer" who violated the organization's committed policy of opposition to desegregation, and he asked Wrighten for the names of the individuals who had cursed him out. Meanwhile, Marshall tried to reassure Wrighten that the national and local NAACP would stand behind him, and that there must be a number of black-owned businesses where he could

[30]Order, 12 July 1947, pp. 1-2. *Wrighten v. Board of Trustees*, C/A 1670.

apply for work. Marshall then followed up his letter to Wrighten with a memo to Hinton, Boulware and Reverend Beard, the president of the Charleston branch of the NAACP, in which he demanded a special meeting with the state executive committee to find out exactly where everyone stood on the issues in the case.[31]

On 1 October, Wrighten wrote Marshall again. He had met with the executive committee of the Charleston branch to ask for their assistance in finding work or funding, and "they told me that they did not have anything to do with the case." Hinton had not responded to a letter Wrighten sent a week earlier, and he was growing more impatient with the local and state branches. "To me I have been treated wrong by these people, but I am willing to fight on regardless to their opinion of me and the case." On 6 October, however, Wrighten wrote that he had re-enlisted in the army, having run out of alternatives and money. "Please don't think hard of me for doing this, but since I could not fine [sic] any kind of jobs here I decided to do something for my self." He still had not heard a response from Hinton, and no longer "care[d] if I hear from him, because he has not lived up to his word." Two days later he wrote Hinton again, explaining to him his reasons for wanting to withdraw from the case. "[I]t's better for me to drop the whole thing before I get into something else without the backing that I was assured when I made application to the university." However, before Wrighten could sign the last papers for his re-enlistment, Boulware and others were able to talk him out of his plans, and to wait at least a while longer. The tensions between the local and national organizations of the

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[31]Wrighten to Carter, n.d. (Received 20 August 1947); Carter to Wrighten, 8 August 1947; Wrighten to Marshall, 27 September 1947; Marshall to Wrighten, 29 September 1947; Memorandum, Marshall to Hinton, Boulware, and Beard, 30 September 1947. NAACP papers, Library of Congress.

NAACP reflected in the Wrighten case are almost the reverse of those that would come later. As Aldon D. Morris has written, by the late 1950s, the NAACP's legal campaign was not working quickly enough for many young activists. Impatience led to the sit-ins and to direct action by new civil rights groups like the Student Non-Violent Coordinating Committee (SNCC). However, in late 1940s South Carolina, it was often the national organization that wished to move faster than many black residents of the state—even those who were members of the NAACP—wanted. Having won the creation of a black law school at State College, many local leaders wanted Wrighten to attend to avoid "the ill feeling that might develop among the whites."[32]

By March 1948 Marshall had become convinced that Wrighten was unreliable. He asked Boulware to withdraw the motion for further relief that had been filed the previous October, and to leave the case where it stood. Wrighten had, Marshall wrote, "demonstrated that he is not the type of reliable plaintiff necessary to proceed in this type of case, . . ." Marshall's final decision was to sit tight. While the defendants had asked for the declaratory judgement in Wrighten's favor be vacated, Marshall was confident that that would not happen. However, he no longer felt it would be advisable to pursue any further relief or damages for Wrighten.[33]

Both legally and personally, however, the matter was not closed. In February 1949, Wrighten, still desiring to go to law school, wrote to Mrs. Waring to ask for her help in securing funding to attend the law school at State College. Judge Waring replied

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[32]Wrighten to Marshall, 1 October 1947; Wrighten to Marshall, 6 October 1947; Wrighten to Hinton, 8 October 1947; Boulware to Edward Dudley, 13 October 1947; Wrighten to Hinton, 8 October 1947. NAACP papers, Library of Congress.

[33]Marshall to Boulware, 3 March 1948. NAACP papers, Library of Congress.

that it would be inappropriate for him to assist Wrighten, since he had been a party in a suit in his court. Waring also sent a copy of Wrighten's letter on to Marshall in New York, and Marshall wrote Wrighten a scathing letter, chastising him for his "bad taste" in writing the wife of the judge who had tried the case, and reminding him that he should always consult with his lawyers before doing anything concerning the case.[34] Wrighten eventually attended the law school at State beginning in 1949, and became an NAACP lawyer of some note himself. The law school itself remained open until 1967, when it closed following the integration of the University law school.

The new Dean of the Law School at South Carolina State, Benner C. Turner, not unexpectedly turned out to be an accommodationist in race relations. Pragmatically, Turner worked within state politics to ensure continued and increased appropriations for the Law School and later the College, of which he became president. Turner cracked down on student demonstrations and Governor James F. Byrnes rewarded him with help in securing grants as well as increased appropriations. By rewarding Turner, Byrnes believed he was undermining more militant black leaders at Allen University and Benedict College, both of which Byrnes and other white leaders regarded as NAACP strongholds.[35]

Wrighten v. Board of Trustees illustrates the many difficulties that African Americans faced as they attempted to use the courts to win their rights. Wrighten,

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[34]Wrighten to Mrs. J. Waites [sic] Waring, 6 February 1949; J. Waties Waring to Wrighten, 8 February 1949; Marshall to Wrighten, 21 February 1949. NAACP papers, Library of Congress.

[35]Synott, "Federalism Vindicated: University Desegregation in South Carolina and Alabama, 1962-1963," *Journal of Policy History* 1:3 (1989): 297.

frustrated at almost every turn by the slowness of the developing case, the actual and perceived lack of help from local NAACP branches, and his inability to support himself following his bold stance as the first person to try to integrate the University law school, was caught between the aggressive strategies of Marshall and Carter and the more complacent attitudes of the people on the ground. Ultimately, it came down to what Wrighten truly wanted: a legal education. Had he been willing to forego his legal education, even while the new law school operated at State College, Marshall may never have had occasion to become so frustrated with his client. However, Wrighten wanted access to a law school in his home state more than he wanted a law degree from the University of South Carolina.

As Wrighten's case moved through Judge Waring's court during 1947, the Sipuel case in Oklahoma was moving through the appellate courts on its way to the Supreme Court. The Supreme Court decided that the state of Oklahoma must provide Sipuel with a legal education "as soon as it does for applicants of any other group." While many thought that the decision meant to admit Sipuel to the University of Oklahoma, the regents decided to take the *Gaines* option of opening a separate black law school, this time by setting aside three rooms in the state capitol. Marshall attempted to challenge separate but equal directly, but the Supreme Court rejected his appeal since he had not challenged the doctrine in the state courts. Ultimately, the black law school in Oklahoma remained open only eighteen months; during that time there was only one student. The school closed in 1949, and Ada Sipuel was admitted to the University of Oklahoma law school, from which she graduated three years later.[36]

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[36]Tushnet, *Legal Strategy*, pp. 121-123.

When they became inundated with applications for graduate school programs from black applicants, the Oklahoma regents did what they could to ensure some measure of segregation. When George McLaurin applied for a graduate program in education, the regents at first refused to establish a separate program. McLaurin sued and easily won. The regents responded by establishing the peculiar rule that McLaurin could attend the University, but that he had to remain segregated in his classes. Thus, he was required to sit in anterooms or alcoves, rather than among his white classmates. Although McLaurin was technically enrolled in the white graduate school, the NAACP pressed on, arguing that the response of the regents was still unconstitutional. In 1950, the Supreme Court agreed, ruling that the restrictions on McLaurin amounted to an unusual impairment of his ability to learn.[37]

Sweatt v. Painter, decided along with the *McLaurin* case in 1950, helped to set the stage for more intense efforts beginning that year for complete school desegregation. While the precedents that Waring relied on in the *Wrighten* case required only that separate schools be established in states where whites enjoyed access to a law school, *McLaurin* and *Sweatt* went a bit further. Whereas earlier decisions had stressed access to law school, the *Sweatt* decision emphasized equality. Heman Marion Sweatt had applied to the University of Texas law school in February 1946, only to be rejected because of his race. The state legislature responded by creating a law school at Prairie View University—recently renamed from Prairie View State Normal and Industrial College for Negroes—and subsequently passing legislation to establish a Texas State University for

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[37]Tushnet, *Legal Strategy*, pp. 125, 132. *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950).

Negroes that would offer courses equal to those at the University of Texas. The issue in Sweatt's case, therefore, was quite clear: a victory meant that the doctrine of "separate but equal" could be seriously challenged. Defeat, on the other hand, meant that African Americans who wanted a top-quality education would be forced to litigate, perhaps endlessly.[38]

The question in *Sweatt* became whether a law school for blacks, hastily established, understaffed, and with meager resources, could be considered the equal of a long-established, well-staffed, and rich law school which only whites could attend. The question went further than mere physical or financial equality, however. Law schools and their graduates, argued Thurgood Marshall for Sweatt, depended on a number of intangibles, such as the publication of a law review, moot court, even the intellectual "give and take" among its students. Texas State's law school, with one applicant, clearly could not claim that it was equal in these respects, even if it could claim equal physical accommodations (which it could not).[39]

The Supreme Court's decision went squarely in Sweatt's favor. While the Court did not address the underlying constitutional principles, it did find that, as far as legal education was concerned, separate was not equal. The Court required Sweatt to be admitted to the University of Texas. Formally, separate but equal was still the law, but the doctrine was seriously weakened. Equality now meant more than just the physical

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[38]Jonathan L. Entin, "*Sweatt v. Painter*, the End of Segregation, and the Transformation of Education Law," pp. 7-9, 32.

[39]Entin, pp. 35-45.

attributes of the campus and buildings—equality meant equal quality, even in some of the intangible areas that are difficult to define.[40]

Immediately, the decision in *Sweatt* led to integration in a number of previously all-white institutions. By the fall of 1950 more than one thousand African Americans attended institutions of higher education with white peers. The University of Arkansas had integrated its medical school in 1948. The University of Kentucky admitted blacks to its graduate school beginning in 1950; in 1954, the University voluntarily admitted blacks to its undergraduate program. Louisiana State University admitted blacks under a court order in 1950, and other Louisiana schools voluntarily integrated in 1954. North Carolina, Texas, Tennessee and Virginia had substantial levels of higher-education desegregation by 1955.[41] In South Carolina and other Deep-South states, the *Sweatt* decision brought no changes. The law school at South Carolina State continued to be the only place in the state where black students could get a legal education, and it would be another thirteen years before any integration took place in a public institution in South Carolina.

Higher education remained a low priority for both the state and national NAACP through the 1950s, as the organization and the nation turned its attention to the integration of primary and secondary education. Nationally, desegregation of higher education had been won in the case of *Sweatt v. Painter*. Locally, the pragmatic acceptance of Wrighten's limited victory put the problem on the shelf until the early 1960s.

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[40]Entin, pp. 57-59.

[41]Henry Allen Bullock, *A History of Negro Education in the South from 1619 to the Present* (New York: Praeger Publishers, 1967), pp. 262-263.

The South Carolina chapters of the NAACP, meanwhile, had grown more active in the aftermath of the Wrighten case and sued first to equalize, then to desegregate, schools in Clarendon County. While that effort and its aftermath are discussed elsewhere, it is important to realize that the late 1950s was in many ways a transitional period for the Civil Rights Movement. Pyrrhic victories in *Briggs* and *Brown* had led to a white backlash that effectively stalled black efforts to desegregate state institutions in South Carolina. A few cases aiming at desegregation were filed, but instead of leading to greater degrees of integration, they often illuminated escalating white resistance. The Edisto Beach State Park case is a prime example of white recalcitrance. Nevertheless, African Americans continued to press for greater freedom, and the late 1950s brought increasing activism throughout the South. Setbacks were met with greater resolve in Alabama, Arkansas and elsewhere. The attempted desegregation of the University of Alabama in 1956 and the successful desegregation of Little Rock High School the following year illustrate the determination of African Americans to continue to fight for their civil rights even in the face of increasingly violent resistance. (Violence following the news of Autherine Lucy's court-ordered admission led the Board of Trustees to suspend, then expel her, leaving Alabama's schools completely white, while the Little Rock case led to the Supreme Court's decision in *Cooper v. Aaron*, which reaffirmed the Court's right to act as ultimate arbiter of the Constitution.)[42] By 1960, the nature of the movement began to change. Sit-ins in Greensboro, North Carolina spread rapidly across the South, as young people refused to accept a *status quo* that their parents and grandparents had only

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[42]Taylor Branch, *Parting the Waters: America in the King Years, 1954-63* (New York: Simon and Schuster, 1988), pp. 167, 181. *Cooper v. Aaron*, 358 U.S. 1 (1958).

begun to challenge. In this context, new legal action in South Carolina and elsewhere eventually led to successful desegregation of public and private institutions.

By mid-1962, the South, Border States, and the District of Columbia had 142 desegregated public colleges out of a total of 234 formerly all-white institutions. In addition, several private schools either had desegregated or were considering it. Since the rejection of Hungarian student Andre Toth at Allen University, however, South Carolina had no integrated institutions of higher learning. In fact, the South Carolina Methodist Convention in June 1962 voted overwhelmingly to keep its two colleges in South Carolina—Wofford College in Spartanburg and Columbia College, a women's school in the state capital—completely segregated.[43] Although several African Americans had applied for admission to South Carolina colleges, all had been turned down.

As 1962 began, South Carolina, Mississippi and Alabama remained the only states without any form of education desegregation but that rapidly began to change. In June 1962 the Fifth Circuit Court of Appeals ordered the University of Mississippi to admit James Meredith, and the violence that followed in the wake of his admission served as a warning to South Carolina leaders. They were determined to avoid the violence that accompanied Mississippi's integration, and were perceived as more moderate in race relations generally than the massive resisters of Mississippi and Alabama. Ultimately, compliance became the policy of the state, but compliance on such a limited scale that it could more rightly be called tokenism.[44]

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[43]"First Negroes Admitted To Five Public Colleges," *Southern School News* 9:1 (July 1962): 1.

[44]Marcia G. Synott, "Federalism Vindicated," pp 292-293. For an account of "the fall of Ole Miss," see Branch, pp. 633-672.

South Carolina officials were not quick to engage even in tokenism. When Clemson accepted $99,000 in grants from the Atomic Energy Commission in June 1957, Governor George Bell Timmerman, Jr. threatened to sue the college unless they returned the money. The government contract contained a nondiscrimination clause which would, Timmerman believed, open the college to blacks and communists.[45] In addition, South Carolina's Code of Laws required Clemson University to close its doors if any person were admitted to the school under court order. State law also required South Carolina State to close if anyone were admitted to any school other than South Carolina State under court order.[46] In the heated atmosphere of the late 1950s, few doubted that the state would follow through on such a threat. By the early 1960s, however, social and political realities made it less likely that the state would close the doors of its public schools and colleges if desegregation were ordered.

In January 1961 a young African American from Charleston, Harvey Gantt, applied for admission to Clemson Agricultural College—now Clemson University—as a transfer student. The application form Gantt filled out asked for the race of the student, and Gantt wrote an "N" in the blank. The application was returned to him on the grounds that the South Carolina Regional Education Board was paying the difference between his in-state tuition and the out-of state tuition at Iowa State University, where he had completed two years, so Gantt was forced to re-submit his application in February. Gantt was joined in his attempt by Cornelius Fludd, also from Charleston, who had gone to Morehouse College for a year. Already, there had been demonstrations that led to tear gas

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[45]Synott, "Federalism Vindicated," pp. 301-302.

[46]South Carolina Code of Laws, 1957 Supplement, § 21-230(9).

attacks by police and wide-scale arrests of black students at South Carolina State in March 1960 as well as threatened marches on the state capital, threats which were actualized a year later when 187 high school and college students were arrested during a protest march.[47]

Some time after receiving Gantt's second application, Clemson President Robert C. Edwards wrote Governor Ernest F. Hollings to request that the State Law Enforcement Division (SLED) do a criminal background check on Gantt and Fludd. Both had been charged with trespassing at the Charleston Kress store during the sit-ins of 1960s, and Hollings' legal assistant Harry C. Walker forwarded that information to Edwards in mid-July. By then Edwards had already been served with the papers for Gantt's suit against Clemson. Edwards immediately called Senator Edgar Brown and Board of Trustees Chairman R.M. Cooper to inform them of the suit, and followed up with a memorandum to the Board of Trustees outlining all that had gone on up to 11 July. Attorney general Daniel McLeod had been notified, and he in turn was to notify David Robinson and Robert McC. Figg. A meeting of the full Board was then tentatively scheduled for the 19th in Columbia.[48]

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[47]Brief for Plaintiff, 27 August 1962, p. 2; Complaint, 30 June 1962, p. 4. *Harvey B. Gantt v. The Clemson Agricultural College of South Carolina*, Civil Action Number 4101, Western District of South Carolina, Anderson Division, Record Group 21, Records of the District Courts of the United States, National Archives-Southeast Region, East Point, Georgia.; Synott, "Federalism Vindicated," pp. 302-303.

[48]Robert C. Edwards to Governor E.F. Hollings. 21 June 1961; Harry C. Walker to Edwards, 17 July 1961; R.C. Edwards, memorandum to Clemson Board of Trustees, 11 July 1961. Clemson University Special Collections. Clemson University Archives, Office of President R.C. Edwards, Correspondence 1959-1965, Folder 189. Senator Brown was a member of the Board of Trustees.

University lawyers contended all along that Gantt had not completed an application, but Gantt argued that he and other black applicants had been subjected to "tests, interviews and other requirements not imposed upon white applicants." He argued that the College had not informed him of his status until after the fall 1961 term began, and that he had in fact complied with all the requirements of Clemson's admissions process. Gantt's complaint alleged, in short, that applications from blacks were not being acted upon quickly enough, and that Clemson's administration "fail[ed] and refus[ed] to advise Negro applicants promptly and fully regarding their applications." This was in addition to the complaints of Jim Crow segregation and the additional tests and other requirements that black applicants had to undergo. In fact, Gantt's complaint details over a year of delaying tactics that Clemson engaged in. From February 1961, when Gantt re-filed his application with the school, to June, Gantt's application was not processed. In June, Clemson Registrar Kenneth Vickery wrote Gantt that there were additional requirements that Gantt had to meet. At the end of August, Vickery wrote Gantt that his transfer application was incomplete, and that therefore he could not enter Clemson in September, despite Gantt's attempts to meet those requirements. In fact, the only requirements still to be met were Gantt's College Entrance Test scores, which Vickery said had arrived too late to be considered; and a personal interview, which Clemson officials had never attempted to schedule.[49]

At the first hearing in the case in August 1962 this issue became centrally important. Since Gantt had been told that his application was incomplete partially

[49]Affidavit of Harvey B. Gantt, 30 June 1962, pp. 1-2; Brief for Plaintiff, 27 August 1962, p. 4. *Gantt v. Clemson*, C/A 4101.

because of the lack of an interview, and since Clemson had never scheduled an interview with Gantt, nor told him that an interview would be necessary, President Edwards would be caught in a vicious circle: the interview was not complete because it had never been scheduled, not because Gantt never showed up for it. In fact, Edwards defended the notice at the hearing on the grounds that the lack of interview was marked on the form as a matter of course. Vickery also told Gantt that he would have to file another application to be considered in the future, which Gantt did in December of 1961. However, by June of 1962, Gantt was still being told that his application was incomplete.[50]

Because of the continued delays, Gantt, through his father, sued. In July the Dean of the School of Architecture at Clemson wrote Gantt to request a portfolio of his work in architectural design from Iowa State, on the grounds that the conversion of his work in Iowa would be difficult for Clemson to accomplish. By this time, however, Gantt had filed his lawsuit. Although he wrote Dean McClure to say that he would furnish any information he could, the fact that the suit had been filed caused Clemson's attorney to cut off conversation between the two parties, saying that "it would seem to us to be highly inappropriate that there be any further consideration of this client's application while litigation is pending."[51]

Clearly, it was not Gantt's incomplete application that prevented his enrollment at Clemson, but his race. President Edwards wrote representatives of the Olin Foundation on 15 October that "there is no question that Harvey Gantt is being used by the NAACP to

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[50]Testimony, Hearing for Preliminary injunction. 22 August 1962. Appellant's Appendix, pp. 50a-60a; Complaint, 30 June 1962, pp. 4-5. *Gantt v. Clemson*, C/A 4101.

[51]Answer, 28 July 1962, Exhibit P; Quotation from Clemson attorney in Brief for Plaintiff, p. 8. *Gantt v. Clemson*, C/A 4101.

force integration upon this institution." Edwards had just outlined the legal strategy that depended on Gantt's incomplete application, and expressed confidence that the two main points of the defense—Gantt's incomplete application and the "fact" that his application received the same treatment as all the other applications—had been accepted by the Courts. He went on:

> All of us in South Carolina are extremely conscious of the very difficult position we are in. Somehow, by the grace of God, we are determined to find a way to resolve this problem in a manner that will reflect favorably to the credit of Clemson College, the State of South Carolina, and, I hope, the United States of America. We are not going to allow a Mississippi situation to develop in South Carolina.

Nevertheless, Edwards expressed dismay at "what the NAACP attorneys have been able to get away with in their pleadings and in their arguments in the courtroom," as well as "the terrible predicament we are in with the every-increasing [sic] centralization of power in Washington. At the same time, we must recognize that orders of the Courts must be obeyed and that we must maintain law and order."[52] Regardless, Clemson officials, like most white officials in the state, used the very court system Edwards pledged to obey to delay the college's desegregation as long as possible.

Judge Wyche displayed annoyance at the preliminary injunction hearing when Matthew Perry wanted to bring R.C. Edwards to the stand. Accusing Perry of deliberately delaying the proceedings, Wyche argued with Perry and LDF attorney Constance Baker Motley over allowing the defense the opportunity to offer a rebuttal witness. Motley argued that the defense knew that the hearing would be held and should have brought any

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[52]Edwards to Charles L. Horn, James O. Wynn, and Ralph Clark, 15 October 1962. R.C. Edwards, Correspondence 1959-1965, folder 190.

witnesses with them, but Wyche allowed them the opportunity to submit any witnesses they wanted later.[53]

In the hearing, Edwards testified that Clemson's Board of Trustees had never discussed the admission of black students to Clemson. When asked what Clemson's policy was, Edwards responded that Clemson "had never had a completed application from a Negro student." When pressed, Edwards insisted that the situation of having to decide whether to admit a black applicant had never come up; therefore, Clemson had no policy on the issue. Wyche denied the motion for a preliminary injunction on 6 September 1962, the same day that Clemson's fall term began. Shortly thereafter, Edgar Brown wrote to Charles F. Young, a New York attorney who had sent Brown some clippings concerning Constance Motley and Jack Greenberg. "I didn't see Mrs. Motley at the hearing on our Clemson case before Judge Wyche, but our College Attorney told me that she looks like a cross between an Indian and one of our half breeds, was arrogant, offensive to the Court, and generally tried to take charge of the Court." In spite of his demeanor toward Motley, Brown promised Young that, should Gantt be admitted to Clemson (and Brown expected that he would, inevitably) there would not be "a situation like Little Rock or Oxford at Clemson. We think we have too much sense for that. . . . [T]he student will be allowed to find his own way to Clemson . . . with the students which are now there, and take his chances on how he will get along."[54]

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[53]Testimony, Hearing for Preliminary injunction. 22 August 1962. Appellant's Appendix, pp. 39a-44a. *Gantt v. Clemson*, C/A 4101.

[54]Testimony, Hearing for Preliminary Injunction, 22 August 1962. Appellant's Appendix, pp. 39a-44a; Opinion and Order, 6 September 1962. Appellant's Appendix, pp. 191a-203a. *Gantt v. Clemson*, C/A 4101; Brown to Young, 2 October 1962. Edgar A. Brown Papers, Clemson University Special Collections, Folder L399.

Following two hearings before the Fourth Circuit Court of Appeals, during the first of which the Court refused to grant a temporary injunction that would have allowed Gantt to enter Clemson in the fall, the case found its way back to Judge Wyche's courtroom in November. Wyche, under pressure from the Court of Appeals for a speedy trial (so that an appeal could be heard in January), accelerated the pace of the trial to accommodate the Circuit Court. Before an overflowing courtroom in which more than half the crowd was black, an often irritated Judge Wyche snapped at the crowd when they laughed at a comment by one of the witnesses. "This is no theater. This is no place for curiosity seekers." Constance Baker Motley, referred to by the Columbia *State* newspaper as "the Negro woman attorney," took the lead in the questioning, calling Registrar Vickery to the stand. Going into the record of correspondence between Gantt and Clemson, Motley tried to set the foundation for the argument that the state was engaged in a systematic attempt to keep blacks out of Clemson. Reiterating the importance of the statute that would close Clemson if it admitted black students, Motley also noted that blind copies of all the correspondence between Gantt and Vickery went not only to Rebecca Connely, the secretary of the Regional Education Agency, but also to Senator Brown and Gressette Committee attorney David W. Robinson. When Motley asked Vickery to describe the Gressette Committee as "established to maintain segregation in South Carolina," however, the judge ruled that it was up to him to decide upon the nature of the Committee.[55]

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[55]"Judge Orders Speed in Clemson Suit," *Southern School News* 9:6 (December 1962): 1; Charles S. Wickenberg, "Judge Says Gantt Case Won't Cover All Others," *The* (Columbia) *State*, 20 November 1962, p. 1; Charles S. Wickenberg, "Judge Says Gantt Case Won't Cover All Others," *The* (Columbia) *State*, 20 November 1962, pp. 1-A, 2-A.

When Gantt testified the next day, Clemson attorney William L. Watkins asked him if his attorney, Matthew Perry, had told him that it would be easier to get a court order than to meet Clemson's entrance requirements. Implying that black students were incapable of keeping up with white schools' standards was a common tactic in primary and secondary school cases, but since Gantt had been accepted at Iowa State and excelled there, it seemed a desperate measure in this case.

The two-day trial consisted also of Clemson President Robert C. Edwards' testimony, during which he insisted that the school had treated Gantt just as it had every other applicant. He also noted that he assumed he had the power to admit black students to Clemson if they were qualified. Edgar Brown testified that segregation was "just a way of life down here." On the other hand, Brown was mystified as to why Gantt went to Iowa State—at taxpayers' expense through the Regional Education Board—if he truly wanted a quality education in architecture. He thought Gantt was happy at Iowa State "because we never heard anything from him. . . ."[56]

Judge Wyche dismissed the case in December, technically because Gantt had still not met all the requirements for admission. Gantt's team immediately appealed to the Fourth Circuit Court of Appeals, which reversed the lower court and ordered Wyche to issue the injunction admitting Gantt. Clemson's administration was prepared for any eventuality, including an appeal to the Supreme Court to review the entire case. With only 11 days left before registration for the Spring 1963 term, however, it seemed that Clemson did not have many alternatives. Edwards kept the Board of Trustees up to date

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[56]"Judge Wyche Promises Ruling in Clemson Case by January," *Southern School News* 9:6 (December 1962): 8; Edgar A. Brown to Charles Fielding Young, 28 November 1962. Brown Papers, Folder L398.

with daily memoranda outlining their strategy to petition the Court of Appeals for a stay of the injunction order and failing that, to petition the Supreme Court for a stay.[57]

Following the Appellate Court's refusal to issue the stay, there was not enough time to appeal to the Supreme Court, so Clemson had no choice left but to admit Gantt to classes on the 28th. The reaction to Gantt's victory among those associated with Clemson was magnanimous, but only on the surface. L. Marion Gressette, the Chairman of the South Carolina School Committee, issued a statement on 23 January advising Clemson's Trustees "to perfect their appeal to the United States Supreme Court for what it may be worth" while acknowledging that "the Trustees have made the only choice possible under the circumstances." Gressette continued:

> For more than a decade South Carolina has successfully defended its public schools from ill-conceived and ill-fated sociological experiments which have produced only discord and disaster for both races and retrogression of scholastic standards and individual educational opportunity.
>
> We have not yet run out of Courts.
>
> We recommend to the Governor and the General Assembly continued resistance by every lawful means to further encroachment of the Federal Government upon the right and duty of the State to operate its schools in the best interest of education. In short, we intend to retain control of education in the hands of South Carolinians.

At the meeting of the Board of Trustees held on 24 January, the Board adopted the recommendation of Clemson's administration to admit Gantt and "employ all of the means at [the College's] disposal to preserve the orderly operation of the total educational

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[57]Edwards to Clemson Board of Trustees, 17, 18, and 19 January, 1963. R.C. Edwards, Correspondence 1959-1965, Folder 191.

program of the college and to preserve law and order upon the Campus and the peace and dignity of the institution."[58]

Already by 20 January, Clemson had begun preparing for Gantt's enrollment. "Outsiders" would not be welcomed on the campus when it opened for spring semester registration. Clemson had learned from events at the University of Mississippi, where four non-students had been indicted for rioting. Clemson's Public Relations Director Joe Sherman issued a press release in which he attempted to make clear the school's policy: to treat Gantt "as any other student at Clemson College" as long as "he, in turn, conduct[s] himself in compliance with the rules of conduct for Clemson students."[59]

Meanwhile, Clemson's lawyers were trying to make their case that Gantt's entry to Clemson should at least be delayed. Expecting rejection from Judge Simon Sobeloff at the appellate level, the Clemson lawyers had arranged to see Chief Justice Earl Warren in his chambers. However, they still had little chance: no delay had been granted by the Court in the Meredith case in Mississippi, and the full Court had denied any appeal in that case. Ultimately Clemson had no option, but the wheels kept turning in any case.

The aftermath of the Fourth Circuit's opinion led Clemson officials to wonder exactly how the injunction affected them. Edwards wrote to William Watkins to have him explain exactly how the injunction affected Clemson. Watkins replied, essentially, that Clemson would have to treat Gantt like any other transfer student, but that Clemson was

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[58]Statement of Senator L. Marion Gressette, Chairman, South Carolina School Committee, 23 January 1963. R.C. Edwards, folder 191; Agenda of Board of Trustees Meeting, 24 January 1963. R.C. Edwards, Correspondence 1959-1965, Folder 191.

[59]Charles H. Wickenberg, "Clemson's Attorneys Will Try Last Legal Resort on Monday." *The State*, 20 January 1963, p. 1.

not responsible for attempting to shape the attitudes of the students there. Clemson also now had to treat applications from prospective black students without discrimination, but they did not have to change school policy as it concerned the general public. For example, Gantt would be entitled to bring a friend to any school function, but that would not "remove from the College the right to exclude other Negroes from the general public from attending the same or a similar function."[60] Desegregation of the student body did not require desegregation of the campus.

Gantt's first day at Clemson was uneventful, which is exactly what Clemson and state officials wanted. Reporters in fact outnumbered interested students by about 160 to 100, and the press crew was "amused" to see two students walking nonchalantly past the throng of reporters on their way to the golf course. With a police airplane overhead and plainclothes officers strewn about the campus, officials were obviously prepared for the worst. The only violence was perpetrated against the tires of one Highway Patrol car, which were punctured with an ice pick. Student reaction was predominantly along the lines of one man's reaction: "I couldn't care less about Harvey Gantt. I've got enough worries of my own with math and physics." Although opposition was not completely absent, the situation could not have turned out better for the college, or for the state. As students returned to campus from the semester break, however, tensions rose somewhat. There were minor attempts to intimidate Gantt, but at the same time there were those who went out of their way to make him feel welcome. There were reports of a late-night "bull

[60]Watkins to Edwards, 25 January 1963. Brown Papers, L397.

session" his first night on campus, and two students ate lunch with him following a minor incident in the dining hall.[61]

Opposition from state politicians leading up to the final decision varied in its intensity, but all were opposed to the court's actions. When Senator John Long of Union rose to appeal for the closing of Clemson, Gressette himself rose to defend the state's actions in the Gantt case. "We may lose a battle but we are engaged in a war," he stated to rousing applause which was followed by a vote of confidence in his committee. James F. Byrnes, like Edgar Brown a life trustee of Clemson, was "confident there will be no acts of violence [at Clemson]. . . . But like any other man who forces himself where he is not wanted, [Gantt] will not be embraced by all . . . Thank goodness, not event the Supreme Court has ordered that be done—yet!"

A group calling itself Concerned Clemson Alumni issued a circular on 24 January calling on Clemson students to leave Gantt "to his own devices. Students should ignore him, avoid conversing with him and sitting next to him, should offer him no assistance and should ostracize him and any student who may offer him association in any respect. He should be treated with the same cold, silent contempt he has earned." By February, an allied group on campus called the Rebel Underground had come into being. While President Edwards denied that any such organization existed at Clemson—the Rebel Underground was an invention of students at the University of Mississippi who were hoping to inflame students at Clemson—the author or authors claimed to be Clemson students. Proclaiming "organized resistance" to Clemson's integration, the Rebel

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[61]"Clemson College Admits Negro On Order of Appellate Court," *Southern School News* 9:8 (February 1963): 8.

Underground claimed that "integration is Communism in action" and resented "the attempts by Clemson officials to depict us as indifferent and too preoccupied with 'grades' to be concerned over such important matters as States Rights, Racial Integrity or the menace of the Communist Party." "RU members," according to the broadside, were "fighting for the Southern way of life. RU is defending the principle of Racial Integrity."[62]

The second edition of the broadside, from March, revealed several incidents that went unreported to the press. According to the editors, Gantt was confronted in the dining hall on two occasions during his first week on campus and stared at. (It was following one of these incidents that two students chose to eat with Gantt.) Another time a group was caught yelling at him from their dormitory windows, and once several students were caught throwing fireworks at Gantt's dorm room.[63]

The editors of the Rebel Underground went on to repeat their battle cry against the "pseudo-scientific social doctrine" of equalitarianism. "Integration," they argued, "[would] inevitably bring about intermarriage between the two races. We must fight integration with every legitimate means at our disposal!" They called for more letters to the Clemson student newspaper, "the silent treatment for preachers, students and editorialists who are attempting to break down our policies of racial segregation, and the

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[62]Concerned Clemson Alumni addressed to Dear Clemson Student, 24 January 1963. R.C. Edwards, Correspondence 1959-1965, Folder 197; Edwards to Thomas F. Jones (President of the University of South Carolina) 15 March 1963. R.C. Edwards, Correspondence 1959-1965, Folder 231; "Rebel Underground," vol. 1, no. 1, February 1963. R.C. Edwards, Correspondence 1959-1965, Folder 196.

[63]"Rebel Underground," vol. 1, no. 2, March 1963. R.C. Edwards, Correspondence 1959-1965, Folder 196.

boycotting of eating establishments which state their willingness to serve our unwanted guest." Finally, they asked students to "refuse to accept [integration] in your heart, and it will never be a fact."[64]

Also in March 1963, Reverend Charles A. Webster of Clement Baptist Church in Clemson charged that he was forced to resign due to pressure put on the board of deacons and the pastor of Clement, Charles Arrington. Webster had been working as director of student work for the church and had assisted Gantt in his early days at Clemson at the behest of South Carolina Council on Human Relations. Webster charged that his role in helping Gantt had led Robert Edwards to call for his being "censured or removed" from the church.[65]

As early as August of the previous year, Edwards had begun receiving correspondence from concerned citizens throughout the state. Mary Smith of Rock Hill, the site of Clemson's sister institution Winthrop College, wrote that

> to give in to their demands, even to the admission of a single Negro, is to lower the bar through which hordes of insolent, impudent Negroes will rush, crushing beneath their black heels all that the white man holds dear. . . . The ultimate aim of the Negroes is to secure control of the government of the United States! . . . True integration will come only if, by enforced familiarity and association, our country becomes a land of Mulattoes.

However, many writers were more moderate, expressing the general belief that, while they hated the idea of Clemson's integration, they were able to, in the words of one writer, "stomach it if [they] have to." Others wrote to express their concern that Clemson

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[64]"Rebel Underground," vol. 1, no. 2, March 1963. R.C. Edwards, Correspondence 1959-1965, Folder 196.

[65]"Minister Quits in Dispute Involving Gantt," *Southern School News* 9:10 (April 1963): 14.

not repeat the ordeal of the integration of the University of Mississippi, or to say that resistance would be playing into the hands of the NAACP. One student wrote to assure Edwards that he and his friends would not cause any violence in connection with Gantt's entry into the College. Following Gantt's enrollment in January of 1963, Edwards' incoming mail continued to be a mixed bag, though the majority of the letters were letters of praise for the way in which Clemson dealt with Gantt's enrollment.[66]

Writers to Senator Edgar Brown offered a variety of opinions. From Columbia, one correspondent advised Brown to "find a worthy, eligible [black] student that is interest[ed] in a subject like agriculture and quietly enroll him one day prior to the entrance of the would be Mr. Gantt." Gantt would then be introduced to his roommate, the first black student at Clemson. The author apparently realized the inevitability of the struggle, but desired to undermine the NAACP, for whom Gantt was a "puppet." Commodore Chester H. Taylor of the Commodore Chester H. Taylor Nautical Academy in Charleston offered the following: "The enrollment of a negro as a student at Clemson College is communist inspired and if allowed will be another gain toward Victory for Communist Russia." A group of ministers met prior to the final ruling of the Court of Appeals to prepare a statement assuming Gantt's victory. "Such a ruling," they noted, "goes contrary to the customs and traditions of the South and of our own state of South

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[66]Mary Smith to President and Trustees of Clemson College, 19 August 1962. R.C. Edwards, folder 214; Truman David Roper to Edwards, 2 October 1962. R.C. Edwards, folder 214. Previous quotation from Lawrence W. Reese to Edwards, 16 October 1962. R.C. Edwards, Correspondence 1959-1965, Folder 215.

Carolina in particular." However, they argued, South Carolinians should remain law-abiding and accept the decision, avoiding violence at all costs.[67]

After Gantt enrolled, others wrote from both sides of the issue to complain about the continued attention the issue was getting in the state legislature, which they thought should be dealing with more pressing issues. From Gaffney, Alma Campbell wrote that South Carolinians should "bow [their] heads in shame that we have a standing committee for Segregation [the Gressette Committee] in these enlightened times." Following Gantt's first term at Clemson, one writer from nearby Greenville objected to the expenditure of $40,000 "spent to keep one black Negro at Clemson College, against the laws of our state," while Brown had argued that adding to the retirement checks for the state's teachers would be too expensive. "South Carolina should hang its head in shame" for "submitting to the Communistic NAACP and making ourselves a laughingstock."[68]

South Carolina has been referred to as a moderate state as far as resistance to integration is concerned. In their attempts first to postpone complete integration and then to minimize integration, moderates in South Carolina were more successful than other southern whites whose policy leaned toward massive resistance, because the moderates successfully avoided federal intervention. Thus, when the inevitable happened and Harvey Gantt did matriculate at Clemson, the lessons of moderation were vindicated. By

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[67]Murrell G. Scott to Brown, 20 January 1963. Brown Papers, L390; Taylor to Brown, 24 January 1963. Brown Papers, L390; Statement enclosed with letter from Arthur Martin to Brown. Brown Papers, L390. Martin was the Executive Secretary of the Presbyterian Synod of South Carolina and Temporary Chairman of the Conference of Church Leaders. Participants at a meeting of representatives of several denominations, including Baptists, Methodists, Lutherans, Episcopalians, and Catholics tentatively approved the statement.

[68]Campbell to Brown, 15 February 1963, Brown papers, L390; (Miss) Fay DeShields to Brown, 6 June 1963. Brown Papers, L397.

complying in a token way with the directives of the federal judiciary, South Carolina's white leadership ultimately won. Having seen the violence associated with the University of Mississippi's integration in 1962, South Carolina's leaders recognized that "peaceful compliance was the best way to preserve state rights and local control." Of course, peaceful compliance took place within a context of continued resistance. Clemson continued to prepare its appeal of the Circuit Court's decision ordering Gantt's admission and efforts to prevent elementary and secondary school desegregation continued.[69]

The election of Ernest F. Hollings as governor in 1958 has been assessed as "probably the most decisive factor in South Carolina's change in attitude." Hollings was a moderate New Southern Democrat who represented economic progress as governor in spite of supporting anti-integration laws while serving in the state legislature.[70] Hollings was, however, a segregationist, at a time when more vigorous enforcement of desegregation would have been not only impractical but politically suicidal. Hollings was not an effective leader of the desegregation movement. When confronted with the reality of Clemson's impending integration, Hollings did call for calm, but he did little to assuage the more virulent anti-integrationists in the state. Rather than take a definite stand, Hollings asserted that South Carolina's official position would be one of "firm flexibility."

Following Clemson's dignified integration, colleges around the state began to admit black students, and colleges that did not admit black applicants faced the prospect

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[69]Marcia G. Synott, "Federalism Vindicated," pp. 292-293; "Proposed Tuition-Grants Plan Arouses Heavy Debate," *Southern School News* 9:11 (May 1963): 14.

[70]Synott, "Federalism Vindicated," p. 304

of new lawsuits. In July 1962 Henri Monteith (niece of Columbia activist Modjeska Simkins) and her parents were reported to be considering whether to sue to gain her admission to the University of South Carolina, which had rejected her the previous spring. In the fall of 1963, after attending the College of Notre Dame in Baltimore the previous year, Monteith became the first black student at the University under court order from Judge J. Robert Martin.[71] At the trial in June, the school acknowledged that it had refused Monteith's admission because of her race. The University decided not to appeal Judge Martin's order, and by July, one other African American had been accepted and two others were in the process of applying. By August, the other black students had been accepted, but the University had re-considered its decision not to appeal, since an appeal would put the school on solid ground if Clemson's appeal were successful. Both schools were appealing the class-action components of the adverse decisions.[72] In October 1963, the Supreme Court ruled that the *Gantt* case had properly been brought as a class action, leaving neither Clemson nor U.S.C. in very good shape.[73]

In June 1963 the South Carolina Conference of the Methodist Church met and decided on a policy that would place "no restraints" on college officials regarding whom to admit. The decision affected Wofford, Columbia and Spartanburg Junior College. The

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[71] *Monteith v. University of South Carolina.*

[72] "Negroes Seek Admission To Two State Colleges," *Southern School News* 9:2 (August 1962): 8; "Maryland," (continued from p. 14) *Southern School News* 9:2 (August 1962): 16; "USC Acknowledges Admission Denied Because of Race," *Southern School News* 10:1 (July 1963): 7; "11 Negroes Enter Classes with Whites in Charleston," *Southern School News* 10:3 (September 1963): 23.

[73] "State Baptists To Consider Desegregation of Furman," *Southern School News* 10:5 (November 1963): 12.

following October, Furman University, operated by the Southern Baptists, decided to consider "all qualified" applicants, opening the door for African Americans to attend. Despite the actions of the Methodist Conference, no affiliated school had moved toward integration, so Furman was actually the first private school to make such a move. Nevertheless, the State Baptist Convention's General Board requested a delay in implementation of the new rules so they could analyze the effect on other Baptist-controlled institutions. Two members of Furman's board, both from the lowcountry, had resigned just before the vote on the change. Meanwhile, Wofford was considering a desegregation move, as was Newberry College, which was affiliated with the Lutheran church.[74]

In May 1964 Lander College, which at the time was supported by Greenwood County, received its first application from a black student, and announced that the application would be handled like any other. Alice Brown had been interviewed by the school's personnel as part of her admission process like all other applicants, and told reporters for the Greenwood *Index-Journal* that she had "always wanted to go to college and [she] would not be able to attend any other way."[75]

That July, Winthrop College, an all-female school supported by the state, admitted its first black student for the summer session term "routinely and without incident." Cynthia Plair Roddey, already a graduate of Johnson C. Smith University and a teacher in Rock Hill, enrolled in graduate courses. News reporters missed her arrival, but were on

[74]"USC Acknowledges Admission Denied Because of Race," *Southern School News* 10:1 (July 1963): 7; "State Baptists To Consider Desegregation of Furman," *Southern School News* 10:5 (November 1963): 12.

[75]"Negro Girl Applies At Lander College," *The State*, 14 May 1964, p. 1-B.

hand later, along with SLED agents and local police, who also guarded gates at the school. That fall, two black women, Arnetta Gladden and Delores Johnson, enrolled as freshmen, and a third black woman had been admitted, but did not appear for registration. Winthrop students had stated they were ready to support integration. When Winthrop college students were reported as being ready and able to "face integration if it came" in February 1962, college president Charles S. Davis re-instituted an old rule requiring any reporters wishing to contact students to get permission from the president's office. This brought about cries of censorship from the *Rock Hill Evening Herald*, which had polled some of the college's students in the first place. Davis further argued that the newspaper's report was inaccurate, since it was based on the opinions of only a few students. The state's system of technical education, which began its existence with the segregated opening of the Technical Education Center in Greenville in 1962, almost immediately began to desegregate. By the fall of 1963, 20 African Americans attended three of the centers, including nine at Greenville.[76]

It is important to note that despite the state's gradual move toward "integration with dignity," not all white South Carolinians necessarily went along with it. Late in the evening of 26 August a bomb exploded in the front yard of Dr. H.D. Monteith, Henri's uncle who lived about 200 yards from her house, leaving a crater a foot deep and five feet long and shattering windows. Registration for U.S.C. was yet to begin on 10 September. Henri Monteith affirmed her decision to attend the university the next day.

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[76]Ron Wenzell, "Winthrop College Admits 1st Negro," *The State*, 21 July 1964, p. 1-A, 6-A; "Winthrop Registers 2 Negroes," *The State*, 17 September 1964, p. 1-B; "State Senators Attack Plan To Build On-Base Schools," *Southern School News* 9:9 (March 1963): 16; "Baptist Convention Asks College To Delay Planned Desegregation," *Southern School News* 10:6 (December 1963): 4.

After Wofford decided to admit two black students for the fall 1964 semester, state Methodists attempted to censure the school, but two measures were defeated in close voting. Several Methodist churches in the state did vote to withdraw funding from the school, however. Nevertheless, the admissions went ahead as planned that fall. The Citadel, meanwhile, denied its first black applicant on the grounds that he had applied too late or after the enrollment had been met. At the same time, Dean Robert McC. Figg of the University of South Carolina Law School announced that its first black student had been accepted for classes in the fall. Figg had been one of the lead attorneys in the original *Briggs* case, and had been a staff attorney for the Gressette committee before his appointment as Dean of the Law School. In November, the state Baptist Convention met at the First Baptist Church of Columbia—the site of the Secession Convention in 1860—and voted 905 to 575 to continue segregation at its schools. The state's Baptist Student Union, however, voted to end segregated activity in December, 121 to 57.[77]

As integration proceeded—however slowly—the Columbia *State* newspaper, edited by *Southern School News* correspondent William D. Workman, weighed in on the issue. The paper's stance on the desegregation of higher education favored the slow progress that was taking place, but the paper worried about what it called "marginal mixing":"In the area of extra-curricular activities . . . integration is moving faster than the

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[77]"North Charleston Plans Fully Voluntary Action," *Southern School News* 11:1 (July 1964): 7; "Methodist College Registers Negro," *Southern School News* 11:3 (September 1964): 12; "15 Districts Desegregate, All But Four Voluntarily," *Southern School News* 11:3 (September 1964): 12; "Segregation-Desegregation Status [Table]," *Southern School News* 11:6 (December 1964): 1; "State Baptists Vote Against College Desegregation,"*Southern School News* 11:6 (December 1964): 6; "Furman To Defy Baptist Vote Against Desegregation," *Southern School News* 11:7 (January 1965): 8.

public and many parents realize. . . . [M]ore and more student local gatherings . . . are serving as vehicles for racial admixture."[78]

Despite the focus on "integration with dignity," state and college officials in the Clemson case worked feverishly to avoid the inevitable: the admission to Clemson of its first black student. While the historical record reflects that Clemson's integration was a relatively smooth transition, despite the elements of segregationism that manifested themselves from time to time, it nevertheless is true that the College's official structure, supported by the state government, did everything in their legal power to prevent Harvey Gantt from becoming a student at Clemson. There are a couple of possible interpretations of their actions. One less plausible explanation is that Clemson officials regarded Gantt's admission as a *fait accompli* even as they were doing everything they could to stop it. Under this argument, Clemson and state officials knew at every step that they would lose, and were merely delaying the inevitable. After all, the Supreme Court had ruled almost nine years earlier that segregation was illegal. In addition, despite continued massive resistance, the pace of integration was increasing. Clemson officials therefore must have known that, once the case moved outside the comfort zone of the federal courts in South Carolina, their cause was doomed from the very beginning.

However, while not unreasonable, such an explanation does not take into account the roll of the legal system. First, it was Gantt who sued Clemson. Had it not been for Harvey Gantt, or someone like him, Clemson would probably have remained segregated for at least a few more years. Gantt, supported by the NAACP, realized that taking advantage of the legal system was the only way to achieve his objective. Like prospective

[78]"Paper Attacks 'Marginal Mixing'," *Southern School News* 11:7 (January 1965): 8.

black college students in the past, Harvey Gantt used the only tool he thought he had—the legal system—to gain admittance to the bastions of southern white education. Second, once faced with a legal challenge, Clemson and state officials also used the legal system to their advantage. Even assuming that they were only using the legal system as a delaying tactic, white officials also realized that it was the only weapon they had left. After having seen the results of mob violence in Mississippi, not to mention the federal occupation of Little Rock brought on by white supremacist mobs there in 1957, South Carolina officials knew that there was little they could do outside of an appeal to law.

In their appeals to the legal system, South Carolina's white establishment was not merely trying to delay the inevitable. Here, as in other cases, there is the very real sense that they thought the law was on their side. Within Clemson's administration, or in the Gressette Committee, the objective was always victory, not to put off surrender for as long as possible. Only after the Appeals Court overturned Judge Wyche did Clemson officials try to delay the inevitable. Up to that time, Clemson officials expected to win the case.

The drastic changes in mood and atmosphere between 1947 and 1962 reveal much about the Civil Rights Movement in South Carolina. When John Wrighten tried to desegregate USC's law school in 1947 he was swimming in largely untested waters. As part of a set of higher education lawsuits, *Wrighten* was at best only a partial victory—partially because of the nature of black protest in South Carolina and partially because of the plaintiff himself. Local black leaders who pressured Wrighten to accept the partial victory that came with Waring's decision represents the pre-*Briggs* black leadership in the state—complacent, pragmatic, cautious in the midst of struggle. While John

Wrighten would go on to become a civil rights lawyer in his own right, representing black plaintiffs in a suit to integrate state parks in 1955 his frustration with dealing with the white-dominated system is telling. Wrighten, essentially, gave up. While Thurgood Marshall wanted him to keep up his fight, Wrighten realized the emotional costs associated with the struggle. Wrighten had secured a victory: Judge Waring had ordered South Carolina to establish a law school at State College, and for John Wrighten, that was enough for him to secure what he wanted—a legal education—without having to leave South Carolina to do it.

Harvey Gantt, on the other hand, was succeeding at Iowa State when something called on him to integrate Clemson. Gantt endured similar hardships to those Wrighten contended with a decade and a half before, but a variety of factors contributed to Gantt's ability to see his case through to complete victory. The most important of those factors, of course, was the case of *Brown v. Board of Education*. For eight years before Gantt's attempt to enter Clemson, separate but equal had been unconstitutional. Other southern states had begun to integrate their schools. Violence in Mississippi and Alabama led South Carolina officials to finally make the fateful decision—once forced to by the courts—to allow integration to occur without violence. White South Carolinians of the time would no doubt have argued that the state's recalcitrance had allowed the state to adjust to the new Constitutional realities it faced. But it was only the determination of black South Carolinians—a determination revived with the rejuvenation of the civil rights movement itself in the early 1960s—that forced white officials down the road that led to the integration of Clemson College in January 1963.

"THE MAGNIFICENT FIGHT": CIVIL RIGHTS LITIGATION IN SOUTH CAROLINA FEDERAL COURTS, 1940-1970

By

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CHAPTER FOUR

"I NEVER HAD ANY PLACE TO GO": DESEGREGATION OF PUBLIC FACILITIES, 1955-1966

The months following the apparent victories offered by the Supreme Court's two decisions in *Brown v. Board of Education* were an exciting time for African Americans in the South.[1] However, though *Brown II* had been decided in May 1955, by September 1956 only 723 of 10,000 Southern school districts had any measure of desegregation. In Charleston, as in others cities and towns in South Carolina, African Americans became increasingly disappointed with the situation and began to organize. Students at Burke high school, for example, met with teachers for planning sessions. One of those students, Harvey Gantt, would later integrate Clemson University. One of the leaders of Charleston's movement was J. Arthur Brown, a realtor who was well known in the African American community. Under Brown's leadership, the city's NAACP membership rose from 300 to almost 1,500 within a few months of his assuming the reins.[2] While whites in the state continued to drag their feet on the issue of segregation, blacks were beginning to move more quickly.

The pace of the Civil Rights Movement both in and out of South Carolina began to accelerate in 1955 for a variety of reasons: the Supreme Court's decision in the second *Brown* case, the Montgomery Bus Boycott that began in December and continued through

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[1]*Brown v. Board of Education* 347 U.S. 483 (1954); 349 U.S. 295 (1955). Chapter five deals with the two cases, the latter of which—the Supreme Court's decision on the remedy portion of the case—is commonly referred to as *Brown II*.

[2]William D. Smyth, "Segregation in Charleston in the 1950s: A Decade of Transition," *South Carolina Historical Magazine* 92 (April 1991): 110-111.

the next year, as well as the increased level of concern among the African American community regarding their rights. In February 1955, Sarah May Flemming of Columbia sued the South Carolina Electric and Gas Company, which operated the city's bus system, for enforcing state law by making her sit in designated seats and use the designated exit for African Americans. The case came before Judge George Bell Timmerman, who quickly ruled that Flemming's case had no standing, since the state codes in question were constitutional. *Brown v. Board of Education*, he wrote, "is not applicable in the field of public transportation. . . . One's education and personality is [sic] not developed on a city bus. . . . To hold that the Brown decision extends to the field of public transportation would be an unwarranted enlargement of the doctrine announced in that decision and an unreasonable restriction on the police power of the state."[3] Timmerman dismissed the case.

Failure to win in the *Flemming* case did not daunt black South Carolinians, however. In May 1955 a group of African Americans in Charleston County met at J. Arthur Brown's office to discuss the idea of writing to get permission to use the Edisto Beach State Park, the only park in the state that was closed to African Americans by law. Blacks in the Charleston area had threatened to sue for some years, though they had taken no action and the issue had been on the back burner since 1953. Now, with the advances being made in the movement, the time seemed ripe to re-open the issue. Etta Mae Clark, the second vice president of the Charleston branch, was among the participants, as were John Chisolm and Charles Mason, both of whom were on the local executive board of the NAACP. Clark initiated the meeting because she "was going to have some friends down

[3] *Flemming v. South Carolina Electric & Gas Company*, 128 F. Supp. 469, p. 470 (1955).

in June and . . . wanted a place to take them, which we do not have, and [she] went to [her] friends and asked about the Edisto Beach Park. . . . [T]hey said they don't see any reason why we shouldn't write and ask for admission. We were not going down, but we wanted to find out what was legal or right for us to do." Clark and the others wrote J.M. Pope, the superintendent of the park, asking for permission to use the park's facilities on May 25, and they received this response from Pope's successor Donald Cooler: ". . . This park was established in 1935 for the exclusive use of white persons, and based on custom and precedence we will have to deny your request." Further, Cooler informed the group that "several of the state parks in South Carolina are designated for Negro use only. One park in this area, Hunting Island, has separate white and Negro areas. I suggest that you visit that park where you will be most welcome." Clark and the others then brought suit against state Forester C.H. Flory, along with state Park Director C. West Jacocks and Cooler. They argued that sections 51-181 through 51-184 of the 1952 state Code of Laws specifically limited the use of the Edisto Beach State Park to whites in violation of the Fourteenth Amendment.[4]

The state's answer to the suit argued that

> the purpose of the Park is to provide wholesome relaxation and recreation for those of all ages and sexes using the facilities, without compulsion and voluntarily, but that due to the natural inclination of each race at this time to associate with members of its own race, and to the present natural, historical, cultural and deep-rooted mental attitudes and feelings of each race against the social and sexual mixing of the races, there exists potential

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[4]"South Carolina," *Southern School News*, 1:8 (April 7, 1955): 13; Testimony for Plaintiffs at Trial, 6 February 1956, pp. 5-6, 7; Donald B. Cooler to Mrs. Etta Clark, 21 May 1955. Exhibit P-1; Amended Complaint, 22 July 1955, p. 2. *Etta Clark, et al. v. C.H. Flory, et al.*, Civil Action Number 5082, Eastern District of South Carolina, Charleston Division, Record Group 21, Records of the District Courts of the United States, National Archives-Southeast Region, East Point, Georgia.

> and definite dangers of unpleasantries, social friction, breaches of the peace and other events leading to riot and bloodshed, which will surely result from an enforced mixing of the races at such a park, for which reason the Legislature of this State and the State Commission of Forestry sought and seeks to avoid this by forbidding the mixing of the races. . . .
>
> [The] defendants deny [that] exclusion of colored persons under such conditions constitutes an inequality under the law, but allege that if there is any psychological inequality, much more will result to the white persons using the parks, if any do so, under any enforced commingling with persons of the minority group, in violation of the well known standards of conduct and racial relations now prevailing in this State, which will constitute a denial of equal protection under the law to the majority in favor of the gratification of a small vocal portion of the minority group.

The answer went on to accuse the plaintiffs of "blocking the establishment" of a separate park for blacks, for which the state had appropriated $50,000, because of "plaintiffs' objection to any segregated system, no matter how equal, and their insistence upon full integration, irrespective of the detrimental affects which will result from such a policy to members of their own and of the white race."[5]

At the first hearing in the case held on 23 August, presiding Judge Ashton H. Williams asked John Wrighten, the plaintiffs' attorney (who himself had been the plaintiff in the case to integrate the Law School of the University of South Carolina[6]) whether it might not be a better idea if the plaintiffs accepted $50,000 to build their own beach. He was "wondering whether or not [Wrighten] would rather see this beach closed altogether and the state surrender it [to private sale], rather than to accept the $50,000 and build a beach of your own?" Wrighten demurred, citing Supreme Court case law, but

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[5]Defendants Answer, 17 August 1955, pp. 3-4. *Clark v. Flory*, C/A 5082.

[6]In *Wrighten v. Board of Trustees of the University of South Carolina*, 72 F. Supp. 948 (1947). To the disappointment of some, Wrighten had settled for the creation of a nominally equal law school at South Carolina States College, the state's historically black public college.

Williams persisted: "We have got an unusual and extra-ordinary situation in Charleston County and in this section of the state, and I think that you are practical enough to realize that."[7]

Williams continued, citing at length an article by Frank Graham, former United States Senator from North Carolina and President of the University of North Carolina. Graham, "the most enthusiastic supporter that you [African Americans] have in the United States," had argued that "a reasonable time is needed in the Deep South for the stages and ways of profound adjustment of the inner spirit of the people for the outer and sincere fulfillment of the new law of the land [*Brown v. Board of Education*]." Williams concluded by noting his duties as a judge to enforce the laws, but he remained "tremendously impressed" by Graham's argument "that the Deep South [states] . . . were the very last places that the people who had won the fight should attempt to press to victory." Nevertheless, Williams was unsure whether he agreed with the racial liberalism he perceived in Graham's report: "In fact, if I had been sitting on the Supreme Court, I wouldn't have signed the opinions that were signed on May 17, 1954 and May 31, 1955."[8]

Williams was not finished. Referring again to the Graham article, Williams advised Wrighten, and the rest of South Carolina's black population as well:

> Don't be glib. Don't be too jubilant. Don't crow too much. Don't let your national secretary [of the NAACP] ever come back to South Carolina and make a speech over the radio. I listened to him. It was the worst speech I have ever heard in my life. It was the worst thing that could ever happen to the colored people. And I believe that if you will read this [article] and

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[7]Transcript of Hearing, 23 August 1955, pp. 34-35. *Clark v. Flory*, C/A 5082.

[8]Transcript of Hearing, 23 August 1955, pp. 34-38. *Clark v. Flory*, C/A 5082.

> carefully digest it, that it may be possible that the plaintiffs in this case would say that "Under the decision of the three-judge court, we have a personal right, but we have no desire to press that at the present time." I am not going to suggest that they do that. . . . But the Supreme Court of the United States has fortunately given the three-judge courts and the district courts wide authority to determine what is the proper time for the assertion of those rights.
>
> Of course I can't state in any case what is the proper time for the assertion of those rights until I have heard the case. But it seems to me that after hearing you here, you have only five plaintiffs. I believe, in this case, that it would be part of wisdom for the five plaintiffs to consider the local situation which exists in Charleston and in this entire area, and determine that it possibly isn't the right time for them to assert their rights.
>
> . . . I think that the question confronting the courts and the people in the South is undoubtedly the most serious that has ever confronted the people of the United States. And I think by unwise action, the courts and the people may make some very serious and grave errors, and may do things which will destroy, if you do it too quickly, the things you hope to accomplish.

The parties then agreed to let the state Supreme Court decide the matter, with the federal court maintaining jurisdiction over the issue. Finally, in an unusual move, Williams issued a statement that was part of the record, but certainly had nothing to do with any of the legal issues involved. After warning the Ku Klux Klan of the dangers of coming into conflict with the decisions of the Supreme Court, Williams went on to cite the NAACP as the second of "two organizations whose apparent purposes and aims are to win by any means." "This organization, along with the Klu [sic] Klux Klan are the real enemies to any progress in the school cases, or in any other like cases. It is my belief that no progress can be made unless and until both the Klan and the NAACP are eliminated from the picture in South Carolina. . . . I shall scrutinize all cases coming before me most carefully,

and if it appears that either the Klan or the NAACP have been guilty of improper and illegal practices, I shall not hesitate to take the proper steps."[9]

In December, the attorneys in the case met with Judge Williams. A similar case in Maryland had been decided in favor of a group of blacks in that state, and under the agreements reached in the August hearing, the Maryland case controlled the issue in South Carolina. However, since the Supreme Court did not address the facts of the Maryland case (which were similar, but not exactly the same as those in South Carolina), it remained unclear to the state's attorneys that the Edisto Park should automatically be opened to African Americans. The parties therefore agreed to trial in the District Court, and the date was set for 6 February 1956.

Assistant State Attorney General James S. Verner questioned Etta Clark at length early in the February trial. After first establishing the NAACP memberships of the principals, he began to question Clark about the $50,000 that the state legislature had set aside to establish a private park for African Americans. Clark declared that she had no knowledge of any such effort beyond having read about it. Verner then asked Clark a question that brought the issues in the case clearly into focus: "Suppose that the state would put a park for the Negro people and one for the white people, would you be satisfied with that, or do you want only one park open to all?" Clark responded concisely: "As of today, I want one. . . . Any place that is open and supported by tax money, I would like to be allowed to go."[10]

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[9]Transcript of Hearing, 23 August 1955, pp. 38-39, 53, 56. *Clark v. Flory*, C/A 5082.

[10]Testimony for Plaintiffs at Trial, 6 February 1956, p. 10. *Clark v. Flory*, C/A 5082.

Verner seemed incredulous: "You are perfectly willing for the park to be shut down so long and no matter how much other people sought it, so long as a Negro cannot go to any park, no matter where it is or what it is, is that correct?" Again, Clark's response was to the point, not of the question, but of the system itself: "They never cared how I felt. I never had any place to go."[11]

Verner moved on to questions regarding Clark's membership in the NAACP, and the issue of her "representation" of Charleston blacks in the case. Of the 35,000 to 40,000 African Americans in Charleston county, only 1,400 belonged to the local branch of the NAACP, and there had never been a vote among the membership concerning the issue of segregated parks. Verner asked whether the group had conferred with Thurgood Marshall, whether the group had conferred with any lawyers prior to writing the letters to the state park, and established that the plaintiffs' lawyer, John Wrighten, was the NAACP counsel for Charleston. Given Judge Williams' tirade against the NAACP in the earlier hearing, Verner's strategy of painting the lawsuit as a conspiracy by leaders of the Charleston branch, with possible connections to Thurgood Marshall, was a clever one. However, Clark continued to insist that no one had conferred with any lawyer before writing letters asking for admission to the state park. No one had contacted Thurgood Marshall. Nevertheless, the connection to the local branch could not be denied: the plaintiffs were members and their lawyer was counsel for the local branch. It remained to be seen whether Verner could establish anything more than a coincidental connection. Of course, the connection was not coincidental in real terms. The NAACP was intimately involved

[11]Testimony for Plaintiffs at Trial, 6 February 1956, p. 10. *Clark v. Flory*, C/A 5082.

in the litigation campaign. However, Verner's attempt to paint the campaign as a conspiracy failed.

When J. Arthur Brown took the stand, W. Newton Pough, the co-counsel for the plaintiffs, established that the local NAACP had had some conferences about the matter, and had hired an attorney to look into the matter. Brown also noted that there had been efforts to look into buying other areas for a recreational beach for blacks in Charleston County, though nothing had ever come of the efforts.

In his cross-examination of Brown, Verner asked whether Brown's and the others' reasoning behind trying to get access to the beach for black people was just "to put this matter to a test and get justice, if you call it justice, and get it over with," instead of truly desiring, after 41 years of life in Charleston County, finally to go to the beach for fun. Verner's next tack was to question whether racial peace in the county could continue with an integrated park system. When asked if he thought the racial situation was "disintegrating due to the present pressures that are being exerted," Brown responded, "I feel that if agitation is not brought about by some hot-heads, that people will get along together." Verner resorted to history, specifically invoking South Carolina's long tradition of racial segregation—the "spirit of the state"—to bolster his argument against suddenly integrating the state's institutions.[12]

Verner then attempted to paint Brown as one of the local "hot-heads" in the matter of racial policy. Brown had been involved in petition drives calling for the integration of local school districts in Charleston county. Brown had also typed the letters to the park

[12]Testimony for Plaintiffs at Trial, 6 February 1956, pp. 22, 24. *Clark v. Flory*, C/A 5082.

superintendent, though he insisted that he did not ask anyone to sign the letters—that was a purely voluntary matter.[13]

Judge Williams allowed his own views to intrude into the courtroom after Verner finished his questioning. Again, he addressed the issue of a separate beach for blacks in the area. He went further this time than he had in the earlier hearing, and brought up the prospect of criminal activity by the blacks who would be using the park. "Now, we might as well be perfectly frank with each other, and we know that there is a greater criminal tendency in Charleston among the Negroes than there is among the white people."[14]

Williams also noted that he was comfortable with the wider discretion that the Supreme Court had given federal judges for dealing with the school situation, but was concerned that no such rules applied for parks. Nevertheless, Williams was willing "to lay down the rule and have the Supreme Court pass on it at a later time."[15]

Desperately, Verner and Williams attempted to get Brown to work out a compromise in which the court could issue an order allowing the beach authorities to set aside a portion of the beach for use by blacks. Williams remained concerned over the prospect of interracial violence and was not convinced, despite repeated assurances from Arthur Brown, that any violence would be the result of individual disagreements rather than racial animosity. Of course, Williams also remained concerned that the beach would be "abandoned" by whites if he opened the beach to everyone. Verner claimed that "that practically happened in the Maryland case. When it was opened, the whites quit using it

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[13]Testimony for Plaintiffs at Trial, 6 February 1956, pp. 24 ff. *Clark v. Flory*, C/A 5082.

[14]Testimony for Plaintiffs at Trial, 6 February 1956, p. 35. *Clark v. Flory*, C/A 5082.

[15]Testimony for Plaintiffs at Trial, 6 February 1956, p. 37. *Clark v. Flory*, C/A 5082.

in Maryland to a large extent." Brown continued to insist that once the park was opened, it may very well take a transition period in which whites would refuse to come to the park, but like other facilities in Charleston, the beach would eventually be integrated as whites began to return. "I think that when those people find out that being around Negroes, that we aren't any type of creature who will eat them or try to tear them apart . . . and that we are just another group of human beings [things will return to normal]." Verner remained skeptical.[16]

In the final exchange at trial, Judge Williams and state Attorney General T.C. Callison discussed the relevance of the case to *Plessy v. Ferguson* and *Brown v. Board*, coming to the reluctant conclusion that the state should have provided an equal beach long before the case ever came to court. Now, with *Brown* as the law of the land, the court's hands were tied, and Judge Williams was quick to blame the state for the predicament he now found himself and his state in: "the State has itself to blame somewhat for not having made some provision years ago."[17]

The Court adjourned to consider its opinion, but on 8 February the State Forestry Commission ordered the park closed, even though it would still remain open to whites: the park was little-used in winter anyway, except by fishermen. The Columbia *State* noted that C.H. Flory had said that any fishermen who showed up could go right ahead and fish—as long as they were white fishermen. The following day the state Senate began consideration of a bill that would close the park officially, pending the legislature's determination of how to deal with state funding for the park system. There was already a

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[16]Testimony for Plaintiffs at Trial, 6 February 1956, pp. 40-49. *Clark v. Flory*, C/A 5082.

[17]Transcript of Trial, 6 February 1956, p. 78. *Clark v. Flory*, C/A 5082.

provision in the appropriations bill to consider only funding the state park system if it continued to be operated on a segregated basis. In the heated atmosphere of the post-*Brown* South, the legislature was also considering banning members of the NAACP from state, municipal, or county offices; it also passed a resolution in the House to commend the formation of Citizens Councils.[18] Ultimately, in addition to closing the Edisto Beach State Park, the legislature amended the state Code of Laws to require segregation in all state parks.

On 2 March Williams wrote the attorneys for both sides that, since the legislature had passed the proposed law closing the park, there was "no further question to be considered in the Park case." He ordered a hearing on the 21st on the question of dismissing the case.[19] Then, on 8 March the Governor signed the act closing the park altogether. The plaintiffs, however, refused to remove their complaint: the issue was not whether the state had the power to close the park, but whether the statutes that mandated segregation in the park violated the 5th and 14th Amendments. Since the commission and legislature had closed the park, they could immediately reopen it if the plaintiffs withdrew.[20]

The state's argument in the dismissal hearing therefore relied on the contention that, since legislative action taking at least until the next year would be required to reopen the park, the case now before the court was moot and hypothetical. The U.S. Supreme

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[18]"Edisto Park Stays Closed but Accessible," Columbia *State*, 10 February 1956, p. 1-D; "Bill in Senate Would Close Edisto Beach State Park," Columbia *State*, 9 February 1956, pp. 1-A, 6-A.

[19]Ashton H. Williams to John H. Wrighten, W. Newton Pough, T.C. Callison, and James S. Verner, 2 March 1956. *Clark v. Flory*, C/A 5082.

[20]Wrighten to Williams, 5 March 1956. *Clark v. Flory*, C/A 5082.

Court had ruled the statutes in question unconstitutional in the Maryland case. Thus, if all the plaintiffs wanted was a declaration that the laws were unconstitutional, they had it—though not from Judge Williams. The only issue left was whether the judge would order the park opened to all, and since there was no park left to open, the issue had dissolved.

In the midst of the hearings in the park case, the General Assembly was considering legislation that would withdraw state funding from any school or park that was ordered to be integrated. Despite the apparent unconstitutionality of such an act, the possibility existed that South Carolina would be a state without public educational or recreational facilities if the courts suddenly began ordering integration across the board. While Judge Williams did not have to rule on the measure, it may have influenced his actions on the bench that March.

Williams refused to issue any ruling concerning all the state parks in South Carolina. Only the Edisto Beach park was at issue in the case and since no blacks had applied for admission to any of the other parks, and may never do so as far as Judge Williams knew, there was no reason to issue a blanket ruling. However, he was prepared to "state here and now that the Supreme Court of the United States has already ruled that [the] plaintiffs have a right to use the Edisto Beach if it is ever used as a public place."[21] Judge Williams then spoke at length with Callison, Verner, Pough, and Wrighten regarding the issue of whether to issue a formal ruling or to dismiss the case. Ultimately, he decided to defer action, keeping the case open but undecided. Noting appeals by leaders of both national political parties, Williams called for a "common sense" solution to the problem, lest South Carolinians of both races find themselves not only without

[21]Transcript of Hearing, 21 March 1956, pp. 30-31. *Clark v. Flory*, C/A 5082.

parks, but without schools as well. The state legislature was "playing for keeps," and Williams apparently did not want to be the judge to lead to the closure of the state's schools.[22]

The *Clark* case had resulted in a stalemate: the Supreme Court had determined that segregation in state parks was unconstitutional, but the state legislature had rendered the decision moot by closing the only state park that was specifically intended in the state code of laws to exclude blacks. As a result, it would not be until 1963 that South Carolina's African American population could enjoy the same state parks that whites did. The case of *Brown v. State Forestry Commission*, which was first filed in 1961 and decided on appeal in 1963, revealed the continued determination of state officials to prevent African Americans from enjoying public facilities.

In September 1960, J. Herbert Nelson wrote to Matthew Perry to request his services if he "should decide to bring charges against the State Forestry Commission." Nelson and a group of friends had attempted to enter the Myrtle Beach State Park at the end of August. Police officers at the park, led by J.P. Strom, the head of the State Law Enforcement Division (the local equivalent of the FBI), refused to admit the group, and Nelson heard on the radio on his drive back to Sumter that the park had been closed early because of prior knowledge of the attempt to enter the park. If true, that would explain the presence of the state's top law enforcement official.

Nothing came of the affair until the following summer, when a second group of African Americans from across the state, led by J. Arthur Brown, attempted to enter

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[22]"Edisto Park Case Action is Deferred Indefinitely," Columbia *State*, 22 March 1956, p. 6-D.

Sesqui-Centennial State Park, located near Columbia, following a state meeting of the NAACP at which Medgar Evers served as keynote speaker. The state park superintendent, an aid to the governor, the sheriff of Richland county, and again, J.P. Strom prevented them from entering the park. Having been forcibly prevented from enjoying the park, the group wrote to Matthew Perry to request his services.[23]

Depositions in the case reveal the growth of the plan to gain access to the Columbia park, and the role of ordinary people in the cases. In addition to Arthur Brown and Herbert Nelson, six other African Americans were named in the suit. Harold White, a recent high school graduate with no plans for college, was a clerk at an A & P store in Columbia. Following the meeting at New Ebenezar Baptist Church at which Medgar Evers spoke, a group of people led by I. DeQuincey Newman, the national field secretary of the NAACP for South Carolina, discussed the prospect of going to Sesqui-Centennial Park the following day, though White was unable to remember who had actually made the suggestion. White did reveal that, upon being refused entry to the park, the cars returned to the NAACP offices in Columbia, where White and the others signed the document authorizing Perry to take the case to court.[24]

Nurses Aide Mary Nesbitt, who had been told of the meeting in Columbia through her local NAACP branch in Spartanburg, went down to Columbia for the meeting at the

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[23]Nelson to Perry, 15 September 1960 and Norris et al. to Perry, 16 June 1961. *J. Arthur Brown, et al. v. South Carolina State Forestry Commission, et al.*, Civil Action Number AC-774, Eastern District of South Carolina, Columbia Division, Record Group 21, Records of the District Courts of the United States, National Archives-Southeast Region, East Point, Georgia.

[24]Depositions, pp. 54-58, Deposition of Harold White. *Brown v. State Forestry Commission*, C/A AC-774.

church along with two other members of the Spartanburg branch. She related that she, Murray Canty, and Edith Davis had gone to Columbia to hear Medgar Evers; after leaving the church she and the others were told that they were going to a park the following morning, and she went along.

Jerrivoch Jefferson of Belton installed underground cable for the telephone company, but happened to be on vacation when the call came from his local chapter in Anderson for three volunteers to go to Columbia. Jefferson remembered that he had been invited on a picnic following Evers' speech, but recalled no mention of trying to enter the park. However, after being refused entry he asked separately to be represented by Jenkins and Perry in "any legal action which was fit to take."[25]

Sam Leverette was a student at South Carolina Area Trade School in Denmark, and a member of the Anderson branch of the NAACP. Leverette, along with Jefferson and Gladys Porter, had already been involved in an attempt to desegregate a waiting room in Greenwood by going into the white waiting room there while on their way to Columbia for the Evers speech.[26]

The class action suit Perry filed on 8 July 1961 subsumed both the Myrtle Beach and Sesqui-Centennial Park groups. Perry asked for a three-judge court to hear the case, as well as temporary and permanent injunctions. Circuit Judge Simon Sobeloff decided against appointing a three-judge panel, however, and the case assumed its place on the regular docket of Judge Timmerman, a staunch segregationist who had been appointed to

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[25]Depositions, pp. 76-83 (quotation on p. 82), Deposition of Jerrivoch C. Jefferson. *Brown v. State Forestry Commission*, C/A AC-774.

[26]Depositions, pp. 84-90, Deposition of Sam Leverette. *Brown v. State Forestry Commission*, C/A AC-774.

the district court at the same time as Waties Waring. The first case to challenge an entire state park system thus began its way through the courts. (Other states either voluntarily desegregated their systems or had not yet been challenged in court.)[27]

As usual, the NAACP membership of the principal plaintiffs came to the fore quickly. H.P. Sharper of Florence had been president of the state convention, a role that Arthur Brown now held, at the time of the attempt to enter the Myrtle Beach park. Herbert Nelson was the chair of the group's veterans committee. Daniel McLeod, the state attorney general, assisted by David W. Robinson, a private Columbia lawyer whose role as attorney for the segregationist Gressette Committee of the state legislature would bring him prominence in the 1960s, argued that the national NAACP was the true plaintiff in the case. It was the goal of the NAACP and the Legal Defense Fund "to destroy the park system of South Carolina pursuant to their purposes to require all persons to integrate regardless of the wishes of the peoples." At depositions held in August 1961, Robinson asked Brown numerous questions concerning the role of the NAACP in the case, even going so far as to demand "a list of all the NAACP employees or agents or attorneys that are employed by either the State Branch or the National Branch or by . . . the Legal Defense Group [sic], and what their compensation is."[28]

In 1961, J. Robert Martin, who would eventually become chief judge of the South Carolina district, replaced Judge Timmerman, who had stepped down from the bench.

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[27]Penn Community Service, Inc., "Public Parks and Recreational Facilities: A Study in Transition," p. 2. Records of the South Carolina Council on Human Relations, South Caroliniana Library, Columbia, South Carolina..

[28]Depositions, p. 8, Deposition of J. Arthur Brown. *Brown v. State Forestry Commission*, C/A AC-774.

The state park case languished, however, until the summer of 1963. That spring, the U.S. Supreme Court had ruled in a Tennessee case, *Watson v. City of Memphis*, that the continuation of segregated public facilities under the rubric of separate but equal was impermissible.[29]

Because of the decision in *Watson*, Martin therefore had no choice but to grant the plaintiffs' motion for a summary judgement. He issued his decision after the July Fourth holiday and delayed implementation for 60 days, making sure that the parks would not be open on an integrated basis until after Labor Day. The transition period was necessary, he argued, because of the safety concerns that had been brought up at trial—specifically, the effect of having members of both races in close proximity without police protection.[30]

Following Martin's decision, the State Forestry Commission, acting on the advice of the state attorney general, closed all 26 state parks. South Carolina thus became practically the only state to shut down its state recreational facilities in response to a court order to desegregate. In fact, of four instances in which facilities were closed, three were in South Carolina. Nevertheless, national parks and some municipal facilities throughout the state had voluntarily opened their facilities to African Americans by 1963.[31]

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[29]*Watson v. City of Memphis*, 373 U.S. 526 (1963).

[30]Eugene B. Sloan, "State Parks Ordered Integrated," Columbia *State*, 11 July 1963, p. 1-A; *Brown v. South Carolina State Forestry Commission*, 226 F. Supp. 646 (1963), p. 650.

[31]Report of the State Commission of Forestry for July 1, 1963 to June 30, 1964, John R. Tiller, State Forester, in Reports and Resolutions of South Carolina for fiscal year ending June 30, 1964 to the General Assembly of the state of South Carolina for the Regular Session commencing January 12, 1965, p. 23; Penn Community Service, Inc., "Public Parks and Recreational Facilities: A Study in Transition," pp. 3, 7.

State parks were not the only venue that came under fire for segregating whites and blacks in the decade following *Brown v. Board.* In November 1958, Air Force civil service employee Richard Henry, whose job required him to fly throughout the country, was forced to use the segregated waiting room at the Greenville Airport. Henry had come to Greenville from his station at Selfridge Air Force Base in Michigan to assist with a troop carrier exercise, arriving and leaving through Greenville's airport. He arrived at the airport 45 minutes before his flight left, and sat in the terminal's waiting room. Airport manager O.L. Andrews told Henry after a few minutes that "we don't allow colored people in here," and Henry responded that he was an interstate traveler. After being "put out" of the waiting room, Henry called the local air force base and his home base, then waited outside for his plane to board, which it soon did.[32]

The suit came before Judge Timmerman, who almost from the beginning made the plaintiff's case difficult. In the hearing for a preliminary injunction, held in July 1959, Timmerman consistently placed obstacles in the path of NAACP attorney Jack Greenberg, who had come from the national office of the Legal Defense Fund in New York to assist with the case. Forced to pursue the preliminary injunction with only the sole affidavit of the plaintiff for support because Timmerman at first refused to allow additional affidavits or testimony at the hearing, Greenberg started out at a disadvantage. Timmerman refused to hear the motion for the preliminary injunction, even though Greenberg pointed out that he could hear evidence from witnesses in support of such a

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[32]Motion hearing, 14 September 1960, pp.15-16. *Richard B. Henry v. Greenville Airport Commission, et al.*, Civil Action Number 2491, Western District of South Carolina, Greenville Division, Record Group 21, Records of the District Courts of the United States, National Archives-Southeast Region, East Point, Georgia.

motion. Timmerman claimed that "it could aid one side or another to get an advantage that they are not entitled to. I don't intend being a party to that," and he finally told Greenberg that he would allow the hearing, but based solely on Henry's affidavit.[33]

Greenberg reluctantly agreed to be heard based on the single affidavit. He argued that "it is now rather late in the day for anyone to argue that a governmental body may maintain racial segregation in any of its facilities. . . . [I]t is perhaps one of the fundamental principles of our jurisprudence that this is something that a governmental body can not do." Timmerman, acting more as advocate than impartial judge, countered that most of the complaint was "made up of references to statutes and constitutional provisions. There is a very small part of it that deals with the factual issues. . . . It looks like somebody had picked up a digest of cases or a digest of the constitution and just at random picked out a whole lot of provisions to plead."[34]

In turn, Thomas Wofford, the attorney for the Greenville Airport Commission, replied with a 26 1/2-page oration on everything from the jurisdiction of the court (it should be denied because Henry never alleged damages over $10,000) to the state of Michigan ("why he wants to go back God Almighty in all of his own infinite wisdom only knows"). Wofford also offered several recent cases in which federal courts had allowed the doctrine of separate but equal to stand.[35] Greenberg might have thought better

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[33]Proceedings of Hearing, 20 July 1959, pp. 3-6. *Henry v. Greenville Airport Commission*, C/A 2491.

[34]Proceedings of Hearing, 20 July 1959, pp. 8-11. *Henry v. Greenville Airport Commission*, C/A 2491.

[35]For example, *Williams v. Howard Johnson* (323 F. 2d 102 [4th Circuit, 1963]), in which a three-judge panel of the Fourth Circuit admitted that the customs of the people of a state do not constitute state action.

of even trying to justify the preliminary injunction after the speech by Wofford, preferring instead to wait until the trial and the actual admission of evidence from witnesses, because he said nothing after Wofford was finally finished. Timmerman refused the motion for an injunction, and a second hearing was held the following September following an appeal to the Fourth Circuit.[36] In denying the injunction, Timmerman actually implied that it was Henry who should be a target for injunction, given that it was he who was "deliberately mak[ing] a nuisance of himself to the annoyance of others. . . . The right to equality before the law, to be free from discrimination, invests no one with authority to require others to accept him as a companion or social equal."[37]

While the appeal was pending, another incident that would bring national attention to the Greenville Airport took place. Jackie Robinson, the great baseball player, was in Greenville to address the state convention of the NAACP in October 1959, and while there he travelled through the airport. At the airport, Robinson was escorted out of the white waiting room and made to wait in the colored waiting area. By December, the Department of Justice had become interested in the Robinson case, and was "making a preliminary investigation."[38]

The second hearing in the Henry case was held on 14 September 1960 at the federal courthouse in Greenville. Jack Greenberg, along with Lincoln Jenkins and

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[36]Proceedings of Hearing, 20 July 1959, p. 39. *Henry v. Greenville Airport Commission*, C/A 2491.

[37]"Negroes Ask Reassignment In Clarendon's Schools," *Southern School News* 6:3 (September 1959): 10.

[38]"Clarendon Reassignment Petitions Rejected; Officials Say Too Late," *Southern School News* 6:5 (November 1959): 12; "Clarendon County Action May Be Renewed in Courts," *Southern School News* 6:6 (December 1959): 2.

Matthew Perry, represented Henry. Over Wofford's objections, Timmerman this time admitted supporting affidavits and allowed testimony from Henry and from the Reverend J.S. Hall of Greenville, who also presented an affidavit. After establishing the basic facts with Henry on the stand, Greenberg turned the witness over to the defense for a lengthy cross-examination.

Henry testified that he had gone into the main waiting room to read a magazine and see the aircraft on the runway, but Wofford quizzed him as to his knowledge of the existence of the segregated waiting room. While it is not clear whether Henry saw the sign for the "Colored Lounge," he did offer that if he had seen the sign, he would not have gone in. Wofford asked Henry about his representation, establishing over Greenberg's objections that Lincoln Jenkins had not been paid and that the NAACP had recommended his services. Wofford also argued with the witness as to the exact words in his original deposition. (Wofford apparently was trying to get Henry to admit that at no time did Andrews or anyone else say that blacks were not allowed in the main waiting room, though it was clear that that was the case.) Interestingly, while on his way to Columbia for the initial hearing in July of 1959, Henry had taken a side trip to Greenville from Charlotte and back before heading down to Columbia for the hearing. Andrews again ordered Henry from the main waiting room, and Henry left to get back on the plane that would return him to Charlotte. He had come to Greenville for just a few minutes "to see whether or not this practice was still being carried out."[39]

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[39]Motion hearing, 14 September 1960, testimony of Richard Henry, pp.19-36. *Henry v. Greenville Airport Commission*, C/A 2491.

Reverend Hall testified that on several occasions he had been forced to use the segregated waiting room, though not on every occasion that he had to use the airport. Once in 1958 he had accompanied someone to the airport and sat undisturbed in the main waiting room. In October of 1959 he had gone to the airport to see off Jackie Robinson along with several other people. Andrews had told them to move. Then on 7 July he and A.J. Whittenburg flew to Charlotte from the Greenville airport, and Mark Tolbert accompanied them to the airport. On that occasion, the three men were asked, again by airport manager Andrews, to leave the main waiting room.[40]

Wofford, like most white southern attorneys representing segregationist interests, invoked the strategy of implying illicit involvement by the NAACP. In the *Henry* case, however, Judge Timmerman himself participated in the state's defense. When Wofford questioned the validity of Henry's affidavit, and then alleged possible collusion by the NAACP and Henry in bringing the case, Timmerman as much as badgered Henry about when and where—and whether—he had actually signed the affidavit. When Greenberg tried to object to questioning about whether Henry had paid Lincoln Jenkins a fee, Timmerman overruled him and directed Henry to answer the questions. Henry had to admit that Jenkins had been recommended to him by the NAACP after the organization had been apprised of the incident in Greenville. Later in Wofford's cross-examination, Timmerman became irritated with the witness. Wofford had asked if the NAACP was financing the Henry suit, and Henry had answered that he understood that to be the case.

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[40]Motion hearing, 14 September 1960, testimony of Reverend J.S. Hall, pp. 44-52. *Henry v. Greenville Airport Commission*, C/A 2491.

Timmerman interjected to ask if Henry ever expected to pay anything on the case, and whether he had known attorney Jenkins prior to the case.

> THE COURT: Did you correspond with him before you came to Greenville with reference to taking this case that you were going to set up?
> THE WITNESS: Oh, I beg your pardon. May I correct that? You asked me did I know Mr. Jenkins before I came to Greenville.
> THE COURT: Yes.
> THE WITNESS: Well, you are assuming. . .
> THE COURT: No, I am not assuming anything; I am asking you questions.
> THE WITNESS: Well, no, I didn't know Mr. Jenkins, and I hadn't corresponded with him before I came to Greenville for the Air Force.
> THE COURT: You did correspond with him before you came down to Greenville the first time?
> THE WITNESS: No, it was before I came to Greenville for the case today, and I suppose I came to Columbia. . .
> THE COURT: Well, suppose you listen to the questions and we'll get along better.
> THE WITNESS: All right, sir. I'm sorry.
> THE COURT: And let's answer the question I ask instead of another one.[41]

Timmerman's decision in the case, issued on 19 October 1960, went squarely for the state. He ruled that even "giving [Henry's] affidavit the most favorable consideration it falls short of indicating any necessity for a preliminary injunction to protect any legitimate right the plaintiff has." Timmerman interpreted the words of the manager of the airport, who said that "we have a waiting room for colored folks over there," completely differently than Henry had: to Timmerman, the words hardly constituted an order to leave the white waiting room, merely a suggestion that Henry might be more comfortable elsewhere. Timmerman invoked the spirit of *Plessy v. Ferguson* well:

> From whom was he segregated? . . . Was he segregated from his friends, acquaintances or associates, from those who desired his company and he theirs? There is nothing in the affidavit to indicate such is true. Was he

[41]Motion hearing, 14 September 1960, pp. 23-26, 38-39. *Henry v. Greenville Airport Commission*, C/A 2491.

> segregated from people whom he did not know and who did not care to know him? . . . [S]uppose he was segregated from people who did not care for his company or association, What civil right of his was thereby invaded? If he was trying to invade the civil rights of others, an injunction might be more properly invoked against him to protect their civil rights. I know of no civil or uncivil right that anyone has, be he white or colored, to deliberately make a nuisance of himself to the annoyance of others, even in an effort to create or stir up litigation. The right to equality before the law, to be free from discrimination, invests no one with authority to require others to accept him as a companion or social equal. The Fourteenth Amendment does not reach that low level. Even whites, as yet, still have the right to choose their own companions and associates, and to preserve the integrity of the race with which God Almighty has endowed them.

Timmerman went on to accept the defense's motion to strike key jurisdictional elements of the complaint, and to grant the defense's motion to dismiss the complaint. Segregation at the Greenville Airport, despite state sanctioning of the Airport Commission, was not something that took place under color of state law. Furthermore, Henry "did not go the waiting room in quest of waiting room facilities, but solely as a volunteer for the purpose of instigating litigation. . . . The Court does not and should not look with favor on volunteer trouble makers or volunteer instigators of strife or litigation."[42]

On appeal, the Fourth Circuit reversed Timmerman's harsh and patently incorrect ruling, and directed him to rehear the case and to grant an injunction against the Airport Commission. Defensively, Timmerman wrote that the Fourth Circuit had created a "new rule of deductive evidence" by deciding that "from the *allegation* that [Henry] was directed to a separate waiting room maintained for colored people, it is fairly inferable that other negroes had been similarly treated." The Circuit Court's decision, as far as Timmerman was concerned, had "the appearance of a groping after a plausible excuse for

[42]*Henry v. Greenville Airport Commission*, 175 F. Supp. 343 (1960), pp. 347, 349-351.

according preferential treatment to some class." Nevertheless, he reluctantly issued the injunction.[43]

Though Timmerman had been on the court for nearly twenty years and had clearly come from a different time, he nevertheless represented a fair portion of white opinion in the state, even as the Civil Rights Movement began to move to a more confrontational stage. The sit-in movement had begun, first in Greensboro, North Carolina, then in towns and cities throughout the South, including Rock Hill, Charleston, and Orangeburg in South Carolina. Black activists, many of them youths in college and high school—and sometimes younger—carried the Civil Rights Movement to the point of direct action against segregated institutions. When confronted by the structure of white power, however, they very often resorted to the courts as a tool for asserting their rights. Thus, even as the Civil Rights Movement began to move to a new level, the courts had not outlived their usefulness.

On 18 February 1961, the same day that Timmerman filed his reluctant injunction in the Greenville Airport case, several youths in Greenville tried to use the skating rink at the city's Cleveland Park and were refused entry. Someone called the police, who arrived soon thereafter and arrested the youths. In June, they filed suit in federal court asking for temporary and permanent injunctions against the skating rink and the city for operating a segregated institution. The defendants, who included the city manager, the director of parks and recreation for the city, the chief of police, and the chief of detectives, countered

[43] *Henry v. Greenville Airport Commission*, 191 F. Supp. 146 (1961). Quotation from Circuit Court's opinion from *Henry v. Greenville Airport Commission*, 279 F. 2nd 751, p. 752, emphasis added by Timmerman.

that, rather than being "clean, orderly [and] dignified," the plaintiffs were engaged "in an effort to stir up strife and trouble and not truly seeking recreation."[44]

A regional convention of the NAACP was in progress, and a group of eleven young men and women met on 18 February, a Saturday, at Springfield Baptist Church and decided to go to the park. When they got there, the attendant told them that they had to have a permit to skate, which they did not. Nor did they need one, according to the testimony of J. Roy Gibson, the supervisor who was on duty that day. Only the purchase of a ticket was required for entry into the rink. After about ten minutes, a voice over the loudspeaker announced that the rink was closed and that everyone had to leave. (The rink reopened later that evening at around 7:15.) The police arrived a few minutes later and ordered the would-be skaters to leave. Since it was raining, they decided to stay on the porch, but the police told them they were violating a city code (possible loitering). When one of the activists, Mary Elizabeth Norris, demanded to see the code, the police said they would have to go downtown to see it. They rode down to police headquarters, were read the ordinance, and promptly booked. They had never been informed that they were under arrest before that point in time. James Carter testified that he had tried to change his mind about getting in the police cars to go downtown and was told "no, you can't turn back now, get in the car." When they arrived at the station, the officer read "something . . .

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[44]Complaint and Answer, quotations from p. 5 and p. 2, respectively. *Classie Rae Walker, et al. v. Gerald W. Shaw, et al.*, Civil Action Number 2983, Western District of South Carolina, Greenville Division, Record Group 21, Records of the District Courts of the United States, National Archives-Southeast Region, East Point, Georgia.

kind of fast," and when Carter asked to see the code, the officer "flashed it in [his] face and shut the book; then he said, 'book 'em'."[45]

In preparing his defense for the civil trial, Greenville city attorney W.H. Arnold deposed four of the seven plaintiffs. All of them had been active in protests before, either in Greenville or in Columbia. Classie Rae Walker had been involved in a march on the state house grounds; James Carter, Mary Norris, and Horace Nash had participated in protests in Columbia and Greenville, including sit-ins at the Greenville Kress store. All were members of the NAACP. Arnold's desire to place this information in the record followed the typical strategy of attorneys for the state and localities involved in suits in which the NAACP, or its members, was a party. Each deponent in the case, as usual, was asked whether they were paying for their representation (they were not). While not clearly relevant to the issues at hand, the information that Arnold and his counterparts in other cases managed to get into the record established the involvement of the NAACP in prosecuting desegregation suits. Donald Sampson, the Greenville-based lead attorney for the plaintiffs, had a bit of fun with Arnold's strategy during his cross-examination of Mary Norris in this exchange with the witness:

> Q. Are you proud to be a member of the NAACP?
> A. I am.
> Q. You intend to stay a member?
> A. Yes
> Q. You're not a member of the John Birch Society, are you?
> A. No.[46]

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[45]Transcript of Motion Hearing, Testimony of J. Roy Gibson, p. 17, 21; Depositions, Testimony of Classie Rae Walker, pp. 2-16; Depositions, Testimony of James Allen Carter, pp. 26-27. *Walker v. Shaw*, C/A 2983.

[46]Depositions, Testimony of Mary Elizabeth Norris, p. 31. *Walker v. Shaw*, C/A 2983.

The trial, held on 20 August before Judge C.C. Wyche, consisted of the testimony of city manager Gerald W. Shaw, director of parks and recreation Carl Hust, and James Gibson, the manager of the skating rink and swimming pool at Cleveland park. As in locations throughout the Jim Crow South, there was not a city ordinance requiring segregation in the city's parks. Rather, Cleveland Park and other parks in the city were segregated by custom. Gibson therefore had the discretion, at least technically, as to whom he would sell tickets. There were only a few rules, none of them specifically designed to segregate the rink. He testified that he would not sell a ticket to a black skater on the day of the trial, just as he had not sold any on February 18.

Before Judge Wyche could rule on the case, however, the City of Greenville closed both skating rinks operated by the city. Both rinks had been "abandoned and permanently closed." Wyche had no alternative but to dismiss the case, but not before noting that the city had the right "to preserve the peace and assure a peaceful enjoyment of skating rinks to all races, regardless of which group of citizens, Negro or White, causes disturbances. The plaintiffs' constitutional rights to use and enjoy the skating rinks on an equal basis with White citizens in the community does not encompass a right to cause a disturbance."[47] Citing *Clark v. Flory*, the Judge noted the right of the plaintiffs to the injunction, if the situation that warranted the injunction still existed. Sampson and Perry tried to re-open the case with a new trial, arguing that the controversy was still alive. Since the city continued to operate a segregated park system, closing the skating rinks had not solved the problem.

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[47]Opinion and Order, October 17, 1962. p. 3. *Walker v. Shaw*, C/A 2983.

The sit-in movement had come to South Carolina in the aftermath of the initial sit-ins in Greensboro, North Carolina. In early March 1960, students from Allen University and Benedict College, black schools in Columbia, sat in at the lunch counter at the F.W. Woolworth store, where they received no service, but were not otherwise disturbed. They followed the Woolworth sit-in by moving down to the S.H. Kress store, where all the seats were either occupied or roped off. The following day around two hundred students participated in sit-ins at ten different downtown stores and restaurants, again with no major incidents. After the city manager issued a statement saying that sit-ins would not be tolerated, the students retired to their campuses and homes, releasing a statement to the effect that their point had been made. Students backed down again when then-governor Ernest F. Hollings threatened mass arrests if students marched on the state house. Arrests for sit-ins began later in March, when small groups of black students started sit-ins at an Eckerd Drug store and a local pharmacy. At the same time, 425 protesters were arrested in Orangeburg. Clearly, Columbia's black population, despite the presence of two independent colleges and a small cadre of vocal black leaders like Modjeska Simkins, was more circumspect in its dealings with white South Carolina than blacks in Orangeburg: only once were Columbia blacks involved in a mass meeting that led to a large number of arrests: in 1962, when 189 protesters were arrested for demonstrating at the state house.[48]

Meanwhile, Columbia mayor Lester L. Bates had entered into secret talks with black leaders, and the talks began to grow into action in the spring of 1963. Despite

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[48]Paul S. Lofton, Jr., "Calm and Exemplary: Desegregation in Columbia, South Carolina," in *Southern Businessmen and Desegregation*, ed. Elizabeth Jacoway and David R. Colburn (Baton Rouge: Louisiana State University Press, 1982), pp. 75-76.

criticism of the mayor's move from both sides, Columbia businessmen began to realize that calling an end to segregation made sense, especially given the alternative of litigation, which Lincoln Jenkins made clear was a possibility. Thus, by the end of summer 1963, most white businesses in Columbia were desegregated. The city was rewarded the following year by being chosen an All-American City by *Look* magazine, an award that the city had won before and which Mayor Bates coveted throughout the struggle for desegregation in Columbia.[49]

Columbia's relative calm was not reflected in other South Carolina cities, however. Recalcitrance by white institutions and businesses required more direct action and more litigation than in Columbia. In Orangeburg, Gloria Rackley took a significant role in the movement by desegregating the city hospital. In early 1962 her daughter had been taken to the local hospital because of an accident. The Orangeburg hospital, which had been built with matching funds from the Hospital Survey and Construction Act of 1946 (commonly known as the Hill-Burton Act), required segregated waiting areas. The Act had not mandated desegregation when it was adopted, merely that black patients would receive equal care. Hospitals in Greenville and Aiken that received Hill-Burton money were nearly equal in treatment of white and black patients, and the Aiken hospital had an integrated staff, like several other Hill-Burton hospitals in the South. As early as 1956, 25 percent of Southern hospitals had blacks on staff, and the level of staff integration was almost at Northern levels. Many of the hospitals that admitted black patients were under no compulsion to do so, however, as many did not receive Hill-Burton money. In Columbia, for example, black patients were put in a separate wing that

[49]Lofton, pp. 76-81.

had no X-ray equipment and had to be carried outside to the white wing for X-rays. None of the hospitals in the Medical College of Virginia system allowed black doctors to practice, and black patients routinely were housed in very unequal rooms in separate buildings.[50]

Orangeburg Regional Hospital, though it was built with Hill-Burton money, continued to practice segregation into the 1960s, and Gloria Rackley's experience there meshed with her activism in other civil rights concerns. While her daughter was being cared for, Rackley sat down in what was supposed to be an all-white waiting area. When asked to leave, she refused and had to be forcibly removed. Soon thereafter, she filed suit in federal court. The case went to Judge Timmerman, who ruled against Rackley, but on appeal the Fourth Circuit vacated the ruling and sent the case back to be re-tried. Timmerman having retired by the time the case came up again, it was up to new District Judge Robert Hemphill to decide the case. In February 1965 Hemphill issued an order to desegregate the hospital within 60 days or face a court-imposed desegregation plan. It was, according to I. Dequincey Newman, "the beginning of the end" of public facility segregation in the state.[51]

Newman threatened to sue other state hospitals, but other black leaders, such as Modjeska Simkins, attempted to gain voluntary compliance. Meanwhile, a new attitude at work among South Carolina's elite led many to call for desegregation. In Columbia, the mayor formed a Community Relations Council to develop plans for gradual integration.

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[50]E.H. Beardsley, "Good-bye to Jim Crow: The Desegregation of Southern Hospitals, 1945-70," *Bulletin of the History of Medicine* 60 (Fall 1986): 368-371.

[51]Beardsley, 379; "State Reports 42 Districts Filed Plans by Target Date," *Southern School News* 11:9 (March 1965): 12.

In Greenville, too, a new effort developed to bring about gradual integration by 1964. Robert Toomey, a hospital administrator was "delighted" that "the black leadership was working with" the white elite of the city, but was equally convinced that the NAACP had no presence in Greenville, and was not involved in the move to desegregate the city.[52] If the state's political and economic elite were beginning to recognize the inevitable, they were certainly in no hurry to bring the inevitable about.

According to some, 1963 was "the year of decision" for South Carolina's white establishment, at least in the area of civil rights.[53] It was the year of Harvey Gantt's integration of Clemson University and the year of the state's first public school desegregation. In Sumter, South Carolina, when three African Americans sued to gain the use of the Carnegie Public Library, the library's Board of Trustees gave in. Of course, had there not been a suit, it may have taken a good deal longer, but by 1963, at least in many areas, white South Carolinians began to give ground less grudgingly than heretofore.

Sumter county operated two public libraries: the Carnegie Public Library and its Lincoln branch. The former was for white patrons, the latter for black, though all the books were theoretically available for patrons of either race. In late 1962, three men—Reverend F.C. James, Reverend E.M. Miller, and Dr. B.T. Williams—applied for membership in the Carnegie Library and were refused. Instead, they were "assigned

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[52]Beardsley, 379-381. Quotation, p. 381. Of course, Beardsley's interview with Toomey took place in 1979, so there are issues of selective memory and genuine forgetfulness to consider.

[53]Newby, p. 330; Maxie Myron Cox, Jr. "1963—The Year of Decision: Desegregation in South Carolina" (Ph.D. dissertation, University of South Carolina, 1996)

membership in the Lincoln Branch of the Library."[54] They consulted Matthew Perry and Lincoln Jenkins, who brought suit on their behalf on 4 June 1963.

Soon thereafter, the trustees of the library met and "adopted a resolution authorizing acceptance of membership of all persons otherwise eligible for membership in Carnegie Public Library, regardless of race or color." The three plaintiffs were included in that number, and they had already been admitted to membership. The defense accordingly moved to have the case dismissed, given that the defendants had "in good faith complied with all the demands set forth in the complaint." Charles E. Simons, District Judge for the Eastern District, struck down the state statute that had been in question, but obviously felt no need to issue an injunction in the case.[55]

All attempts to segregate South Carolinians by race did not end in 1963, however. On 21 July 1964, several African Americans in Orangeburg, Gloria Rackley among them, attempted to buy tickets (for the ground floor rather than the customarily reserved balcony) at the Edisto Theater and the Carolina Theater. The Orangeburg Theater corporation, which was primarily owned by James H. Gressette and John H. Rembert, owned and operated both theaters. Gressette was the brother of L. Marion Gressette, the head of the Gressette Committee. In the first weeks after the suit, the Edisto theater tried to convert to a private club, with no membership fee other than the price of admission to a

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[54]Letters from Chapman J. Milling, Jr., Librarian to James, Miller, and Williams, 4 September 1962, Plaintiffs' Exhibit A, *James v. Carnegie Public Library*. Civil Action Number AC-1163, Eastern District of South Carolina, Columbia Division, Record Group 21, Records of the District Courts of the United States, National Archives-Southeast Region, East Point, Georgia.

[55]Answer, n.d. (filed 25 June 1963) p. 1; Notice to Plaintiffs, n.d. (filed 5 July); and Order, 25 November 1964, p. 3. *James v. Carnegie Public Library*, C/A AC-1163.

picture. In August, however, the theaters' Board of Directors met and adopted a resolution to comply with the Act. Henceforth, no restrictions would be made as to who could sit where in either theater.[56]

Not surprisingly, not all South Carolinians were willing to abide by the new Civil Rights Act. In Columbia, following passage of the act in the summer of 1964, J.W. Mungin, a local black minister, filed a complaint with the F.B.I. against Maurice Bessinger, the owner of several local drive-in barbecue restaurants—and one eat-in establishment—and the president of the National Association for the Preservation of White People. On 3 July and 12 August 1964, Bessinger denied service to Anne P. Newman and two other African Americans at his Columbia restaurant. Bessinger denied that he served food to interstate travelers—in fact small signs were placed in the windows of the restaurants to that effect—but admitted that he did not serve black customers for on-site dining. Bessinger said in a Wallace-for-President press conference that he planned to continue his practice of requiring blacks to come to the back door and leave the premises with their orders. Forcing him to allow blacks at the drive-in or inside the restaurants would violate not only his "constitutional right," but his "divine right" to refuse service to anyone he pleased. Bessinger was confident that very little prosecution under the new law would take place before November's presidential election, when he

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[56]Eugene B. Sloan, "Orangeburg Has First Civil Rights Challenge," *The State*, 30 July 1964, pp. 1-B, 6-B; Resolution of the Board of Directors of Orangeburg Theatres, Inc., 31 August 1964, *C.H. Thomas, et al. v. Orangeburg Theatres, Inc.*, Civil Action Number 8421, Eastern District of South Carolina, Orangeburg Division, Record Group 21, Records of the District Courts of the United States, National Archives-Southeast Region, East Point, Georgia.

hoped a new Republican administration would back off from rigorous enforcement of the act.[57]

Judge Simons disposed of most of Bessinger's arguments in short order. Bessinger depended on his own rights to due process and equal protection, as well as protection under the Commerce Clause of the Constitution, but the Supreme Court had already ruled against similar arguments, particularly in *Heart of Atlanta Motel, Inc. v. United States*, decided two years earlier.[58] Simons also rejected Bessinger's argument that forcing him to serve African Americans would violate his right to freedom of religion under the First Amendment. Simons wrote that while "Bessinger has a constitutional right to espouse the religious beliefs of his own choosing . . . he does not have an absolute right to exercise and practice such beliefs in utter disregard of the clear constitutional rights of other citizens." Ultimately, though, Simons ruled that the drive-in restaurants did not constitute restaurants under the definitions in the 1964 Civil Rights Act; the plaintiffs were not entitled to relief as far as those restaurants were concerned. Bessinger's one eat-in restaurant, however, was ordered to serve black customers as it would any other. The following April the Fourth Circuit Court of Appeals reversed Simons' decision vis-a-vis the drive-ins, ruling that the Civil Rights Act was clearly meant to apply to those as well.[59]

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[57]*Newman v. Piggie Park Enterprises, Inc.*, 256 F. Supp. 941 (1966), pp. 944, 947; William B. Williams, "FBI Gets Complaint From Local Negro," *The State*, 10 July 1964, p. 1-C.

[58]*Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

[59]*Newman v. Piggie Park Enterprises, Inc.*, 256 F. Supp. 941 (1966), p. 945, 377 F. 2d 433 (1967), pp. 435-436.

Even as the Bessinger case worked its way through the legal process, the Columbia *State* reported that there was very little opposition to the new Civil Rights Act in the state. I. DeQuincey Newman reported that "100 of 121 formerly all-white establishments [in 14 cities and towns throughout the state] had served Negroes since passage of the bill last week." While an incident in Charleston and the Bessinger incident were reported, the paper noted that most establishments either admitted blacks following passage of the Act, or in some cases already had admitted black customers or clients.

Newman urged restraint rather than immediate action against those who did not comply. Places that did not serve blacks at first would be given a second chance, then the NAACP would resort to the courts. Only then would demonstrations be attempted. It is significant that Newman's strategy was one that called upon the courts as first resort. Throughout the civil rights struggle in South Carolina, blacks had been far more likely to try their hand at a victory in federal court following an incident. Even when demonstrations and boycotts were used, as in Orangeburg, South Carolina's black population continued to regard the federal courts as their best friend in the struggle.

Newman also noted that Governor Donald Russell had not publicly urged compliance with the law, and that state officials were "not living up to expectations of leadership requirements." However, Newman was encouraged by a plan that state attorney general Daniel McLeod had to meet with law enforcement officials to discuss the law.[60]

Legal victories by African Americans were not enough to lead all South Carolina institutions to desegregate their facilities. Roper Hospital in Charleston, privately owned

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[60]"Civil Rights Bill: Little S.C. Opposition," *The State*, 10 July 1964, p. 1-C.

and operated by the Medical Society of South Carolina, had never opened its doors to black in-patients, though some African Americans had received physical therapy and X-rays there. (This refers to the so-called "New Roper Hospital." Old Roper, closed in 1957—eleven years after New Roper opened its doors—had been the primary institution for Charleston's black population needing hospital care. Since New Roper opened, however, black patients had come to be cared for at three other hospitals in the area, one of them black-owned.)[61] The prospect of federal funds becoming available inspired the hospital's chief of staff in 1964 to recommend integration, but the Society refused because it would mean federal intervention in hospital operations. In March 1965, the hospital announced that it would not participate in programs initiated by the Department of Health, Education and Welfare.[62]

In 1968, United States Attorney General Nicholas Katzenbach decided to sue the hospital to force it to accept black patients and to desegregate its workforce. The hospital accepted patients from out of state, and their out-of-state visitors were served in the cafeteria. The professional staff, with the exception of one black registered nurse, was all white. African Americans were employed as orderlies, nurses' aides, and in menial positions. Until 1968 the hospital maintained separate toilet facilities for its black and white employees, as well as separate locker rooms for black employees. Black workers in the hospital laundry were required to punch time cards while white laundry workers were

[61] *United States v. Medical Society of South Carolina*, 298 F. Supp. 145 (1969), pp. 147, 148.

[62] Beardsley, pp. 383-384; *United States v. Medical Society of South Carolina*, 298 F. Supp. 145 (1969), p. 148.

not. There were several other egregious examples of employment discrimination as well.[63]

On 10 March 1969 Judge Martin ordered the hospital to end discrimination "against Negroes on account of their race in relation to their admission or treatment as patients at Roper Hospital and with respect to their employment at Roper Hospital." The hospital was not allowed to ask patients if they had a racial preference for a roommate, and white patients were not allowed to be moved from rooms with black patients. Martin required the hospital to use a somewhat cumbersome but fair procedure to ensure nondiscrimination in employment as well. Blacks in the laundry and dietary departments were allowed into jobs that they previously could not hold based on seniority. The hospital had to provide evidence of compliance quarterly for the next two years.[64]

Cases dealing with the desegregation of public facilities exemplify two ideals: the determination of African Americans to achieve integration, and the equally fierce devotion to segregation that continued at the official state level well into the 1960s. Even as South Carolina was integrating its colleges and schools for the first time, state officials believed it was right to close the state park system. The state was hailed for achieving "integration with dignity" as Harvey Gantt became the first black student at Clemson College,[65] but he could still not enjoy his lunch at a state park near the college. While the state re-opened the parks in June 1964, based on hearings that began before Judge

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[63]*United States v. Medical Society of South Carolina*, 298 F. Supp. 145 (1969), pp. 149-151.

[64]Beardsley, pp. 383-384.

[65]George McMillan, "Integration with Dignity," *Saturday Evening Post*, March 16, 1963, pp. 15-21.

Martin's ruling and held throughout the state, it was on a limited basis. No swimming was allowed. Only in 1966 did the state legislature pass a law requiring the Department of Parks, Recreation and Tourism to "open any State park to public use for . . . normal recreational, educational and forestry purposes and uses. . . ."[66] Ultimately, one can look back at the cases and events of the early 1960s and note that the state was beginning, however slowly, to turn the corner.[67] Nevertheless, despite important victories like the Gantt case or the state parks case, African Americans continued to have to rely on the courts for access to previously white institutions until the 1970s. As white South Carolina began grudgingly to allow African Americans into their parks, restaurants, and even colleges, elementary and secondary schools throughout the state continued to maintain their discriminatory past.

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[66]Report of the State Commission on Forestry for 1964, pp. 23-26; 111 Race Relations Law Reporter 1578, p. 1579; South Carolina Code of Laws, 1966, Section 51-2.5.

[67]Of course, it was a very gradual and grudging change. In the early 1960s, young African Americans became very active in the sit-in movement that originated in Greensboro, North Carolina. Many were prosecuted in municipal court, and the state Supreme Court routinely upheld convictions for trespass (though occasionally it would overturn a conviction for a collateral offence, such as in the case of *Mitchell v. Charleston*, in which the Court ruled that black students who had cooperated with police when placed under arrest could not be convicted of the city statute barring interference with a police officer just because they did not leave when instructed by the police chief). Several of these cases were appealed from the South Carolina Supreme Court to the U.S. Supreme Court. There, in *Peterson v. Greenville* (373 U.S. 244 [1963]) the Court ruled that the city's segregation ordinance effectively removed private action from consideration. Convictions based on the statute, or resulting from it, violated the Fourteenth Amendment. See Lois B. Moreland, *White Racism and the Law* (Columbus, Ohio: Charles E. Merrill Publishing Company, 1970), pp. 136-138, 149-151, 153-156 for more on cases from South Carolina.

CHAPTER FIVE

"RESERVED FOR EDUCATION, NOT INTEGRATION": SCHOOL DESEGREGATION AND THE LIMITS OF THE LAW, 1950-1960

This chapter deals with the first case in the effort to end public school segregation in the nation, *Briggs v. Elliot*, and its aftermath in South Carolina. During the late 1940s and early 1950s, black people in Clarendon County displayed tremendous courage in the face of enormous adversity in the form of economic and often physical reprisals, and fought all the way to the Supreme Court to secure their rights not just to equal yet separate schools, but to the same schools. Following the Supreme Court's decision, however, black South Carolinians were unable to follow up on the decision with concrete action leading to real desegregation. Meanwhile, white politicians in the state managed to prevent progress by passing new laws and otherwise avoiding the implications of the Court's decision. The white power structure was unwilling to relinquish the system of education that had served them well for so long.

Education for black South Carolinians before the middle of the twentieth century was, to say the least, inadequate. In fact, education for blacks, even when reluctantly granted, was intended to maintain the system of white supremacy that had developed in the aftermath of Reconstruction. Idus A. Newby argues that three factors controlled the attitudes of whites regarding education for black South Carolinians: white supremacy, Booker T. Washington's ideal of industrial education, "and the progressive idea that 'education is preparation for life's work'." Because of those three factors, what little education that existed for blacks became a means of "brainwashing and programming." Most state politicians expressed no interest in black education and as a result, resources

simply did not find their way to black schools. In 1900, for example, the state spent $1.30 for each black student and $5.55 for each white student. By 1920 the figure for blacks rose to $3.04, but the amount for whites had risen at twice the rate for blacks, to $26.08. Between 1900 and 1920, the percentage of state expenditures for blacks fell from 22 percent to 11 percent of the total expenditure on education statewide.[1]

In 1923-1924, the state spent nearly 13 million dollars on education for children of both races, over 60 percent of that on salaries for black and white teachers. The vast majority state money, however, went to white teachers and white schools. Almost 7 million dollars went to white teachers' salaries, while less than 1 million was spent on the salaries of their black counterparts. White libraries received almost $27,000 compared to a paltry $220.48 divided among all the black libraries in the state. Expenditures on physical plant were over two million dollars for whites and only $372,000 for African Americans. The most egregious example of disproportionate spending, however, was in transportation: nearly $174,000 for white students, only $196.25 for black students. In 1925, the average salary for a white teacher in South Carolina was $885; the average salary for a black teacher was $261. The average school year for whites was 159 days; for blacks, 97 days. In all, expenditures on white schools were over eight and one-half times that for black schools. Contributions from individuals, both white and black, as well as from the Rosenwald Fund helped to make up some, but not nearly all, of the discrepancy.[2] By the mid-1920s, however, some progress was beginning to be made. A modest building

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[1]Idus A. Newby, *Black Carolinians*, pp. 82-86.

[2]Asa H. Gordon, *Sketches of Negro Life and History in South Carolina* (Industrial College, GA, 1929; reprinted as second edition, Columbia, SC: University of South Carolina Press, 1971), pp. 107, 267, 270.

program meant that students in nearly 10 percent of the public schools in the state enjoyed new buildings.[3]

For the first 20 years of this century, no black student completed four years of high school because there was no such thing for blacks in the state. Little wonder, then, that when in 1913 a graduate student at the University of South Carolina tested the intelligence of 225 white and 125 black children, only 8.9 percent of the black students tested above their age level. Over three-fifths tested below their age level.[4] In the future, white officials would use such numbers not as evidence of the inadequacy of the schools, but of the intellectual inferiority of black students. "Evidence" of black inferiority later became part of the legal record in the case that finally brought desegregation to South Carolina in 1963.

Despite some improvements in black schools in the mid-1920s, the Depression drastically slowed the pace of progress. In fact, some indices declined: per-pupil expenditures fell nearly 30 percent in the first two years of the Depression. However, high schools became more common in the black education system. By 1937 there were 31 public black high schools in the state. Nevertheless, poverty and a lack of transportation made attendance at high school impossible for large numbers of black children in the state.[5]

African Americans reacted in several ways to the problems they experienced with the schools for their community. Some teachers, like Septima Poinsette (later Clark) in

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[3]Newby, *Black Carolinians*, p. 219.

[4]Newby, *Black Carolinians*, pp. 86, 90.

[5]Newby, *Black Carolinians*, pp. 220-224.

Johns Island during the 1910s, supplied the schools from their meager salaries. The Negro Teachers Association, organized early in this century, tried to do what it could to upgrade black schools, but because they were on renewable contracts from year to year, black teachers had little power to effect change. Some teachers, in fact, underbid their colleagues in the struggle for jobs from year to year. When a group of educators submitted their appeal for limited improvements in 1910, it was couched in language that clearly reflected their awareness of their powerless position. They "sought an opportunity . . . to get in touch with the head of this department [of education], find out his ideas, and, by his kindly consent, offer such suggestions affecting our welfare, as we deem peculiar or needful. . . ." Ultimately, even their pleas for more industrial education fell on deaf ears, because industrial education was more expensive than a traditional curriculum.[6]

African Americans also responded to the inadequacies of their schools by digging into their own pocketbooks. Local blacks contributed 20 percent of the funds toward the building of schools up to 1927. This amounted to $415,000 toward the education of their own children. Black teachers also began to teach black history, if only that part of it that white school officials found uncontroversial. Nevertheless, even simple exposure to the positive aspects of the black experience meant that increasing numbers of black students were learning about their race's past.[7]

By the 1940s, efforts by African Americans to improve the state of education for black students began to reach a crucial stage. The Supreme Court ruled in 1939 that

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[6]Newby, *Black Carolinians*, pp. 89-93. Quotation p. 92. See also Septima Poinsette Clark with LeGette Blythe, *Echo in My Soul* (New York: E.P. Dutton and Co., 1962), p. 39.

[7]Newby, *Black Carolinians*, pp. 219-225.

unequal pay for black teachers was unconstitutional in a case arising from Baltimore, Maryland, and black teachers in South Carolina filed suit themselves to equalize their salaries. The process of equalizing teachers' salaries led to increasing centralization in the state's educational system, since the prospect of dealing with the multitude of school districts in the state daunted the educational establishment.[8]

In 1948, African Americans in Clarendon County filed suit in federal court in an attempt to equalize transportation in their district. Although ultimately the case was dismissed on a technicality (the plaintiff, Levi Pearson, although he lived in the district targeted in the suit, paid taxes to a different district—at least that is what the state successfully argued), *Pearson v. County Board of Education* did set the stage for *Briggs v. Elliot*, the landmark suit that would ultimately lead to integration—fifteen years after it was filed.[9]

In 1949, a group of African Americans led by the Reverend J.A. DeLaine organized to petition the school board of Clarendon county for more equal school facilities, and when the board refused to act on their petition, the families brought suit. The lead name on the case, that of Harry Briggs, belonged to a service station attendant whose five children attended the Scott's Branch school, a combination elementary and

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[8]For an analysis of litigation on school segregation between 1865 and 1935, including the one case from South Carolina, see Gladys Tignor Peterson, "The Present Status of the Negro Separate School as Defined by Court Decisions," *Journal of Negro Education* 4:3 (July 1935), pp. 351-374. In the South Carolina case, *Tucker v. Blease* (81 S.E. 668 [1914]), the state Supreme Court ruled that a separate school for children who were one-sixteenth black was legal, despite the state law establishing a one-eighth rule for determination of blackness.

[9]For the Pearson case, see Richard Kluger, *Simple Justice* (New York: Vintage Books, 1975), pp. 3-17.

high school for blacks. Despite the reprisals that Levi Pearson had faced because of his earlier suit, however, Briggs and the other plaintiffs were willing to stand their ground. Briggs and his wife Liza both lost their jobs as a result of his signing of the equalization petition. Eventually, Briggs and his family had to leave the state, soon after the Supreme Court's decision in *Brown*.[10]

When Briggs' case was brought before Judge Waties Waring for a pre-trial conference in November 1950, Thurgood Marshall was relatively sure of getting a fair hearing. Waring was a friend of black plaintiffs in the state's federal courts, and had mandated a law school for black residents, as well as equal salaries for black teachers. Marshall decided to plead the case based on the fact that the schools were unequal rather than taking advantage of the recent precedent that Marshall had himself helped to set in *McLaurin v. Board of Regents*.[11]

Waring, who according to Kluger "had taken his own private plunge" into the dangerous waters of equal rights for blacks, had been contacted by Walter White, the National Director of the NAACP. White who told Waring of his fears that Marshall was reluctant to join the judge in the cold waters of racial equality. Waring as much as ordered

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[10]Kluger, pp. 18-24. For a brief discussion of the *Briggs* case and some of the other cases from South Carolina, one may consult Raymond Wolters, *The Burden of Brown: Thirty Years of School Desegregation* (Knoxville: University of Tennessee Press, 1984), pp. 129-174. Wolters' factual background is based on many of the same sources I have used herein, but his perspective is that of one who believes that *Brown v. Board of Education* was flawed, and that the results have largely been negative. Jack Greenberg, a lawyer in the Legal Defense Fund from 1949 to 1984, and director of the LDF from 1962, approaches the problem from the perspective of an insider in his *Crusaders in the Courts*, pp. 85-194. For personal accounts of Clarendon County and the aftermath of *Brown*, see Carl T. Rowan, *Go South to Sorrow* (New York: Random House, 1957), pp. 3-23, 110-115 and John Bartlow Martin, *The Deep South Says "Never"* (New York: Ballantine Books, 1957), pp. 43-77.

[11]Kluger, pp. 301-303.

Marshall to drop the case and re-file a new complaint directly attacking segregation. The unfortunate immediate result of Waring's action meant that the case would have to be heard by a three-judge court made up of arch segregationist George Bell Timmerman and Chief Judge John J. Parker, who had sided with African Americans in cases on appeal, but had not endeavored to break any new ground when it came to their rights.[12]

State officials had been in a hurry since 1950 to improve the conditions of black schools to forestall court-supported desegregation. In June of that year a six-man committee formed by the state House of Representatives began meeting to discuss a new state sales tax with the purpose of improving the schools with the proceeds. Efforts to give the state more power over the education of its children proceeded. Officials drastically reduced the number of districts from 1,200 to 102, and the state assumed greater authority over both financial and educational policy. On the first of July 1951, a 3 percent sales tax went into effect—the first in the state's history. By September 1954, the legislature had appropriated over 100 million dollars for the improvement and construction of schools in the states, over 65 percent of which was earmarked for black schools.[13]

The school equalization program was part of Governor James F. Byrnes' three-part strategy to avoid desegregation and protect states' rights. State responsibility, exemplified by Byrnes' move to equalize the state's schools, was merely the first stage. The second was more drastic: resistance to the federal government, especially the

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[12]Kluger, pp. 303-304.

[13]"South Carolina," *Southern School News*, 1:1 (September 1954): 12; Marcia G. Synott, "Federalism Vindicated," p. 298. Newby, *Black Carolinians*, pp. 306-307.

judiciary. The establishment of the School Segregation Committee, was South Carolina's first foray into resistance. The Committee's job was to study the situation and make recommendations to the state legislature for laws to ensure the perpetuation of segregation. Later, the Committee's legal team assisted school districts in their defense against integration suits. The legislature made plans to sell or lease public schools to private individuals as well, in preparation for closing the schools if desegregation were ordered. The third part of the strategy, epitomized by Byrnes' support for Eisenhower in the 1952 election, involved cooperation among southern states to resist federal intervention.[14] It also represented a turn away from the perceived liberalism of the Democratic Party that accelerated in the 1960s.

In the early years of the equalization program, the money spent on black schools far outpaced that spent on white schools: in Clarendon county over 2.1 million dollars were spent by 1956 compared to $770,576 for white schools. In early 1956, the Columbia *State* had reported that the state's school equalization program was 95% complete in Orangeburg. Spending in the county, which had an enrollment of 6254 white students and 12,859 black students, totalled $5.3 million, of which $3.9 million went to for black schools.[15] However, by 1963, white schools had received 53.9 percent of the equalization money. The program had standardized school buildings and led to a boom in school construction, but despite the huge gains in school expenditures in the early 1950s, South Carolina still lagged behind many of its Southern neighbors in spending. In 1952, for

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[14]Numan V. Bartley, *The Rise of Massive Resistance*, pp. 44-46.

[15]"Orangeburg Equalization Program is 95% Complete," Columbia *State*, 10 February 1956, p. 7-A.

example, South Carolina trailed every state but Arkansas in spending for instruction and total education spending. South Carolina's spending on education had increased by 253 percent between 1940 and 1952, but similar jumps throughout the region kept South Carolina behind. South Carolina also lagged behind all other Southern states in the ratio of spending for black and white students: in 1940 black students received $0.30 for every dollar spent on white students; by 1952 the amount had risen to $0.60—but it was still the lowest percentage in the South. With the exception of Mississippi and Arkansas, South Carolina's black teachers were the lowest-paid in the region as well.[16]

In 1950-51, there had been 1,300 one or two-teacher schools for its black citizens. By the end of the 1954-55 school year, South Carolina still had 339 of the tiny schools serving black South Carolinians. At the same time there were, in 1954-55 and 1950-51 respectively, 96 and 377 of the schools for white students in the state. By the 1956-57 school year, the numbers had been drastically reduced even further: 54 one or two-teacher schools remained for whites and only 79 for blacks. In 1956, there were 236 white high schools and 131 black high schools in the state.[17] Black students averaged only 4.3 years of schooling, and whites averaged 7.6. While both were below the national average of 9.3, clearly the state had not lived up to any semblance of equal while offering separate educational opportunities to black students.[18]

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[16]Harry S. Ashmore, *The Negro and the Schools*, with a Foreword by Owen J. Roberts (Chapel Hill: University of North Carolina Press, 1954), pp. 150-153, 159 (Tables 6-8, 14).

[17]"Substandard Schools in SC Now Few," Columbia *State*, 13 October 1956, pp. 1-A, 3-A.

[18]Synott, "Federalism Vindicated," p. 298.

In that context, the trial in *Briggs v. Elliot* began on 28 May 1951. Robert McC. Figg, representing Clarendon county, began the proceedings with a stunning announcement. The defense stipulated that the black schools of the district were in fact unequal to those of the white schools. Furthermore, because of the new sales tax designed to end the disparities between black and white schools in the state, Figg asked the court to delay the proceedings to allow the state sufficient time to put the plan into effect. Thurgood Marshall was unwilling to concede at this point, however, and Judge Parker allowed Marshall to proceed with his case.[19]

The plaintiffs' case in *Briggs* depended substantially on the testimony of expert witnesses such as Matthew Whitehead, a Howard University professor of education. Whitehead had examined the schools of Clarendon county, and found them not only wanting, but terrible. His report to the Legal Defense Fund following his visit to the schools of Clarendon county in April 1951 detailed the horrible conditions that black children suffered just to get what little education was afforded them. For example, the white schools were all brick or stucco while the black schools were all of wood. Teacher to student ratios were 67 percent higher at black schools: 47:1 as opposed to 28:1. The black high school's curriculum consisted of agriculture and home economics. White students took classes in typing or biology. Black schools sometimes lacked running water or electricity and no black school benefited from indoor toilets. There were other problems as well, ranging from the lack of transportation, lunchrooms, or janitorial services to, at one black school, a complete lack of desks.[20]

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[19]Kluger, p. 347-348.

[20]Kluger, pp. 331-332, 351-353.

Harold McNally of Columbia University's Teachers College testified that there was no way that students in conditions such as those outlined by Whitehead could receive an adequate education. Per-pupil expenditures and teacher:student ratios both had important effects on the quality of education. Ellis O. Knox, like Whitehead also of Howard, reinforced McNally's testimony. McNally, however, had to admit under Figg's cross-examination that he had no experience studying segregated school systems. Knox, however, did have such experience, and he testified that even in substantially equal situations, segregation would lead to unequal educational achievement.[21]

After spending the morning with the educational experts, Robert Carter, who was handling the examinations for the Legal Defense Fund, introduced his key witness. Kenneth Clark was a social psychologist who had worked on the effects of segregation on black children. In Clarendon county, he had found that black children often identified white dolls as "nice," or that when asked to identify the doll that most accurately resembled themselves, chose a white doll instead of a black one. He had examined sixteen children at Scott's Branch school, and the numbers of children who preferred white dolls to black dolls mirrored those he had found in earlier experiments he and his wife had conducted in Washington and New York. Later analysis of Clark's methodology led to questions not only of his methods but also of his results. New York University professor Ernest van den Haag criticized Clark for fudging his results, which in fact supported the idea that black children fared better, or at least were less harmed, in

[21]Kluger, pp. 331-332, 351-353.

segregated situations. Fellow NYU professor Edmond Cahn, who supported the decision in *Brown*, nevertheless granted that Clark's science was weak.[22]

Social scientists and politicians who disagreed with Clark would affect the progress of anti-segregation litigation in the years to come. If Clark's study was accurate, however, it revealed the social hegemony of whiteness.

The next day, Marshall delivered the closing arguments. The facts were no longer at issue: since the defense had admitted to the disparities in facilities, the two sides were in agreement on that subject. What remained at issue was the law. Segregation was not a reasonable application of the law, and the plaintiffs had proved that the institution had caused significant psychological and social damage. Figg responded by arguing that precedent allowed states to run their educational systems as they saw fit, but when pressed by Judge Parker, vacillated on what decree he might suggest be issued. Vaguely, he asked for "a reasonable time" to prepare the plans for the school equalization program. There would be a time in some undefined future when the "problem" of segregation would "disappear," but Figg did not elaborate. Following a final statement by Marshall, court adjourned and the three judges met to consider their response to the arguments.[23]

Judge Parker, joined by Timmerman, ruled that the issue was properly a legislative one: since there were strong arguments on either side of the segregation controversy, he reasoned, legislatures must be let alone to hash it out. Recent Supreme Court precedents dealing with higher education did not apply, since education at the lower levels was compulsory, since education could conceivably be as good in a

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[22]Kluger, pp. 317, 330-331, 353, 355-356; Wolters, p. 135.

[23]Kluger, pp. 363-365.

segregated lower school, and since professional contacts were not as important as they were in a law school. Judge Waring issued his final major opinion from the bench: a twenty-page dissent excoriating segregation and arguing passionately for its demise. Soon thereafter, however, Waring retired and left the state, never to return until his burial in 1968.[24]

The three-judge panel's decision was not, of course, the final word in *Briggs v. Elliot*. Three years later, joined by other cases from Kansas, Virginia, and Maryland, Judge Parker's opinion was overturned by the Supreme Court in *Brown v. Board of Education*, a decision which led to more than twenty years of conflict in the courts and ultimately in the streets of South Carolina and other states. In the immediate aftermath of the decision, however, the only thing that changed was the intensification of rhetoric, at least among the state's white leadership.

Of course, the school equalization program started out as something other than a means of securing social justice to a deprived class in South Carolina society. It was intended all along to delay integration. In April 1951 the legislature had authorized a 15-member Segregation School Committee led by Calhoun County Senator L. Marion Gressette (usually called the Gressette Committee), "to study and report on the advisable course to be pursued by the State in respect to its educational facilities in the event that the federal courts nullify the provisions of the state constitution requiring the establishment of separate schools for children of the white and colored races."[25] Although

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[24]Kluger, pp. 365-366. The Waring dissent is at *Briggs v. Elliot*, 98 F. Supp. 529, pp. 540 ff. (1951).

[25]Quoted in "South Carolina," *Southern School News* 1:1, p. 12.

the School Committee did little work during its first years, following the Supreme Court's decision in *Brown v. Board of Education*, the committee took a very active role in attempting to maintain segregation or—later on—delay integration. The Committee's life had already been indefinitely extended by the legislature in February 1952.

Governor Byrnes in January had recommended repeal of the section of the 1895 constitution that required the state to operate public schools. In the November 1952 elections, South Carolina voters by a margin of more than two-to-one approved the repeal. Although never acted upon—in fact, the repeal amendment was not even ratified until March 1954—the repeal would have allowed the General Assembly to eliminate the entire system of public education without having to consult the public or wait for a regular election.

When the Supreme Court refused to accept the separate but equal doctrine in 1954, Governor Byrnes and many of the other political leaders of the state turned to other means of avoiding integration. Byrnes wrote an article for *U.S. News and World Report* that castigated the Supreme Court—of which he was a former member—and demanded that it be "curbed."[26] Byrnes immediately froze the school construction program. The shutdown only lasted a couple of months however, as after an appraisal of the system the Gressette Committee recommend in July that the program be re-started. Funds were released at the end of August.[27] The Gressette Committee recommended re-starting the program primarily because its members were worried, after meetings with black groups

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[26]Quoted in Rowan, p. 87.

[27]"South Carolina," *Southern School News*, 1:1, p. 12; Synott, "Federalism Vindicated," p. 299; Howard H. Quint, *Profile in Black and White: A Frank Portrait of South Carolina* (Washington: Public Affairs Press, 1958), p. 93.

and others in the state, that shutting down the program would provide added incentive for African Americans to demand desegregated schools.[28] Debate over school closing continued well into the 1960s. If African Americans had been successful at integrating schools in the late 1950s, parts of South Carolina probably would have followed the disastrous course followed in Prince Edward County, Virginia, but by the time desegregation came to South Carolina (1963) most political leaders were no longer willing to resort to that desperate measure.

The Supreme Court's decision in *Brown* led segregation committee attorney—and former president of the South Carolina Council on Human Relations—David W. Robinson and others involved in perpetuating the state's segregated school system to wonder what could or should be done to adjust South Carolina to the new situation. In early June 1954, Robinson proposed—or wished—that the Court's decision could be made to apply only to personal rights:

> It seems to me that if the Court would restrict its decree in line with the principle that the right to go to a mixed school is individual and personal, for which reason each child or each parent may exercise the right, or refuse to exercise it, the school authorities could adjust their operations within the frame work of the present segregated school program.

The adjusted operations could include a "restricted" right to petition for transfers to different schools. Some of the restrictions Robinson proposed eventually came to pass, such as requiring the petition to be filed a certain amount of time before school started in the fall. Other proposals, such as a requirement that only lawyers admitted to the state Bar

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[28]Marcia Synott, "Desegregation in South Carolina, 1950-1963: Sometime 'Between "Now" and "Never",'" in *Looking South: Chapters in the Story of an American Region*, ed. Winfred B. Moore, Jr. and Joseph F. Tripp (New York: Greenwood Press, 1989), p. 57.

and who lived in the state could represent students wishing to transfer—clearly aimed at NAACP attorneys from New York—did not pass.[29]

Robinson revealed a relative degree of moderation—at least for the time and circumstances. While he believed that "most of the parents prefer their children to go to segregated school," and that most would therefore not take advantage of transferring, he also believed "that a few negro children in the white schools would not create a serious problem." State attorney-general T.C. Callison agreed with Robinson that individual rights not "exercised or demanded by the individual" should not be enforced by the courts, but acknowledged that the *Brown* case would work as a class action and control the situation for everyone.[30]

In response to the shutdown of the school building program, Robinson argued that the money should be released to local school boards. They should be given "broad powers in the assignment of pupils [since] the best chance of evolving something satisfactory is to leave the problem in local hands." Releasing school building money would allow the local school boards to have something to work with as they undoubtedly would continue to assign students on the basis of race: "If we decline funds for a negro high school in a school district, the Trustees will have no alternative but to mix the children. If we provide the high school, the chances are great that most of the negroes will prefer their children to go to this new school."[31] Following the centralizing efforts of the early 1950s, the new

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[29]DWR to T.C. Callison and Robert McC. Figg, 5 June 1954. DWR papers. Correspondence.

[30]DWR to T.C. Callison and Robert McC. Figg, 5 June 1954; Callison to DWR, 11 June 1954. DWR papers. Correspondence.

[31]DWR to James F. Byrnes, 13 July 1954. DWR papers. Correspondence.

push to allow local districts more control had legal ramifications. If blacks desiring to integrate had to sue local districts, rather than a county or the state itself, it would consume time and resources. Giving local district boards more control meant that, instead of suing a county Board of Education, plaintiffs would have to sue individual district boards of trustees.

Robinson wrote, sometime during the summer of 1954, of the "strong disagreement" felt in South Carolina regarding the Supreme Court's decision in *Brown*. The decision, argued Robinson, was erroneous in relying extensively on in Topeka, where segregation was optional, and Delaware, where the black population was small, rather than on Virginia and South Carolina, where segregation was required and the black population was quite large. Nevertheless, he wrote, "we must recognize that when reduced to decree form it becomes the law of the land. . . . [However,] in the absence of a decree, . . . final decisions must be postponed." Robinson called for "calm, considered thinking" but said that the schools should be operated just as they had been in 1953-54. Regardless, there were only two alternatives in the long run. The only advantage, if it were one at all, to closing the schools altogether, would be "some exodus of our Negro population," leading to an estimated reduction to 10 percent from the current 40 percent. Some people thought that "Negroes deserve to lose their public education facilities because of their part in the segregation litigation," but Robinson considered such an attitude "short sighted": "[O]ur Negroes should be educated into responsible, efficient, tax-paying citizens, not left as unskilled recipients of social security benefits." The other alternative Robinson foresaw was equally unattractive: "mixing the races in the schools

. . . [would] retard rather than advance the education of both races." In addition, "[m]any Negro school teachers would be without jobs."[32]

The solution would require a holding by the courts that "trustees cannot be forced to integrate the schools on . . . a geographical basis, [in which case] the Negro parent [would be] relegated to his right to petition to have his own child admitted to the white school upon the ground that there is no reason other than race upon which the Board can exclude him." Robinson believed that such a strategy would lead to "very few" blacks applying to white schools for several reasons:

> (a) There are few Negroes educationally qualified to go to schools with similarly aged white children and the few Negro children will not wish to go to a school with a large number of white children.
>
> (b) Most Negro parents will realize that for the present and for a number of years in the future his child can obtain a better education in the negro school.
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> (c) The newer, more modern buildings which the Negroes have in most school districts will tend to keep the Negro in the Negro schools.
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> Of the few Negroes who may apply to go to white schools, most can be legitimately disqualified by the Board of Trustees for educational reasons.[33]

In the fall of 1954, according to state Superintendent of Education Jesse T. Anderson, no black students attempted to enroll in any of the white schools of the state. However, a Catholic school in Rock Hill opened its doors to black students for the first time. On the first day of school 29 white children and five black children were enrolled. At the same time, the state's Presbyterian Synod voted to continue segregation in its

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[32]Undated memorandum. DWR papers. Legal Memoranda, ca. 1954 . . . 1962-1970.

[33]Memorandum—Re: Segregation, n.d. DWR papers. Legal Memoranda.

institutions. The vote affected Presbyterian College and Thornwell Orphanage in South Carolina and a seminary and a college in Georgia and North Carolina, respectively. By early November, the state's white Methodists and the white teachers' organization, the South Carolina Education Association, had recommended the continuation of segregation.[34]

The 1952 election in South Carolina had been in some ways a watershed. Eisenhower, while he failed to carry the state (or any other Southern state), won 49.3 percent of the vote. No Republican since before Franklin Roosevelt had managed more than 4.5 percent. According to Numan Bartley, Byrnes did more for Southern Republicanism than any other individual. Factionalism was returning to state politics, but for the most part the factionalism remained within the Democratic party. In 1954, the factions were represented by Columbia businessman Lester Bates, whose support came primarily from old-time Democrats, loyalists to the party. His opponent in the governor's race, and the eventual victor, was George Bell Timmerman, Jr., son of the federal jurist. Timmerman's base of support came from the old Dixiecrats from the 1948 party split.[35]

Upon taking office in January 1955, Timmerman reiterated his position that freedom of choice was the only acceptable answer to the quandary posed by the Supreme Court's decision. Freedom of choice plans in fact were tried in South Carolina, as elsewhere, only to be ruled unconstitutional in 1968. Timmerman also proposed removing public school issues from the jurisdiction of the federal courts, arguing that

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[34]"South Carolina," *Southern School News*, 1:2 (October 1954): 12. "South Carolina," *Southern School News*, 1:3 (November 1954): 14.

[35]Bartley, p. 70.

such "judicial infringement upon . . . freedom" must be stopped.[36] Timmerman, in his role as quintessential southern conservative—defined by Howard H. Quint as a racist in favor of states' rights and decentralized government—became the spokesman for white segregationist dissent against the Supreme Court's ruling. Timmerman criticized President Eisenhower for daring to suggest that individuals should be "judged and measured by what he is, rather than by his color, race or religion." "Never before," said Timmerman, "has a national administration proclaimed as unimportant a person's race and religion."[37]

Meanwhile, the Gressette Committee offered its own suggestions on how to proceed. First, the legislature should remove all compulsory attendance laws from the books. Then it should authorize the devolution of the power to open and close schools to the district boards of trustees from the county boards of education, where it then resided. Thus each individual district could control its own destiny and lawsuits would have to be initiated individually against individual districts rather than counties. The legislature should also allow pupils to transfer across county lines and allow trustees to lease or even sell school property. In March, the legislature passed several laws based on those recommendations, including a repeal of the compulsory education law. Timmerman declared that the repeal was "a pledge of good faith to the people of South Carolina that they will not be forced to send their children to mixed schools." The fact that Timmerman did not define the people of South Carolina as white reveals his belief—which he shared with many other white South Carolinians—that black parents did not want their children

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[36]"South Carolina," *Southern School News* 1:6 (February 1955): 3.

[37]Quoted in Quint, p. 95.

attending white schools. Timmerman said in his address to the convention of the South Carolina Education Association that "[n]ever before has anyone seriously proposed that the children of two biologically different races should be compelled to mix socially. . . . It is new. It is novel. It is contrary to the divine order of things. Only an evil mind could conceive it. Only a foolish mind can accept it." Thomas R. Waring, editor of the Charleston *News and Courier*, wrote in *Harper's* of white fears: black underachievement was a major cause of dread for white parents, but in addition "there's no use to tell them that it is unlikely that anyone will catch venereal disease from a toilet seat. They just don't want to take risks of any kind with their children."[38]

In April the state legislature, in an amendment to the annual appropriations bill, provided that state money would be cut off for any school ordered to integrate by a court order. Several counties, including Clarendon, followed suit by adopting similar measures for their localities. In addition, the state legislature acted to end the practice of automatically re-hiring teachers, thereby giving local trustees more power over their teaching staff. The state's two U.S. senators, Strom Thurmond and Olin D. Johnston, proposed legislation to reduce the scope of jurisdiction of federal courts over education.[39]

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[38]"South Carolina," *Southern School News* 1:6 (February 1955): 3."South Carolina," *Southern School News* 1:8 (April 1955): 13. Waring quotation from Rowan, p. 105. For a brief look at a variety of state laws passed to maintain segregation in the aftermath of *Brown v. Board of Education*, see Richard Bardolph, ed. *The Civil Rights Record: Black Americans and the Law, 1849-1970* (New York: Thomas Y. Crowell Co., 1970), pp. 373-393. Bardolph also covers in brief a number of civil rights cases from federal and state courts during the 1950s and 1960s.

[39]"South Carolina," *Southern School News* 1:9 (May 1955): 6 and 1: 10 (June 1955): 11; "South Carolina," *Southern School News* 1:10 (June 1955): 11; Wolters, p. 143.

Plans for the 1956 legislative session began soon after the 1955 session ended. (South Carolina's legislative sessions usually ran only a couple of months beginning in January.) Burnet R. Maybank, Jr, son of the late U.S. Senator (whom Strom Thurmond had replaced in 1954), proposed a bill to provide state income tax credits for people who sent their children to private schools in the state. It would allow relief for 30 percent of tuition, which could grow to 100 percent if integration were ordered. Maybank also explored relief from local property taxes, which supported public schools, for the same group.[40] The 1956 session resulted in laws or, when laws were irrelevant, resolutions designed to shore up or make clear the state's commitment to segregation. The most important of the latter was a resolution of interposition which recalled the state's heritage of defiance of federal law going back to the days of John C. Calhoun. Laws passed included requirements to close South Carolina State and any white college involved if desegregation were ever ordered. Anti-NAACP laws were also passed, as well as laws to screen books for the state's public libraries and closing Edisto Beach State Park because of the lawsuit seeking to end segregation there.

When *Briggs v. Elliott* was remanded to the three-judge panel for further review on orders from the Supreme Court in *Brown II*,[41] Judge John J. Parker issued the following dictum interpreting the high Court's decision:

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[40]"South Carolina Officials Stand Firm Against Court Decree," *Southern School News*, 2:1 (July 1955): 14.

[41]*Brown v. Board of Education*, 349 U.S. 294 (1955). This was the implementation phase of the case, in which the Supreme Court called for desegregation "with all deliberate speed."

> The Constitution . . . does not require integration. 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.[42]

While the actual decree enjoined the Clarendon county school board from excluding black children from white schools, the language of Parker's dictum caused trouble for over a decade. School districts used his words to delay desegregation until the early 1960s, and to prevent large-scale desegregation until the fall of 1970. Thus, as dozens of Southern communities in several states began the process of desegregation following *Brown II*, South Carolina remained one of the states where adamant resistance predominated.

In the aftermath of *Brown II*, Thurgood Marshall remained optimistic, declaring in an interview with the *Southern School News* that the policy of the NAACP was "[d]esegregation in most areas of the South by not later than September 1956."[43] However, despite Marshall's optimism, William D. Workman, a correspondent for the *News and Courier* who went on to become the editor of *The* (Columbia) *State* newspaper and South Carolina correspondent for the *Southern School News*, wrote that "[r]esistance to desegregation [was] increasing in South Carolina." Resistance took several forms in addition to legislative action. When black parents in Charleston county organized petition drives, signers' names were published in the *News and Courier*, and its editor, Thomas Waring (nephew of Judge Waring), suggested that whites "study carefully" the list of names. White parents in Moultrie District, across the Cooper River from Charleston,

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[42]"Lower Court Decrees Mark Busy Month," *Southern School News*, 2:2 (August 1955): 1.

[43]"Marshall Cites Strategy," *Southern School News* 2:3 (September 1955): 1.

organized in response to the petition there and went "on record as being in favor of the closing down of the schools before any school in the district is permitted to operate on a non-segregated basis." In all, more than 1,000 whites attended three different meetings in response to petitions from blacks in the county.

Black South Carolinians reacted in different ways to the Supreme Court's first decision in *Brown*. On 25 May 1954 some parents of black students in North Augusta submitted a petition requesting the continuation of segregation. In Mullins, about one hundred "patrons" of a black school argued for segregation's continuation as well. Interestingly, one of the black leaders of the state who was opposed to the *Brown* decision was George Elmore, who had fought for black voting rights in the 1940s. However, Quint alleges that most of Elmore's discontent arose from his inability to acquire an office with the NAACP.[44]

Despite isolated opposition, most black South Carolinians favored desegregation. James M. Hinton, the state NAACP president, said that local action would be taken in school districts to urge desegregation, and in Sumter the Board of Directors of Morris College for Negroes, a Baptist school, officially desegregated by ordering the admission of all qualified students—the first school in the state to officially desegregate since the imposition of Jim Crow.[45] In response to the move by the white Education Association, the parallel black teachers' organization, the Palmetto Education Association, promised "to work unceasingly to uphold" the *Brown* ruling.[46]

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[44]Quint, pp. 71-82.

[45]"South Carolina," *Southern School News*, 1:1 (July 1954):12.

[46]Quoted in "South Carolina," *Southern School News* 1:4 (December 1954): 13.

African Americans also acted by signing petitions in various parts of the state. Whites responded by organizing Citizens Councils to exert economic and political pressure to force black citizens to back down. Following the lead of Mississippi, Alabama, and Louisiana, South Carolina whites began belatedly and usually in response to black assertiveness to form the Councils. In Orangeburg county, a petition signed by 36 blacks led to the formation of the Elloree Citizens Council, and three more Citizens' Councils were formed by the end of August in that county alone. The Council movement in South Carolina thrived especially in the lowcountry and piedmont, and enjoyed the approval, if not the direct participation, of many members of the state's power structure. Members of the so-called "Committee of 52," which cooperated with the Councils, included several members of the business and political communities, and many politicians spoke at Council meetings. Unlike the Councils in other states, however, the South Carolina Citizens' Councils did not have very much legislative influence. Dominant politicos did not associate with the Councils, even though Emory Rogers, who had represented Clarendon County in the *Briggs* case, served as the first executive secretary of the statewide group. The Citizens' Council movement in South Carolina peaked in 1956 and, though new chapters were formed into the 1960s, membership began to dwindle thereafter. Following Rogers' retirement at the end of 1956, the South Carolina Association had no cohesive leadership. Dedicated segregationist William D. Workman charged that the Ku Klux Klan had infiltrated the Citizens' Councils in the state, a charge that indirectly led to the resignation of Baxter Graham, the third chairman of the state association in as many years. Subsequent leaders were content to make sure

that local governments were aware of the problems that desegregation brought, and were never dedicated to expanding the organization's membership.[47]

Several African Americans who signed the Orangeburg petition were dismissed from their jobs or told not to return as tenant farmers or sharecroppers the next season. Some African Americans in various areas responded by requesting that their names be removed from the petitions they had signed. In Orangeburg, the first name on the petition was that of John E. Brunson. While Brunson's name would lead the list of plaintiffs in a subsequent desegregation case from Orangeburg county, several signers there asked to have their names removed. Some, like Wilheminia Jones, claimed they did not know what they were signing. In all, more than 30 signers asked to have their names removed from the petition. In Clarendon county, J.H. Richburg asked that his and his son's names be removed from the list of people added to the list of plaintiffs in *Briggs v. Elliott* because his daughters and daughter-in-law were having trouble getting their teaching jobs renewed. Nevertheless, African Americans filed or circulated petitions in several South Carolina counties.[48]

The Gressette Committee considered what to do about the petitions. In a memorandum to Robinson, a writer identified only as JMMcF, perhaps Robert Figg's son, reported that McEachin, Riley and Evins—probably state legislators and members of

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[47]Bartley, pp. 92-94; Neil R. McMillen, *The Citizens' Council: Organized Resistance to the Second Reconstruction, 1954-64* (Urbana: University of Illinois Press, 1971), pp. 74-80.

[48]"Resistance to Desegregation is Increasing in South Carolina," *Southern School News* 2:3 (September 1955): 6; Petition, 31 July 1955; Affidavit of Wilhelmenia Jones, 30 August 1955; Matthew D. McCollom (Orangeburg NAACP President) to Larry Wells (Chair, Orangeburg District Five Board of Trustees), 6 September 1955. DWR papers, File Calhoun County/Orangeburg County *U.S.A. v Calhoun School District #2, U.S.A. v. Elloree School District #7* 1966, 1968-69; Quint, pp. 83-85.

the Gressette Committee—all agreed that those who solicited signatures, even though under false pretenses, would not be liable under the state's criminal code, although the possibility of Bar Association action was not out of the question. The Gressette Committee was also concerned that the fact that some black lawyers were soliciting signatures might be a violation of the state law prohibiting solicitation of business. McEachin and Evins thought the statute was unconstitutional in the first place, and all three agreed that no violation had taken place.[49]

In the summer of 1955, J. Arthur Brown, the president of Charleston's NAACP branch, announced that the local group would seek to gain entrance to white schools for blacks students in the city. However, five years elapsed before Brown himself, on behalf of his daughters, initiated a suit against the county's district 20 (made up of the city of Charleston proper).

Orangeburg county state representative Jerry M. Hughes proposed investigating NAACP activities at State College, and Reverend John V. Murray, under pressure from local Methodists because of his anti-segregation ideas, was removed from his position and transferred. In October, Lieutenant Governor Ernest F. Hollings declared that the NAACP should be declared "subversive and illegal." In November it was revealed that Dean Chester C. Travelstead of the University of South Carolina's school of education had been dismissed for favoring desegregation, and in Batesburg, Governor Timmerman's own pastor resigned from his position in the First Baptist Church over the issue of integration. Reverend G. Jackson Stafford had voted for a resolution adopted in the Southern Baptist Convention favoring the Supreme Court's decision in *Brown*, and

[49]Memorandum, JMMcF to Robinson, 31 August 1955. DWR papers, Legal Memoranda.

opposition quickly arose against him among his congregation, forcing him to resign.[50] For many whites, opposition to desegregation remained the priority.

Meanwhile, the NAACP reached a different but practical decision regarding Clarendon County. The case had been made that school segregation was unconstitutional, but whites in the county made it abundantly clear to Thurgood Marshall on a visit to the county in 1955 that they would have no problem closing the schools if push came to shove. NAACP executive secretary Roy Wilkins stated that "from a practical standpoint" it did not matter "if Clarendon [county] is not integrated for 99 years." The organization thus made the difficult decision to leave the county alone.[51] Having won the key Supreme Court decision against one of the most racist counties of the Deep South, the NAACP was now content to use that decision in areas where it could practically be applied. Clarendon County was left to its own devices, and additional legal action beginning in 1960 and lasting most of that decade was required before meaningful desegregation could occur there.

In December 1955 the Gressette Committee issued its third annual report, calling for "every legal means" to be employed to maintain school segregation. The Supreme Court, according to the Committee's interpretation (certainly informed by Judge Parker's decision in the 1955 *Briggs* action), "did not intend to force integration on an unwilling people." In the January 1956 session of the state legislature, several legislators introduced

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[50]"Citizens' Council Movement is Spurred in South Carolina," *Southern School News* 2:4 (October 1955): 3; "'Clarendon Case' Figure Quits S.C. Over Shooting Incident," *Southern School News* 2:5 (November 1955): 11; "Lines Sharply Drawn on School Question in South Carolina," *Southern School News* 2:6 (December 1955): 6. For more on the state's attacks on the NAACP, see Quint, pp. 60, 87-91; on Travelstead, see also Rowan, pp. 177-180.

[51]Wolters, p. 145.

new bills designed to cement the state's commitment to segregation or to prevent the operation of the NAACP. Joining other southern legislatures, including those of Virginia and Texas, South Carolina's General Assembly began to pass laws attempting to restrict the activities of the NAACP and to otherwise ensconce massive resistance into state law. Among the new bills were proposals to give county sheriffs the power to reassign students in case of potential violence, to bar teachers from being members of the Communist Party or the NAACP, to forbid state employees from membership in the NAACP or the KKK, to remove the tax-exempt status of churches that allow their buildings to be used for meetings of the Communist party or the NAACP, and to study the effects of disposing of state-owned property that might be abandoned (such as the closing of public schools entirely) if integration were ordered. The legislature passed all but the latter bill by April. Legislators also broadened the powers of the Gressette Committee during the session. It now could deal with "all phases of segregation affecting the state government and its political subdivisions, and all the citizens of South Carolina." The legislature also passed a law that requested the State Library Board to remove books judged "antagonistic and inimical to the traditions of South Carolina."[52]

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[52]"S.C. Legislator Plans Resolution to Reaffirm Sovereignty," *Southern School News* 2:7 (January, 1956): 5."S.C. Legislature Weighs New Bill to Back Up Segregation," *Southern School News* 2:8 (February 1956): 16;"S.C. Legislature Adopts New Laws to Maintain Segregation," *Southern School News* 2:10 (April 1956): 12. See also Bartley, pp. 214-236 for anti-NAACP legislative activity in South Carolina and other southern states. Anti-NAACP efforts were less successful in South Carolina than in Alabama, Texas or Arkansas, where the organization was rendered completely helpless for varying periods. Bartley, p. 215. See also Tushnet, *Making Civil Rights Law*, pp. 272-273 (Texas), 283-289 (Alabama) and 291-293, 294-295 (Arkansas).

In June 1956, the governor and lieutenant governor appointed six members of a committee to investigate the activities of the NAACP in the state.[53] One member appointed by the governor, Augustus M. Graydon, would later figure prominently in the struggle over school integration, becoming a staunch advocate of testing as a method to keep the schools as racially separate as possible. At South Carolina State College, one of the targets of the anti-NAACP investigation, several students were asked not to return and several faculty members' contracts were not renewed. Other faculty members had not asked for contract renewals. All of this was fallout from a strike there in April in which students boycotted classes to protest the state legislature's proposal to crack down on the NAACP.[54]

Economic boycotts were also important means of exerting pressure, and both sides used the tactic in the struggle. After they began to spring up following the petition drives, Citizens Councils became very adept at exerting economic pressure on blacks. When the opportunity presented itself, blacks retaliated with boycotts of their own. Orangeburg provides the most vivid example. The Elloree Citizens Council's purpose, members declared, was to exert "economic pressure on all persons connected with the NAACP." Their primary targets were those parents who had signed the school desegregation petition, but the boycott expanded to include everyone associated with the organization. Black merchants found themselves without goods to sell, and credit dried up. African Americans in Orangeburg, due to their relatively large portion of the

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[53]"Little Major Activity Reported in South Carolina During Month," *Southern School News* 3:1 (July 1956): 11.

[54]Quint, pp. 53-54; Bartley, p. 230. Bartley also covers the state's attempts to undermine academic freedom at Allen University and Benedict College, pp. 231-232.

population (about 50 percent), were able to mount an effective retaliation. Black leaders targeted twenty-three white businesses, at least one of which was reported to have failed. Meanwhile, the Victory Savings Bank chanelled money from the NAACP and others to blacks. By spring 1956, whites were willing to compromise, and the two-sided boycott began to ease. However, African Americans continued to fight for desegregation, ultimately in the courts.[55]

Violence, too, erupted in South Carolina, though it was certainly not as extreme as that in other states. The two most widely publicized events involved Reverend J.A. DeLaine and a relatively well off black Greenvillian, Claude Cruell. His church and home having been repeatedly attacked by fire or rocks, DeLaine retaliated when men in a passing car fired shots at his home. He fired back, ostensibly to mark the car for a subsequent investigation, and was forced to leave the state for New York or face charges himself. DeLaine, like Judge Waring, thus became an exile from the state. Claude Cruell's only mistake was to associate with whites. Sherwood Turner, a white man, rented a house from Cruell, and occasionally Cruell would give Turner rides to the bean fields where Turner and his family scraped out a livelihood. On 21 July 1957, a group of "independent" Klansmen viciously beat Cruell for associating with whites. The Turner children happened to be in the Cruell home at the time, as Turner was taking his anemic wife to the hospital. Four of the Klansmen involved received jail terms, but the rest went free, the charges dismissed by Judge James M. Brailsford.[56]

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[55]Quint, pp. 51-53.

[56]Quint, 36, 40-41.

Despite violence and intimidation, however, blacks in South Carolina, as throughout the South, refused to back down. The drive for desegregation continued, even intensified, as the years after *Brown* passed. By the late 1950s, African Americans had had enough delay, and were preparing to go to court to secure their rights. In Greenville, rumors of a lawsuit to be filed by blacks in the county to integrate the county's schools circulated, though no suit was yet filed. The county branch of the NAACP had threatened legal action if the county did not respond to a year-old petition to comply with the Supreme Court's decision by mid-October. Yet by the end of October, no suit had been filed, and the NAACP's local attorney, Donald James Sampson, stated that he was "not in any grand hurry" to bring a desegregation suit.[57]

Meanwhile, with the new legislative session in January 1957 came new proposals to delay integration. Bills to automatically close any desegregated school and give the governor the power to authorize tuition grants, to prevent state police officers from aiding federal officers, and to prevent the use of state jails to house federal detainees charged with opposing integration were just three examples. Other laws were proposed to prevent barratry and to require local chapters of the NAACP to file membership lists with the secretary of state. The anti-barratry bill passed in February. In addition to those mentioned above which were still pending, there were bills that would require public transportation carriers in Florence county to mark their rest rooms "white" or "colored," to require blood banks operating in the state to mark their blood by race, as well as other less "colorful" laws all with the goal of restricting the operation of the NAACP and those

[57]"Two S.C. Lawsuits Hold Spotlight During Month," *Southern School News* 3:5 (November 1956): 13.

sympathetic to it. During the 1959 session, new bills calling for the state to sell its school property and to make "fathering an illegitimate child"—to which white officials apparently believed black men were more prone—a crime which would prevent one from voting made it to the legislature's docket.[58]

Despite the very real possibility of reprisals, in August 1958 several parents in Clarendon county submitted petitions to urge compliance with the Supreme Court's decision, only to be rebuked by the school board, which argued that "the prevailing operation of the schools . . . was to the advantage of the children of both races." The parents' attorney, Lincoln Jenkins, said that "further action" would be taken. S. Emory Rogers believed that active Citizens' Councils in Clarendon county would have prevented the submission of the petitions.[59]

Senator Gressette, speaking before a group of some 100 leaders of state Citizens' Councils in June 1959, pledged that South Carolina would close its schools if integration were forced upon the state. Meanwhile, hints of legal action to desegregate schools accelerated as well. Following a decision by a federal court judge in Atlanta, Georgia requiring the city to submit a school desegregation plan, I. DeQuincey Newman stated that the ruling was "a source of encouragement to all Southern Negroes. . . . [I]t is

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[58]"New Legislation on Schools, Court Tests Occupy South Carolina," *Southern School News* 3:8 (February 1957): 10; "S.C. Legislature Passes New Act Aimed at NAACP," *Southern School News* 3:9 (March 1957): 6; "S.C. Legislature Acts to Strengthen Resistance to Desegregation," *Southern School News* 3:10 (April 1957): 9; "NAACP Certified; Attorney General Sees Check-Rein," *Southern School News* 5:9 (March 1959): 9. See also Walter F. Murphy, "The South Counterattacks: The Anti-NAACP Laws," pp. 374-376, for South Carolina's and other states' laws on barratry and other matters pertaining to bringing lawsuits.

[59]"Status Quo Prevails; Two More Petitions Filed," *Southern School News* 5:3 (September 1958): 16.

altogether possible that this same thing might happen in this state by or during the coming school year." In Charleston, J. Arthur Brown moved closer to legal action as well, noting that "[w]e have been contacted by several parents disgusted with the inequalities in our local schools. They are conferring with our lawyers."[60]

In August 1959 a number of children in Clarendon county requested reassignments to white schools. By the end of September the small initial group of 12 to 15 students had grown to 78. Regardless of the petitions to transfer, however, county school superintendent L.B. McCord swore that "there will be no integrated schools in Clarendon county." The school board denied all of the requests. At the same time, the board denied a request to use the auditorium of the black high school for an address by NAACP field secretary Roy Wilkins. Local NAACP president Billy Fleming said he would petition to use the white school's auditorium since the black school's facility was off-limits for the speech. In November Wilkins, speaking to a black Clarendon County audience at the Negro Fair Grounds, said that the Summerton case that had been decided in *Brown II* and subsequently led to the order by Judge Parker, would be reactivated, though he could not say when.[61]

South Carolina in the late 1950s was in many ways a state preparing for an onslaught. While white South Carolinians endeavored to forestall any application of the

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[60]"Leader Reaffirms Stand For Separate Classrooms," *Southern School News* 6:1 (July 1959): 10.

[61]"Negroes Ask Reassignment In Clarendon's Schools," *Southern School News* 6:3 (September 1959): 9; "Clarendon County Object Of New Move For School Reassignment," *Southern School News* 6:4 (October 1959): 13; "Clarendon Reassignment Petitions Rejected; Officials Say Too Late," *Southern School News* 6:5 (November 1959): 12; "Clarendon County Action May Be Renewed in Courts," *Southern School News* 6:6 (December 1959): 2.

new law, black South Carolinians seemed to be waiting for something. Perhaps discouraged by the lack of progress, and probably to an extent afraid of both economic and physical reprisals, blacks carefully chose their legal moves in the late 1950s. The crisis in Little Rock, Arkansas in 1957 revealed, however, that waiting for whites to act positively might well be waiting for the impossible rather than the inevitable. When black students in Greensboro, North Carolina began the sit-in movement in the spring of 1960, they were quickly followed by black youths in South Carolina and throughout the South. Blacks in Clarendon county filed suit in April to gain access to the white schools of the county, and blacks throughout the state began to work increasingly hard for the rights that the Supreme Court had acknowledged, but which they knew belonged to them all along.

CHAPTER SIX

"RESISTANCE BY EVERY LAWFUL MEANS": FROM ABSOLUTE SEGREGATION TO "FREEDOM OF CHOICE," 1960-1964

The spring of 1960 saw violence begin in the state as reactions to sit-ins and mounting frustration among black college and high school students began to overwhelm the voices of moderation. Sit-ins rapidly spread to Rock Hill following their beginnings in Greensboro, North Carolina, and quickly began to spread to other cities in the state as well. By March, crowds of marchers and protesters sometimes reached 1,000 people. The police stepped in as tensions rose, arresting students who refused to disperse. In Charleston three young African Americans were arrested for attacking and slashing a white youth, and in Columbia a number of black students from Allen University and Benedict College were arrested following a club-wielding attack on cars in a white drive-in. The attack was spurred by rumors of a cross-burning on one of the school's grounds. In Orangeburg, police had to use tear gas to quell a demonstration of about 1,000 people after they refused to disperse. Governor Ernest F. Hollings, responding to threats of a march on the state house, warned that further demonstrations would not be tolerated. All across the state, African Americans were beginning to assert their rights militantly: in Greenville, two African Americans tried to use the library; there were lunch-counter demonstrations in Sumter, Florence and Denmark. Members of the legislature responded with several bills designed to curb the sit-in movement, ranging from redefining "trespass" to revoking the state's ratification of the Fourteenth Amendment.[1]

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[1]"Demonstrations by Negro Groups Bring Legislative, Other Action," *Southern School News* 6:4 (April 1960): 4.

Clarendon County South Carolina, the target of litigation in *Briggs v. Elliott*, was mostly rural, and the population was on a steady decline. The county was economically under-developed as well: two-thirds of the families in the county earned less than $3000 per year in 1960, compared with 32.1 percent nationwide. While over 20% of the nation's families enjoyed incomes above $10,000 that year, in Clarendon County only 2.5% had that much income. Less than 30% of the homes had complete plumbing systems.[2] Nevertheless, it was in Clarendon County that two key cases in the post-*Brown II* era of school desegregation took place.

By August 1959 ten parents in Clarendon County District Two had filed petitions for the transfer of their children from the all-black schools they attended to the all-white schools forbidden to them. Some of the parents had petitioned as early as July 1958. On 1 September David W. Robinson, a Gressette Committee attorney who represented the district, sent school district attorney Joseph O. Rogers, Marion Gressette and Charles Plowden a proposed letter that, when sent, would inform the parents that their applications came after "school assignments for the current year were made." Robinson and Bob Figg were both "of the opinion that the less the local authorities say about this situation the better it will be."[3]

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[2]"A Desegregation Plan for Clarendon School District #1: A Report to the Superintendent," n.d. [before 26 May 1969], pp. 10-11. Division of Equal Education Opportunities, United States Office of Education. David W. Robinson (hereafter DWR) papers, File *Brunson v. Clarendon School District #1* 1958, 1960, 1962-1970. South Carolina Department of Archives and History, Columbia, South Carolina.

[3]Joseph O. Rogers (attorney for the district) to DWR, 28 August 1959; Lincoln Jenkins to M.L. Marvin (member of Board of Trustees), 8 October 1959; DWR to Gressette, Rogers, and Plowden, 1 September 1959 and enclosed form letter. DWR papers, *Miller v. Clarendon 2*.

When Lincoln Jenkins asked the school board to comply with *Brown* and begin to integrate District Two, his letter offering to meet with the school board was sent over to Rogers, who sent it on to Robinson in Columbia. Someone, probably Robinson, sent back a template for a letter to Jenkins in which the school board would say that "since it believes that no useful purpose would be served by conferring with you, or with the organization which you represent, they have not set up any conference." Gressette, to whom copies of the correspondence had been sent, thought that Jenkins was "trying to build up a record and [his letter] should be ignored."[4]

On 13 April 1960 42 children from Clarendon County School District One, which encompassed the original district in the *Briggs* case, petitioned the federal court alleging that the district continued to operate a segregated school system. The students, some of whom had been involved in the original *Briggs* case decided by the Supreme Court in 1954 and by the district court in 1955, requested that district officials comply with the courts' directives on the matter and put an end to segregation in the school system. W.C. Sprott, the chairman of the district's Board of Trustees, responded that the deadline had passed, but the deadline had not been announced or published, according to the complaint.[5]

Robinson moved to strike all parties except Bobby Brunson, whose name was first on the list of plaintiffs, and to make sure that the case could not be heard as a class action.

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[4]Jenkins to M.L. Marvin, 8 October 1959, Rogers to DWR, 12 October, and anon. to Jenkins (template or copy), 16 October 1959; Gressette to Rogers, 17 October 59. DWR papers. *Miller v. Clarendon 2*.

[5]Complaint, filed 13 Apr. 60, pp. 5-6. DWR papers, File *Brunson v. Clarendon School District #1* 1958, 1960, 1962-1970.

The case languished for two years, but in May 1962 Judge C.C. Wyche, sitting by designation, agreed with Robinson's interpretation, since state law required that each child individually request a transfer. In short, there was no "common question of fact" justifying a class action. The state law in question—the pupil placement law—allowed any student to attend any school other than the one he or she was assigned to, provided they jumped through a series of administrative hoops. The law also required "that the case of each child shall be considered individually." It was therefore easy for the judge to reach his conclusion: since only a relatively few students had actually requested transfers, he could not assume that there was a class of individuals whose interests could be represented by Brunson and the others. Lincoln Jenkins called the ruling "one of the most asinine" he had experienced, adding that he "really [did not] think that judge expects his ruling to be upheld." It was a delaying tactic from a judge who "apparently put state law over federal law."[6] By the time of the appeal, Bobby Brunson had graduated, though his name would continue on the case until its final decision.

The defense in the 1962 appeal in *Brunson v. Board of Trustees* turned *Brown v. Board of Education* on its head. Taking the argument from *Brown* that forcing members of a minority to attend a separate school creates in them "an inferiority complex" and completely reversing it, Robinson argued that since blacks outnumbered whites 8-1 in Clarendon County, forcing whites to go to integrated schools would constitute violation

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[6]Motion to Strike, 2 May 1960; Order, 31 May 1962, p. 4. *Brunson v. Clarendon School District #1*, DWR Papers, File *Brunson v. Clarendon School District #1* 1958, 1960, 1962-1970; "Lull in Legal Action Ends; 2 Suits Filed," *Southern School News* 8:12 (June 1962): 1; "Negroes To Appeal Wyche Ruling in Clarendon Suit," *Southern School News* 9:1 (July 1962): 11.

of their rights to equal protection.[7] In effect, it would create in whites the same kind of inferiority complex which black children suffered in segregated schools.

In addition, since the Parker decision in the 1955 remand of *Briggs* did not mandate immediate desegregation, Robinson argued that the school board was correct in continuing to operate as it had before. Besides, the segregation that existed in Clarendon County was voluntary. District parents continued to send their children to the same schools they had always attended or would have attended prior to *Brown*. Since economic or violent reprisals could not have been the reason that black parents continued to send their children to black schools, their satisfaction with the *status quo* must have been the reason. At any rate, given that the three-judge court had ruled in 1955 that voluntary segregation was constitutional, there could certainly be no class action in the case, which should leave Bobby Brunson to fend for himself in the case.[8]

In December 1962 the Fourth Circuit struck down Wyche's ruling, thereby allowing all the "persons similarly situated" to take part in the case, which was remanded to the District Court for a full trial. By May 1963, the case, like many others, began to make its way through the system. Matthew Perry, working on this case as well as a case challenging segregation in Charleston, argued that the record clearly indicated that relief was due the plaintiffs, since, as in Charleston, the district had "not given . . . any attention to their duty to initiate desegregation of the Clarendon school system."[9]

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[7]Brief and Appendix for Appellees Motion to Dismiss Appeal, September 1962, pp. 9-10. DWR papers, File *Brunson v. Clarendon School District #1* 1958, 1960, 1962-1970.

[8]Brief and Appendix for Appellees Motion to Dismiss Appeal, September 1962, *passim*. DWR papers, File *Brunson v. Clarendon School District #1* 1958, 1960, 1962-1970.

[9]Plaintiffs' Brief, *Brunson v. Board of Trustees*, 22 January 1963. DWR papers, File

While the Clarendon case remained open, new developments had taken place throughout the state. In Marion County, African Americans filed suit to open the schools on an integrated basis in September 1960. The school board had divided one school district into two. White children were allegedly allowed to transfer across districts while black children were not.[10] What is unusual in the case was that black students were petitioning for the right to transfer to another black school rather than to a white school.[11]

In June 1960 the Charleston city school board released its figures for the numbers of students enrolled in the city's schools. Black students made up 70 percent of the total students in the city. Total black enrollment in two black high schools was 1,783 while 1,528 white students were divided among three different high schools.[12] In September a group of black parents submitted a list of demands to relieve some of the inadequacies of the district, such as overcrowding in the black schools of the city. In October, after the school board rejected the demands on financial grounds, black students staged a boycott of the city's schools for one day. Over 8,300 students refused to attend school on 12 October, 94 percent of the total black enrollment.[13]

The numbers are, if not staggering, at least compelling: Per capita spending at white schools in Charleston was $267.11 for the 1961-62 school year, and only $169.75

Brunson v. Clarendon School District #1 1958, 1960, 1962-1970.

[10]*Eva Johnson v. Marion County Board of Education.*

[11]"Massive Boycott Underscores Demands for Improved Schools," *Southern School News* 7:5 (November 1960): 6.

[12]"Thurmond Renamed to U.S. Senate Seat," *Southern School News* 7:1 (July 1960): 10.

[13]"Massive Boycott Underscores Demands for Improved Schools," *Southern School News* 7:5 (November 1960): 6.

for black students. In the 1962-63 school year, there was a total of 12,647 students enrolled in Charleston City schools. Of those, 9,539 were black, or well over three-quarters. There were two black high schools in the city, Burke and Brown, with 1,485 and 1,415 students in each, respectively. Three white high schools, including a vocational school, served 403, 549, and 497 students. Student-teacher ratios at the black schools averaged 25:1, while the ratio at the three white schools averaged 19:1.[14]

Following the one-day boycott, parents of 15 black students ranging in age from 6 to 16 requested transfers to white schools in the city under new rules in effect since the summer of 1959. Four white schools would be affected if the transfers were approved, with as few as one and as many as six black students showing up in the white schools of the city. The requests were denied, on the grounds in one case at least that the request had been submitted after the date for requests. The school board had rejected their requests "on the ground that the best interests of each of the respective children would best be served by the child remaining in his former educational environment, where the school personnel were familiar with his background, prior performance and capabilities." Of course, since all the black students who might apply were better known by his or her black teachers in the "former educational environment," it seemed unlikely that the board would ever be in a position to approve an application for transfer. J. Arthur Brown, one of the original parents involved, petitioned the board on behalf of his daughter later in

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[14]Letter Form of Answer to Interrogatories, Appellant's Appendix, pp. 54-55. *Millicent F. Brown v. School District No. 20, Charleston, South Carolina.* Civil Action No. 7210, District of South Carolina, Charleston Division, Record Group 21, Records of the District Courts of the United States, National Archives-Southeast, East Point, Georgia. Hereafter referred to as *Brown v. Charleston*, C/A No. 7210.

October, but no action was taken. In the spring of 1961 some of the parents tried again. This time, Brown's younger daughter Millicent was the subject of the request.[15]

The school board met in July, having conducted "thorough investigations . . . to ascertain . . . each child's record, each child's background and each child's personality." In addition, the board interviewed the students' principals and teachers before advising the parents to be present at the hearing with their children. One child, Lydia Glover, was visiting relatives in Tennessee and unavailable; although her father was there, the board took her absence "as silent evidence that the parent was not altogether anxious to press the Petition." Regardless, the committee allowed for some delay in Glover's case, and made no determination at the hearing. Thomas Seabrook was not a model student: his record, according to the Special Committee, was "atrocious," and the committee was reluctant even to let him attend school at all, and rejected his request for transfer. Millicent Brown was another story: she was "above average" intellectually, though "she ha[d] never quite realized her full capabilities." The only reason Arthur Brown could give for desiring a transfer was that he "felt he had a right to have the child attend any school of his selection." However, since Millicent lived closer to her current school, the Committee denied her application. Other students did not fare any better. Ralph Dawson was classified a moron on his intelligence tests. Delores Wright was a rising senior.

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[15]Requests for Transfer, n.d.; Thomas A. Carrere (Superintendent of Charleston City Schools) to J. Arthur Brown, 21 October 1960; Request for transfer, 1 May 1961. DWR papers, File Charleston County *Brown v. Charleston School District #20/ Johnson v. Charleston School District #20*, 1960-66, 1968-69. Answer, Appellant's Appendix, p. 13; Opinion and Order, 22 August 1963, p. 3. *Brown v. Charleston*, C/A No. 7210.

Finally, Clarice Hines was a "timid introverted child" and transferring her would "expose [her] to psychological difficulties. . . ."[16]

The Committee concluded that the children, with the exception of Millicent Brown, were uncooperative—even unwilling to participate in the transfer. "In no instance did it appear that the welfare of the child was a factor in the action taken by the parent." The committee emphasized that the only consideration was the best interests of the children. Brown threatened a federal lawsuit if positive action on the requests was not taken, but at a hearing in November, the county board of education refused to grant the transfers.[17]

Statewide, December 1961 brought with it hints of change among some of South Carolina's white political figures. A few weeks earlier, state Senator Francis B. Nicholson of Greenwood County, suggested the possibility of pursuing a "local option" program of desegregation. In December, state Representative Robert E. McNair, who was running for lieutenant governor in 1962, said that "people in the areas affected will have to determine their own course of action. . . . Some might prefer to leave the schools closed. Others might want other solutions." Governor Hollings noted later that there were no laws

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[16]No title: the document is a report of the Special Committee of the Board of Trustees of School District No. 20 regarding the requests for transfer of six students in the district. 29 July 1961. DWR papers, File Charleston County *Brown v. Charleston School District #20/ Johnson v. Charleston School District #20*, 1960-66, 1968-69. Hereafter, I will refer to it as the Report of the Special Committee.

[17]Report of the Special Committee, DWR papers, File Charleston County; "Negro Transfer Requests Opposed in Charleston," *Southern School News* 8:6 (December 1961): 16. There is a bit of confusion in the chronology. The sources in the Robinson papers indicate that the hearings with the parents and children took place in July, but the *Southern School News* reports that they took place on November 21 after the requests were rejected in July. At any rate, a final decision by the county board had yet to be made, though it was highly unlikely that the board would grant the transfers.

against voluntary desegregation and said the state had "a firm policy of flexibility" in the issue.[18] In January, the state legislature deleted the words "for racially segregated schools only" from school and park appropriations bills. The Gressette Committee had recommended such a change in 1960, but the words remained in the 1961 budget due to legislative wrangling and a last-minute veto of an attempt to remove the language. By January 1962, however, the issue was moot, since the language was no longer part of the appropriations bill. At any rate, Hollings' veto was upheld in the first act of 1962's legislative session, even though the act was meaningless. Now, appropriations would be in the hands of the State Budget and Control Board, which legislators thought could maintain segregation on its own.[19]

In April 1962, the *Southern School News* reported Senator Gressette's comments that "South Carolina is relatively free of agitation and disorder in the field of education." However, within a few months, several suits to integrate schools in various parts of the state would give the Senator's committee plenty of work that would take it through the decade.[20]

In March, U.S. Secretary of Health, Education and Welfare Abraham Ribicoff had ruled that segregated schools attended by children residing on military bases would no longer receive federal funding beginning in February 1963. Schools in nine South

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[18]"South Carolina Figures Hint Favor for 'Flexibility'," *Southern School News* 8:7 (January 1962): 15.

[19]"Segregation Gets Little Attention in Assembly," *Southern School News* 8:9 (February 1962): 3.

[20]"Officials React Adversely To Aid Withdrawal Threat," *Southern School News* 8:10 (April 1962): 3.

Carolina counties would be affected by the ruling, which state politicians unanimously lambasted. Hollings recalled his opposition to the federal aid to education bill as he excoriated the Ribicoff move as "an unconstitutional attempt to control the state public education systems."[21]

Nationwide, the end of the 1961-62 school year marked the first time since 1954 that schools in the nation had successfully desegregated without accompanying violence. South Carolina, Louisiana and Mississippi maintained their allegiance to segregated schools despite indications that the South and the nation were beginning—however gradually—to accept integrated schools.[22] The spring of 1962 brought with it a new era in legal activity by South Carolina blacks. Certainly spurred by activity in the national civil rights movement, as well as by the participation in sit-ins and demonstrations of black students in the state, parents in the city of Charleston and Darlington County initiated action in the courts.

On 26 May 1962, parents in Charleston sued to have District 20, which consisted only of the city of Charleston itself, integrated. Charleston County operated its schools, according to the complaint, totally separately. Black schools were administered by a Superintendent of Negro schools, and the district maintained two separate attendance zones. Charleston parents were suing on the grounds that South Carolina's Pupil

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[21]"Officials React Adversely To Aid Withdrawal Threat," *Southern School News* 8:10 (April 1962): 3.

[22]"Lull in Legal Action Ends; 2 Suits Filed," *Southern School News* 8:12 (June 1962): 1; "Public Schools Mark First Peaceful Year," *Southern School News* 8:12 (June 1962): 1.

Assignment Law was unconstitutional because its remedies upheld segregation rather than contributing to desegregation.[23]

Parents in Darlington County also brought suit in May 1962. They sought to force the school district to present a desegregation plan by giving the court only two options for remedies: enjoining the district from maintaining its dual-system policy immediately or requiring the district to submit a desegregation plan "within a period of time to be determined by [the] court." Lawyers for the plaintiffs in both the Charleston and Darlington cases were Jack Greenberg and Constance Motley of the NAACP Legal Defense Fund and Matthew Perry and Lincoln Jenkins of Columbia. The *Southern School News* reported that it was unlikely that either case would be heard soon because of vacancies in the federal bench.[24]

After Wyche's ruling in ***Brunson*** and the subsequent successful appeal, it was not until August 1963 that a hearing in a school desegregation case took place. For months, only two judges out of four for the state were available for work on the docket. As a result, cases were substantially delayed. Some steps toward desegregation were taken in the state's parochial schools. In June 1963, the Bishop of South Carolina's Catholic Diocese announced that by September 1964 all the parochial schools in the state would be open to black children as well as to whites. St. Anne's School in Rock Hill had been desegregated since the fall of 1954. Of 105 students in the spring of 1963, fourteen were

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[23]Complaint, *Brown v. Charleston*. Appellant's Appendix, p 5. *Brown v. Charleston*, C/A No. 7210.

[24]"Lull in Legal Action Ends; 2 Suits Filed," *Southern School News* 8:12 (June 1962): 1; Complaint, *Stanley v. Darlington County School District* (referred to hereafter as *Stanley v. Darlington*), p. 7. DWR papers, File Darlington County.

black.[25] In the interim before the Charleston case was heard (it had been decided that the Charleston case would be first since some of the Darlington plaintiffs still had technical remedies to try), South Carolina devoted its attention to the integration of Clemson College in January 1963. Only the Fourth Circuit's demands for a speedy trial had accelerated the *Gantt* case that integrated Clemson earlier in the year, and there were no similar orders pending for the elementary and secondary cases. The Clemson case and reactions to it are discussed at length in chapter three. However, one of the reactions to Harvey Gantt's successful integration of Clemson merits discussion in the present chapter. State Senator John D. Long, one of the state's most outspoken defenders of segregation, proposed an amendment to the annual appropriations bill that would have required segregation by sex rather than by race in the state's public schools. In order to "take the heart out of the integration crowd, because the ultimate goal is to conglomerate the races," Long proposed to "place a barrier between our white women and colored men." Senator Gressette noted that his committee had taken a look at the possibility, but that the members did not "think we have reached the point where it is necessary," although "[t]here may be a day in the not too distant future when it becomes necessary."[26]

When the Charleston case finally came to trial, if offered a number of issues that would continue to arouse controversy for several years. The defense in ***Brown v. Charleston*** offered their own sociological evidence, perhaps in the hope of undermining the weight of the sociological evidence that had been offered by the plaintiffs in the original

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[25]"USC Acknowledges Admission Denied Because of Race," *Southern School News* 10:1 (July 1963): 7.

[26]"Segregation-by-Sex Proposal Voted Down by State Senate," *Southern School News* 9:11 (May 1963): 14.

Briggs case back in the early 1950s. S. Emory Rogers, the attorney for the Clarendon district in *Briggs*, realized that South Carolina whites had to use "the same psychological and sociological warfare that has been used so successfully against us." School district attorneys consulted George S. Leonard, who had represented Prince Edward County in Virginia. Leonard marshalled evidence of innate black intellectual inferiority to justify segregation based on intelligence. There were, the district argued, "such differences and disparities between the ethnic group allegedly represented by Plaintiffs and that represented by Defendants as to form a rational basis for separating such ethnic groups in the schools of Charleston." The defense then claimed that black children in the district were intellectually deficient. "The mean mental age of White School children in the . . . District ranges from two to four years ahead of the mean mental age of Negro school children in the . . . District." They could not in good conscience combine children of disparate real ages, but if they combined children of similar real ages, then "existing academic standards in the now all-White schools cannot be maintained and the system of education for the White children will be virtually destroyed."[27]

The defense went even further, however, and attacked the "socio-moral and behavioral standards" of the black students. "Rates of emotional instability, behavioral delinquency, illegitimacy and venereal diseases among Negro children and their parents are vastly greater than among White children and their parents." These "racial differences in physical, mental and behavioral traits" were "to a large extent genetically determined,"

[27] Answer, *Brown v. Charleston*. Appellant's Appendix, p.15-16, *Brown v. Charleston*, C/A No. 7210; see also Wolters, pp. 145-146.

according to the defense, and such differences, having been genetically determined over millennia, constituted "a rational basis for segregation of races in schools."[28]

Finally, after continuing the sociological analysis of the problem of race formation and the connections between "ethnic group identity" and "optimum growth and maturity," the defense alleged that integration would inevitably lead to

> (a) Serious sex problems due to the lower moral standards of the Negroes . . .;
> (b) A severe increase in disciplinary problems resulting from the more prevalent use of violence, vile profanity, lascivious sexual behavior, thefts, vandalism, cheating, lying, and other anti-social conduct on the part of the Negro students; [and]
> (c) A severe strain on the time and talents of the [white] teachers of School District No. 20 due to their increased preoccupation with disciplinary problems.[29]

Clearly, the defense's strategy was designed to counter the sociological and psychological evidence that had been offered during the original *Briggs* case back in 1951. In fact, a body of literature in the field of "scientific racism," a field of intellectual endeavor that had increasingly lost favor among academic psychologists, sociologists, and others since the 1930s, experienced a sort of resurgence during the mid-1950s that continued through the mid-1960s. A handful of respectable, if not exactly revered, social scientists adhered to notions of black inferiority and expressed those views in a series of predominantly self-referential works appearing during the period. In the 21 September 1956 issue of *U.S. News and World Report*, Frank C.J. McGurk published "A Scientist's Report on Race Differences," which was "apparently the first systematic effort by a social

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[28]Answer, *Brown v. Charleston*. Appellant's Appendix, p. 16-17, *Brown v. Charleston*, C/A No. 7210.

[29]Answer, *Brown v. Charleston*. Appellant's Appendix, pp. 18-19, *Brown v. Charleston*, C/A No. 7210.

scientist to dispute the social science incorporated in the Brown decision." Indeed, *U.S. News* and other magazines as well as individuals and organizations such as James J. Kilpatrick and the Citizens' Councils were propaganda tools for the dissemination of the ideas of scientific racism.[30] Much of the scientific racism that became part of the record in the Charleston case, in fact, had been admitted in a case in Savannah, Georgia—*Stell v. Savannah Chatham County Board of Education*, which became a model for the suit in South Carolina.[31] In the *Stell* case, a group of white parents petitioned to intervene in the case because the school board was doing an inadequate job in defending their interests. Their petition was based primarily on the tenets of scientific racism.[32]

As in Savannah, a group of white students and their parents filed a motion to intervene in the Charleston case as well. Much of the same "evidence" from the District's answer was offered. In addition, the motion to intervene directly addressed the ideas proposed by such noted authorities as Kenneth Clark, who had testified in the *Briggs* case. The "self-devaluation and identification with Caucasian values and standards of beauty" were "not the consequences of legally sanctioned racial segregation *per se*, but rather of the total social situation." In short, blacks should be expected to have bought

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[30]I. A. Newby, *Challenge to the Court: Social Scientists and the Defense of Segregation, 1954-1966*, revised ed. with commentaries (Baton Rouge: Louisiana State University Press, 1969), passim, quotation p. 65. For material on Kilpatrick and the Citizens' Councils, see p. 183. See also McMillen, *The Citizens' Council*, pp. 159-188 for more on the prosegregation argument, especially the scientific justifications for segregation.

[31]220 F. Supp. 667 (1963).

[32]Newby, *Challenge*, pp. 191-197. For a complete analysis of the *Stell* case, see pp. 191-212. See Newby's edited work *The Development of Segregationist Thought* (Homewood, Illinois: The Dorsey Press, 1968), pp. 146-153 for excerpts from the Pleas and Answers to Intervenors and the Brief and Argument of Intervenors in the *Stell* case.

into white standards of beauty because "the 'ideal of beauty' of a particular society or culture is an idealization of the physical features of the dominant racial type." Further, they argued that blacks who went to segregated schools actually had stronger self-images and greater "race pride and solidarity" rather than less. Had "impartial" authorities testified at the earlier trials that had resulted in integration decrees, they were convinced, those decrees would never have been issued.[33]

District superintendent Thomas A. Carrere testified that standards would suffer if blacks were allowed into white classrooms. In a variety of achievement tests, black students consistently scored less than their white counterparts. Echoing the general tone of the defense's psycho-social arguments, Carrere argued that putting students in classes of the same age group would result in students of vastly different achievement, and that matching achievement levels would lead to classes with students of different ages. Under cross-examination by Constance Baker Motley, Carrere admitted that he believed that genetics largely determined the differences in the achievement levels of different students. Carrere also admitted that black teachers were accepted with a lower score on the National Teachers Examination. School board chairman Lawrence Stoney told the court that the district had not prepared a desegregation plan and had no plans to do so.[34]

Experts like psychologist Henry Garrett and Ernest van den Haag were called in to support the defense's arguments for black inferiority. Garrett contended that blacks lagged behind in "the realm of . . . abstract intelligence . . . , those things which made

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[33]Motion to Intervene and Proposed Answer of Intervenors, Appellant's Appendix, pp. 20-33, *Brown v. Charleston*, C/A No. 7210.

[34]"Schools Quietly Desegregated In Charleston; First in State," *Southern School News* 10:3 (September 1963): 22.

European Civilization and never have made a civilization in Africa in five thousand years." Van den Haag testified to the inadequacies of Kenneth Clark's science in the *Briggs* case, and argued that prejudice would increase if integration took place. Even if smart black students were placed in classes with smart whites, the result would still be undesirable, since the black elite would no longer have their leadership position and most blacks would suffer. In the event, Judge Martin admitted the intelligence evidence solely to "develop the record" while emphasizing that "that [was] not the issue" and could have no bearing on his decision, since the Supreme Court had already ruled on the matter of school segregation.[35]

Lawyers for the Gressette Committee built on the intelligence data to develop a plan to integrate the state's schools. Calling for the creation of a system of educational classification, which would admittedly not result in "absolute segregation," Augustus Graydon nevertheless noted that a system based on educational qualification in some way would "allow the public educational system to continue without educational chaos and complete frustration." Graydon considered a variety of alternatives: classification by sex appealed to him primarily because "sexual problems [would] be accentuated by the introduction of the racial factor," but classification by intelligence, by chronological age, or by "behavioral or psychological criteria" also made the list of possible means of dividing up the student population.[36]

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[35]"Schools Quietly Desegregated In Charleston; First in State," *Southern School News* 10:3 (September 1963): 22; Wolters, pp. 146-147. Garrett Quotation from same.

[36]Augustus T. Graydon, "A Plan in Regard to the Integration Push in the Public Schools of South Carolina," 22 August 1963. DWR Papers. File Achievement Testing 1963.

Such a system would result, Graydon thought, in a "predominantly white" high classification (IQ of 100 or more), a more-or-less equal grouping of blacks and whites in the middle range (IQ of 85-100), and a "predominantly Negro" class of those at the bottom (IQ below 85). The bottom group, "(predominantly negroid at the outset) would become more negroid as the chronologically older Negroes who failed were continued in this group." This system, designed for primary grades, would be "accentuated in the secondary (8-12) grades." Further, the system would lead to a deepening level of segregation: vocational and manual education would be for those who could not pass the primary grades, the higher grades and upper-level tracks would be predominantly white, and blacks would increasingly disappear from high schools altogether, as "the majority of Negroes would not be able to attain any standard of academic achievement based on national levels in the secondary grades."[37]

The end was so desirable that Graydon called for implementation of a testing plan for the upcoming school year. Establishment of upgraded academic standards "would result in chaos in the Negro schools but demonstrate the necessity for a realistic educational reappraisal of the *de facto* situation." The new educational standards would reveal conclusively "that separate schools are advantageous from the standpoint of each racial group," and that using achievement tests as a means of pupil assignments was a reasonable idea.[38]

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[37]Augustus T. Graydon, "A Plan in Regard to the Integration Push in the Public Schools of South Carolina," 22 August 1963. DWR Papers. File Achievement Testing 1963.

[38]Augustus T. Graydon, "A Plan in Regard to the Integration Push in the Public Schools of South Carolina," 22 August 1963. DWR Papers. File Achievement Testing 1963.

With those ends in mind, Graydon and John S. Wilson embarked on a plan to prove the uses of "achievement tests in classifying pupils to obtain some measure of *de facto* segregation." W.B. Royster, the Coordinator of Testing and Guidance Services for the state Education Department, noted that African Americans generally did not test as well, though there were always some who classified in the middle and higher ranges. Royster believed ultimately that social acceptance would be a stronger factor in keeping schools segregated. Graydon ultimately and reluctantly agreed: in his report he lamented that lower-achieving white students would inevitably end up in classes with black students. There was no reason, therefore, to increase the level of testing in the state "at this time as a force to meet the integration situation in various school districts."[39]

Judge Martin issued his order in *Brown v. Charleston* on 22 August 1963, a mere 16 days following a two-day trial in Columbia. Citing at length a Fourth Circuit decision from North Carolina as well as other cases,[40] Martin decreed that it was not necessary for all the plaintiffs to have exhausted their administrative remedies. Martin was bound by *stare decisis* to reject the arguments of the defense, especially given the Supreme Court's ruling in *Watson v. City of Memphis*[41] criticizing the continued delays that states in the South routinely engaged in.

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[39]Augustus T. Graydon, "Memorandum on Testing as a Method of Achieving Some Measure of Racial Segregation in Public Schools," n.d. DWR Papers. File Achievement Testing 1963.

[40]*Jeffers v. Whitley* 309 F. 2nd 621 (1962); *Bell v. School Board of Powhatan County*, No. 8944, Fourth Circuit, 1963; *Green v. School Board of the City of Roanoke* 304 F. 2nd 118 (1962); *McNeese v. Board of Education* 373 U.S. 668 (196?).

[41]373 U.S. 526 (1963).

Martin found that the school district was "completely segregated," and that the practice of having dual attendance zones continued. Freedom of choice did not really exist in the district: no rules were spelled out at any time for initial assignments or transfers. The district had never "taken [any] action . . . towards carrying out the mandate of the United States Supreme Court" to end school segregation.[42]

He ordered the district to admit the plaintiffs "at the white school, where a white child would normally attend, if he resided in the same school zone that each of plaintiffs respectively resides in, subject to the same terms and conditions of other students enrolled there. . . ." However, Martin stopped short of ordering the immediate integration of the entire district, citing a variety of administrative headaches and the shortness of time before the start of school in the fall. That would have to wait until the following school year, when the district would have to "freely and readily grant" requests for transfers. Martin also required the district to provide a notice to all the parents of the district to the effect that they could choose the schools their children would attend.[43] Charleston thus became the first city in the state with any level of integration in its elementary and secondary schools.

The district, as well as the case's group of intervenors, immediately appealed. Continued delay met every order from Judge Martin. Following his original ruling, the

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[42]Opinion and Order, *Brown v. Charleston*, 22 August 1963, p. 12. DWR papers, File Charleston County *Brown v. Charleston School District #20/ Johnson v. Charleston School District #20*, 1960-66, 1968-69.

[43]Opinion and Order, *Brown v. Charleston*, 22 August 1963, pp. 12-16. DWR papers, File Charleston County *Brown v. Charleston School District #20/ Johnson v. Charleston School District #20*, 1960-66, 1968-69.

district petitioned to vacate the order, which Martin summarily denied, leading the district and the intervenors to appeal the case to the Fourth Circuit.

In their appeal, the intervenors wanted the Appeals Court to consider the sociological evidence they had submitted at trial—evidence that Judge Martin had no authority to consider in the trial. Continuing its elaborate language, the intervenors' brief argued that mixing the two races, when it had been proven that blacks were inadequately educated, would "cost this country its leadership and endanger its constitutional system. . . . [T]he compulsory congregation of classes requested by the plaintiffs would seriously diminish, and could ultimately destroy, the education of thousands of Charleston children, both white and negro."[44]

Invoking the idea that they were only concerned with the "educational benefit and psychological health" of the children, the intervenors argued that the state must be allowed to discriminate on that basis, not on any basis of race or color. This represented a significant shift in the nature of the argument put forward by white lawyers attempting to maintain segregation. The goal, however, remained the same. The brief went on to discuss the issues brought up at trial, specifically the importance of test results that supposedly revealed significant differences between black and white children. These differences were "innate, related both quantitatively and qualitatively not to color or race

[44]Final Draft of Intervenors' — Appellants' Portion of Brief in the United States Court of Appeals for the Fourth Circuit, n.d. p. 3. DWR papers, File Charleston County *Brown v. Charleston School District #20/ Johnson v. Charleston School District #20*, 1960-66, 1968-69.

but to certain common physical variances in the relative size, proportion and structure of the brain and neural system."[45]

Legally, the new evidence of psychological harm being done to children in the mixed-race classroom required no less than a reconsideration of *Brown v. Board of Education*. The intervenors argued that *Brown* had been decided on the basis of inferior, now-discredited (by their own experts) factual testimony, and the new evidence clearly indicated that black children would be more harmed by being in class with white children, rather than segregated from them. "Hence, the continued operation of a dual school system in Charleston . . . constitute[d] a reasonable and constitutionally permissible classification."[46]

One of the more interesting aspects of the struggles for civil rights in the federal courts was the insistence of the defense, in various cases, that whatever segregation existed was based on the "voluntarily observed custom and tradition" of the state, rather than an appeal to basic principles, or constitutional law. Once the basic framework of constitutional segregation fell away with the *Brown* decision of the Supreme Court, white South Carolinians were left with little ideological basis to maintain their preferred system of race relations. Instead, many turned to weak justifications such as the questionable scientific rationale for separating the races, or to an appeal to the old customs and

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[45]Final Draft of Intervenors' — Appellants' Portion of Brief in the United States Court of Appeals for the Fourth Circuit, n.d. pp. 6 ff. DWR papers, File Charleston County *Brown v. Charleston School District #20/ Johnson v. Charleston School District #20*, 1960-66, 1968-69.

[46]Final Draft of Intervenors' — Appellants' Portion of Brief in the United States Court of Appeals for the Fourth Circuit, n.d. p 14. DWR papers, File Charleston County *Brown v. Charleston School District #20/ Johnson v. Charleston School District #20*, 1960-66, 1968-69.

traditions of the state, both of which were rooted in white supremacy. Logically, however, one cannot help but notice that this appeal to tradition was bound to fail. Without the legal underpinnings that *Plessy v. Ferguson* had offered, custom and tradition had to give way. Only one individual, unwilling to live life in the old customary way, could theoretically destroy the entire system. Of course, the implicit threat of violence present in the segregation of the races—violence that often erupted throughout the South during the civil rights years—was more of a factor in black observations of "voluntary custom and tradition" than their desire to perpetuate the system of apartheid into which they had been born.

When the Charleston school board began its defense of segregation in the school system, they added to the social scientific justifications for the practice the assertion that voluntarily school separation was beneficial. Since, in their belief, the Supreme Court only "prohibit[ed] mandatory separation of the races in the public schools on the basis of race alone," rather than requiring integration (the enforced violation of voluntary segregation), the complaint in *Brown v. Charleston* was invalid.[47]

While *Brown v. Charleston* was being appealed, two Charleston County districts, one of them district 20, told the state Department of Education of their intention to participate in the new tuition grants program that had passed the state legislature earlier in the year. The South Carolina plan would give students money equal to the state's annual per-pupil expenditure, to which would be added the amount usually spent by the district as long as students attended a private school that was not religiously affiliated. The

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[47]Letter Form of Answer to Interrogatories, *Brown v. Charleston*, Appellant's Appendix, pp. 52-53, *Brown v. Charleston*, C/A No. 7210.

money would be awarded regardless of race. School officials from the Piedmont region, where the black population was a small minority, vigorously opposed the plan. Officials from the lowcountry and black belt, however, were firmly behind the bill, which ultimately passed both houses with decisive majorities. Governor Donald Russell, a proponent of the bill, floated the possibility of calling a special session of the legislature in order to get money flowing into the program. It is worthy of note that, of 16 white children whose parents responded positively to the program in Charleston County, 15 were already attending private schools.[48]

As Charleston's schools were preparing to desegregate for the first time, students in Greenville, after having been rejected for transfers, filed suit in federal court in August 1963. The first to sue was service station owner A.J. Whittenberg on behalf of his daughter Elaine. The next month, airmen at Shaw Air Field in Sumter County, at the other end of the state, filed suit on behalf of their 30 children to desegregate the Sumter County District Two schools—basically all the county schools outside the city limits of Sumter proper. As in Charleston, the Sumter school board responded by alleging extreme differences in mental capabilities between black students and their white counterparts.[49]

In November, black parents in Orangeburg officially requested transfers for their children, and black parents in Rock Hill announced their intentions of doing the same. One of the Orangeburg parents was Gloria Rackley, recently elected state vice-president

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[48]"School Quietly Desegregated in Charleston; First in State," *Southern School News* 10:3 (September 1963): 22; Wolters, p. 149.

[49]"Greenville Rejects Transfers," *Southern School News* 10:3 (September 1963): 22; "Six Negro Students Attending Public Schools With Whites," *Southern School News* 10:4 (October 1963): 16.

for the NAACP, who stated vehemently, "We want the transfers immediately. We don't want to wait until the next school year. . . . [We don't want our children] to be hampered and handicapped by the evils of school segregation."[50]

In December, still working under the handicap of a double workload, Judge Martin unexpectedly called for the hearing of the Darlington case. So, on 18 December 1963, *Stanley v. Darlington County School District No. 1*, on the docket for a comparatively brief six and one-half months, had its first pre-trial hearing.[51] As it would turn out, it would be the first of several pre-trial hearings, and like most post-*Brown* cases in the state, there would be no trial. In January 1964 the Court of Appeals ruled against the use of the spurious science that the district claimed proved that segregation was actually beneficial to both races of students in the Charleston case.[52]

In May, Judge Martin met with attorneys in the Darlington case. Since all the evidence was in the briefs and exhibits, the attorneys agreed that no trial would be necessary, and Martin took the case under advisement, with an order expected as soon as possible. Meanwhile, in June the two replacements for Timmerman and Ashton Williams, Robert W. Hemphill and Charles E. Simons, Jr., began their tenures on the bench. Hemphill had represented the state's fifth Congressional district, and during the fight over the 1957 Civil Rights Act had come out against the act. He had argued that civil rights

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[50]"Baptist Convention Asks College To Delay Planned Desegregation," *Southern School News* 10:6 (December 1963): 4.

[51]"Hearings Begin on Darlington County Desegregation," *Southern School News* 10:7 (January 1964): 8.

[52]"Charleston Holds Segregation Aids Negroes; Appeal Rejected," *Southern School News* 10:8 (February 1964): 11.

bills did nothing but "keep the pot boiling, stir up feeling, give vent or opportunity to people to express hatred or feelings which might be lived down." A new civil rights bill would "not improve race relations."[53]

Meanwhile, adult evening classes at Columbia's Dreher High School were opened to blacks in January as well. Among the first students were Modjeska Simkins, a leader of the state NAACP and an aunt of Henri Monteith, who had integrated the University of South Carolina; Dr. H.T. Monteith, her uncle and in whose yard a bomb had been detonated some months earlier; Richard Monteith, her brother; and three other blacks, all of whom were important local leaders of the civil rights movement.[54]

In March 1964 the promised desegregation suit against Orangeburg County was filed by Rudolph, Brenda, and Theodore Adams and 23 other black students, making it the sixth county in the state to be sued in federal court for school discrimination.[55] Twenty-two youngsters, including the daughter of Gloria Rackley, sued to end the practice in District Five of continuing to operate a biracial school system.[56] The school district, like that in Charleston, alleged that segregation existed not by law but because of the voluntary decisions of parents in the county, both white and black. Here, though, the

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[53]"General Assembly Completes Session Without Enacting New School Laws," *Southern School News* 5:12 (June 1959): 9.

[54]"Charleston Holds Segregation Aids Negroes; Appeal Rejected," *Southern School News* 10:8 (February 1964): 11.

[55]"School Desegregation Suit Draws Officials' Answer," Columbia *State*, 17 April 1964, p. 1-C.

[56]*Adams, et al. v. School District Number 5, Orangeburg County, South Carolina.* Civil Action No. 8301. David W. Robinson Papers, Desegregation Files, 1954-1974. File Orangeburg County, *Adams v. Orangeburg*. Orangeburg's District 5 consisted of the city of Orangeburg itself. Hereafter, I will refer to the case as *Adams v. Orangeburg* and the file as

defense added what appeared to be a crucial argument: the case was filed in March, but the statute on pupil transfers requiring all requests be made no later than 100 days before the next school year started meant that the district could wait until at least mid-May before deciding. They argued that it was district policy to wait until all requests for transfer were in hand before making any decisions on transfers.[57]

Finally, the district brought out the same arguments on the relative skills of white and black students that the Charleston defense had used, including arguments about the "mean mental age" of the two groups of children, as well as "emotional instability, behavioral delinquency, illegitimacy and venereal diseases."[58] As in Charleston, there was also a plea for a group of white students as intervenors in the case, and their defense read almost verbatim like that of the white Charlestonians.[59]

As the state moved forward on its plan to allow private schools to participate in a tuition grants program, the chair of the District Five School Board announced that he would vote to approve the plan's application in the district. Other districts in Charleston and Clarendon counties had already started planning for private schools there. The state had approved a quarter of a million dollars for tuition grants for private schools, but the state board had yet to receive any formal applications. T. Elliot Wannamaker, a chemical manufacturer, headed the plan to develop a private school system for Orangeburg County,

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DWR Papers, Orangeburg County.

[57]Answer, *Adams v. Orangeburg*, 11 April 1964, pp. 4-5. DWR papers, File Orangeburg County.

[58]Answer, 11 April 1964, pp. 6-7. *Adams v. Orangeburg*, DWR papers, File Orangeburg County.

[59]Pleas and Answer of Intervenors, filed 22 April 1964. *Adams v. Orangeburg*, DWR

and spoke of developing private schools "that can handle every white child in the community. . . . We are planning to offer a freedom of choice to every white child whether the child is able to pay the tuition or not." According to the Columbia *State*, about 60 percent of the area's white parents had expressed some sort of interest in the private school program.[60]

On 14 July 1964 Judge Charles B. Simons, in his first desegregation case, convened a pre-trial hearing in Orangeburg, and the issue of the petition to intervene came up very quickly. The petition to intervene was based on the petition of a similar group of white students in Mississippi in the case of *Evers v. Jackson, Mississippi*.[61]

Matthew Perry argued strongly that the entire plea for intervention, based as it was on irrelevant information, should be denied. The Supreme Court had, in fact, foreclosed the claimed defense. In short, the plea for intervention would create a whole area of discussion in the case that had been rendered irrelevant. Perry argued simultaneously to strike the similar paragraph in the answer on the same grounds. David Robinson, representing the school board, argued that the ethnological evidence was indeed relevant. "The school board feels that those differences are important to it in the management of the schools. It may be that the Negro has certain natural tendencies that should be reflected in the curriculum which would capitalize, for instance, in the field of coordination." Like Jimmy "the Greek" Snyder, he went on to marvel at the strength and

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papers, File Orangeburg County.

[60]"Orangeburg's Private School Plan Continues," Columbia *State*, 2 July 1964, p. B-1; "Private Or Public School?" Columbia *State*, 15 July 1964, p. 1.

[61]232 F. Supp. 241 (1964).

agility of "those defensive halfbacks, most of whom are Negroes" as evidence "that in that field of coordination, the Negro race is very superior." This argument led almost inexorably to the conclusion that "over a period of the last years that the disadvantage to the Negro children has been attempting to put them into a white pupil's curriculum. It may be that we ought to have different courses."[62]

Ultimately, since the *Brown* case from Charleston was still active (it was being heard on certiorari by the Circuit Court), Judge Simons felt that he was bound by the decision of Judge Martin in the Charleston case, which had allowed such evidence to be admitted if only to establish a record for future appeals. Simons also allowed the intervenors into the case. Now, of course, other matters had to be dealt with, and Simons went on to ask School District attorney Hugo Sims whether the requests for transfer had yet been acted on, which they had not. The 100-day deadline was only to make sure that no one could apply for transfer within 100 days of the start of school, and now it would be appropriate for the school board to act on the requests at any time. Sims told the judge that the next monthly meeting would probably take care of the issue, though Simons noted that if the next meeting were postponed, then no action would be taken before the start of the school year.[63]

Judge Simons was determined that the case be decided before the start of the school year. Some people in Orangeburg were already worried that the judge was planning to wait until the last minute in order to undermine any decisions that could be

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[62]Transcript of Pre-Trial Conference, 14 July 1964, pp. 10-11. *Adams v. Orangeburg*, DWR papers, File Orangeburg County.

[63]Transcript of Pre-Trial Conference, 14 July 1964, pp. 18-20. *Adams v. Orangeburg*, DWR papers, File Orangeburg County.

made on opening private schools in the county. Simons made it clear that he wanted to issue any order so that there would be plenty of time for compliance. After agreeing to accept the record from the Charleston case, meaning that there would be no more testimony in the case, the sides repaired to write their briefs for Judge Simons.

The plan that Martin had approved for Charleston meanwhile came under attack from black plaintiffs there. Martin had approved a plan based on five basic criteria: the student's preference, whether his educational program could be met by the school transferred to, the capacity of the school to be transferred to, the availability of space in schools other than the ones being transferred from and to, and the distance the student lived from those other schools. Black plaintiffs in Charleston and Greenville, even though they had been admitted, realized that under the class action rules, other African Americans would be affected by the transfer rules approved by Martin, and clearly they were not advantageous to blacks in the those districts.[64]

In Greenville, Judge Martin ordered the school district to act on the transfer applications it had by 6 April. He also added to the list of plaintiffs the names of students who had recently applied and been rejected. The trustees of Greenville's unitary district agreed to desegregate that fall. Martin issued the official order on 27 April. Greenville thus became the first district in the state to desegregate voluntarily. The Gressette Committee, meanwhile, reported that the Supreme Court's decision in *Brown* would soon

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[64]"Summary Judgments Asked in Two Lawsuits," *Southern School News* 10:12 (June 1964): 15.

be modified under the weight of mounting evidence of racial differences and public unwillingness to comply with integration.[65]

Title IV of the 1964 Civil Rights Act, signed on 2 July 1964 by President Lyndon Johnson, greatly expanded the role of the federal government in trying to achieve school integration. The Office of Education in HEW now had the power to give assistance to local school districts and was required to make a report to Congress within two years on the progress of integration. Title IV also gave the attorney general the power to initiate lawsuits against school districts and colleges if he received a meritorious complaint. Title VI gave the federal government the power to withhold federal dollars from school districts (as well as any other agency or organization receiving federal money) if they did not desegregate.[66]

On 10 June, meanwhile, the schools of North Charleston became the first in the state to desegregate without court action, announcing that four black children would begin attending white schools that fall. Two weeks later, Charleston's district 20 announced that 77 black children would be transferring that fall. Greenville was considering 75 transfer applications, and James Island was considering three. Cheraw, however, rejected 25 transfer requests because they were allegedly filed too late. The North Charleston school board's statement noted that they had "been advised that, . . .

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[65]"Desegregation Suit Filed Against Orangeburg County," *Southern School News* 10:10 (April 1964): 5; "Greenville Desegregation Set For Next September," *Southern School News* 10:11 (May 1964): 8-A; Opinion and Order, 27 April 1964, *Whittenberg v. School District of Greenville County*, Civil Action No. 4396. DWR papers. Folder Greenville County: School System Review, *Whittenberg v. Greenville*, 1961, 1964.

[66]"Strongest Civil-Rights Bill Becomes Law," *Southern School News* 11:1 (July 1964): 1, 2. See also Paul Wesley McNeill, "School Desegregation in South Carolina, 1963-1970" (Ed.D. dissertation, University of Kentucky, 1979), p. 19.

from a legal standpoint, no useful purpose would be served by going to court. . . . [Therefore,] upon advice of counsel, the board determined to admit these four Negro students, all of whom had made timely application." At the same time, black parents in Richland County's first district submitted a list of demands that did not include immediate integration. Instead, most of the demands were intended to gain improvements in the black schools of the district.[67]

On 11 July, the day before the scheduled pre-trial conference in the *Adams* case from Orangeburg, Judge Martin ruled that schools in Darlington County must be opened to five black children who had filed suit previously. Martin also forbade the district from making admission or transfer decisions based on race, and that applications for transfer be made available. The school district's three area superintendents had almost absolute authority to determine which schools a child would attend, and the schools were totally segregated. The appeals procedure for pupil assignments or transfers required written applications four months before school started. Up to July 1962, the assignment criteria were determined by racial designations. However, when the school board dropped the use of "White" and "Negro," they did not bother to tell the public of the decision. Martin ordered the desegregation of the schools in the fall. Transfers could no longer be based on race, and the district had to publicly announce the change in policy. Martin used the same five criteria for transfer that he had set down in the Charleston case, and also required students to attend the same school they had attended (outside of promotions, of course)

[67]"North Charleston Board Sets Up State's First All-Voluntary Plan," *Southern School News* 11:1 (July 1964): 6.

unless they applied for transfer.[68] This would come to be known as the Darlington plan, and would govern integration in the state until the end of the decade.

Perry objected to Martin's order, as he had in other cases. "A biracial school system is not saved from unconstitutionality by superimposing on it procedures by which pupils who have been initially assigned by race may escape from segregated schools only by making formal application and submitting to administrative procedures."[69] Like other court-imposed plans, it also did not account for desegregation of faculties or extra-curricular activities.

The Darlington plan was not without its faults, at least as far as the black plaintiffs were concerned. Martin's ruling was criticized for vagueness, because it still allowed for too much discretion by the school board in assigning pupils. The board still had the authority to deny transfers based on space availability, the educational program offered by the school, and the distance the child lived from the school.[70]

On 18 August, Columbia city schools (Richland County District One) decided to approve the requests for transfer of "qualified" black applicants. Citing recent decisions in the U.S. Supreme Court and the Fourth Circuit Court of Appeals, the board decided that litigation would serve no useful purpose. Already by August, the number of school districts expected to be integrated in the fall of 1964 had risen to 12. The next day, schools in Oconee County also decided to accept applications from four black students to

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[68]Opinion and Order, *Stanley v. Darlington*, pp. 4, 7-10. DWR papers, Darlington County.

[69]Plaintiffs' Motion to Vacate or Amend and Plaintiffs' Objections to Plan, *Stanley v. Darlington*, p. 3. DWR papers, Darlington County.

[70]"Desegregation Plan Attacked by Negroes," Columbia *State*, 29 July 1964, p. 1-B.

Northside Elementary and Seneca Junior High. This followed an earlier vote in which the applications were denied.[71]

Even as attorneys were preparing for the pre-trial conference in *Adams*, the U.S. Justice Department was busy filing a suit against Sumter County District Two, which had refused to educate children from nearby Shaw Air Force Base effective on 1 July. The district had offered to rent a school to the Air Force for the education of the base's children, and also offered to accept children into the district schools provided they accept assignment according to the district's guidelines. The district had already been sued by some of the base's black airmen on behalf of their children,[72] but the government argued that most of the money used to construct Shaw Heights Elementary in 1953 had come from the government under a plan that would require the district to educate all the children in the district. In addition, the government alleged that it had spent nearly a million dollars for various school construction projects in the district between 1950 and 1960, compared to less than $7,000 spent by the district in the same period. The district offered the alternative of processing transfers as long as the parents agreed that their children would accept the decisions of the school board.[73]

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[71]Mont Morton, "City Schools To Consider Applications," Columbia *State*, 19 August 1964, pp. 1-A, 2-A; "4 Negroes Admitted In Oconee," Columbia *State*, 20 August 1964, p. B-1.

[72]*Randall v. Sumter School District 2*. Civil Action Number 1240. Eastern District of South Carolina, Florence Division. Record Group 21, Records of the District Courts of the United States. National Archives-Southeast, East Point, Georgia.

[73]Thomas N. McLean, "U.S. Sues Sumter School District," Columbia *State*, 8 July 1964, pp. 1-A, 8-A; "Darlington County Gets Orders to Admit Negroes With Whites," *Southern School News* 11:2 (August 1964):8.

Also in July, school districts in Beaufort County (district one) and York County (district three, the city of Rock Hill) voluntarily desegregated, and Greenville announced the acceptance of 55 more applications for transfer. Pickens County was reported to be close to an announcement of voluntary integration.[74]

Of course, it must be remembered that North Charleston's and Beaufort's schools were in heavily military areas, and faced the cut-off of over a million dollars in federal funds. In the government's case on behalf of Shaw Air Base case, Judge Hemphill in July enjoined the district from refusing to educate black children of parents stationed at the base.

Meanwhile, in Dorchester County, shotgun blasts damaged the home of five children seeking transfers and Orangeburg's fifth district said it would participate in the state's fledgling tuition grants program. T.E. Wannamaker, the leader of the private school fight in Orangeburg, if not the state, stated that "we know Orangeburg's schools will be integrated by September."[75]

Hugo Sims and David Robinson, meanwhile, in the *Adams* case, urged Judge Simons to accept the proposed racial differences even though he could not issue an order based on them (since the Court of Appeals had already affirmed Judge Martin's ruling to that effect in the *Brown v. Charleston* appeal). If Simons acknowledged the evidence of racial differences, the "appellate courts [would] have a basis for determining whether such factual findings require a holding that the ruling in *Brown v. Board* . . . is not *stare*

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[74]"Darlington County Gets Orders to Admit Negroes With Whites," *Southern School News* 11:2 (August 1964):8.

[75]"Darlington County Gets Orders to Admit Negroes With Whites," *Southern School News* 11:2 (August 1964):8.

decisis here." Judge Sidney Mize of Mississippi had just recently done so in approving school desegregation plans in that state. On 12 August Simons issued an order similar to the one that Martin had issued in Charleston, admitting *Brown* as *stare decisis* and ignoring the defense's pleas to consider the intelligence data. Just two days before, Judge Hemphill had ordered the Darlington school district to enroll thirteen black plaintiffs in white schools. As in other cases, however, Matthew Perry and his partners objected to the plan's use of Martin's criteria for transfer because it remained too subjective. The Orangeburg school district tried also to get Judge Simons to amend his decision, since he had not apparently considered the intelligence and social differences between the two races in his decision.[76]

Nineteen sixty-three has been called "the year of decision" for South Carolina, and for the rest of the country in the realm of civil rights.[77] If so, 1964 was certainly a year of action, both nationally and locally. The passage of the Civil Rights Act led almost immediately to a change, if not in attitude, then certainly in behavior in many South Carolina school districts. As school began that fall, 16 districts opened their doors to black children, 15 of those for the first time, and only four under orders from a federal court. Although the 16 districts represented less than 15 percent of the state's districts, they were located in major population areas. Charleston County was the state's most

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[76]Brief of Defendants, pp. 10-11; Plaintiffs' Motion to Vacate or Amend and Plaintiffs' Objections to Plan; Petition to Amend the Findings and Conclusions and to Vacate or Amend the Order and Judgment, *Adams v. Orangeburg*. DWR papers. File Orangeburg County; "15 Districts Are Desegregated For First Time As Term Opens," *Southern School News* 11:3 (September 1964): 13.

[77]Newby, p. 330; Maxie Myron Cox, "1963—The Year of Decision: Desegregation in South Carolina." Ph.D. dissertation, University of South Carolina, 1996.

populous; Greenville's unitary district was the state's largest geographically. The largest high school in the state, in Spartanburg, desegregated in the fall, as did the schools of the capital city, Columbia. Horry County schools announced that they would desegregate in January and schools in Aiken County, under threat of a suit, announced their desegregation for the 1965-66 year. In two of the newly-desegregated districts, Sumter and Orangeburg, recent court orders from judges Hemphill and Simons respectively had led to the move to integrate. Neither case ever went to trial. Thus, even though very few blacks actually did attend school with white students (261 throughout the state—0.1 percent of the total number of black students—and 84 of those in Charleston alone), and even though the great majority of the state's school districts remained segregated, a great many black students—over a third of the state's total student population lived in desegregated districts—had at least theoretical access to formerly all-white schools.[78]

Among the districts in the state that were still segregated, however, was Clarendon County's Summerton district, the site of the original *Briggs* case from 1951. In addition, black parents in Cheraw, after having been told that their applications for transfer on behalf of their children were filed too late, filed a new suit in federal court. Lawyers for various plaintiffs throughout the state also filed motions protesting the desegregation plans for Orangeburg and other areas. The plans, based as they were on

[78]"15 Districts Desegregate, All But Four Voluntarily," *Southern School News* 11:3 (September 1964): 12; "Segregation-Desegregation Status [Table]," *Southern School News* 11:6 (December 1964): 1; "State Baptists Vote Against College Desegregation," *Southern School News* 11:6 (December 1964): 6.

Judge Martin's five criteria, were "inadequate and unreasonable" according to the complaint in the Orangeburg case.[79]

When *Brown v. Charleston* reached the Supreme Court on appeal from the white intervenors in the case, the Court refused to rule, upholding the Appellate Court's rejection of the spurious science undergirding the arguments of racial differences between whites and blacks.[80] The denial of certiorari by the Court led Robinson to reconsider the strategy the state should use in future cases. Since "innate differences between the two races" could not be used to justify segregated schools, Robinson thought that integration could be kept to a minimum through two mechanisms. First, achievement testing should be expanded to make sure that children of relatively similar abilities would be in the same classroom; second, districts should add more vocational training in black schools to discourage them from wanting to transfer to white schools, which presumably would be focused on a more academic curriculum.[81]

When the Civil Rights Act went into effect in January 1965 leaders in the South found themselves facing an ultimatum: comply with Title IV or face the cut-off of federal funds. Compliance could come in one of three ways: submitting an HEW assurance form, being subject to a court order, or submitting a desegregation plan. Essentially, the schools of the state were left with dislikable choices. If they did not sign a compliance form, they

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[79]"Transfer Plan Attacked By Negro Attorneys," *Southern School News* 11:3 (September 1964): 16; Plaintiffs' Motion to Vacate or Amend and Plaintiffs' Objections to Plan, 20 August 1964, p. 3. *Adams v. Orangeburg*. DWR Papers, Orangeburg County.

[80]"Supreme Court Rejects Ethnic Difference Plea," *Southern School News* 11:5 (November 1964): 1.

[81]Robinson to Gressette, 13 October 1964. DWR papers, Correspondence.

could face a suit from HEW under Title IV. Clarendon County superintendent L.B. McCord (who had been in his job for the past 25 years) expressed defiance: "It would have to be some terrible force to make me [sign a compliance form]." McCord went on to say that "we've got a good bunch of colored people in this county. But the taxes the colored people pay in this county wouldn't hire a janitor." McCord, when he refused to let Manning students play a football game against St. Johns High School, forced the cancellation of the game. Another unnamed official from the Pee Dee region said he thought his district might sign the forms and then forget them. State Superintendent Jesse T. Anderson advised against signing the forms unless a school district was fully integrated. Instead, he suggested that local districts submit desegregation plans to HEW.[82]

Almost half (42) of the state's 108 school districts filed plans by the 4 March deadline, although Jesse Anderson refused to divulge the names of the districts. Pressed by newspapers, Anderson said "They're not public unless I make them public."(Most of the districts that had sent plans admitted it, however.) Most of the plans contained "freedom-of-choice" programs based on the five-point program set forth by Judge Martin in his decision in the Darlington case. Cheraw County, the latest to face attack in federal court, was among those submitting a plan.

The freedom-of-choice plans came under attack from HEW, and several were sent back to the state for "more information." According to Fort Mill (York County) superintendent J.E. Thompson, "They're [the U.S. Office of Education] encouraging us to forget 'freedom of choice' plans. . . . They want to push it all [that is, desegregation

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[82]"Official Says Form Calls For Full Desegregation," *Southern School News* 11:8 (February 1965): 1, 7. On the football game, see McNeill, 62.

plans] in geographic zoning." Meanwhile, the number of districts that had submitted plans grew to 79. Most of those were similar to the Darlington plan, and figured on some variation of the same freedom-of-choice plan that Martin had approved in districts throughout the state. The federal Office of Education required notification of individual parents rather than the public announcement which had become customary, and nondiscriminatory bus transportation. The Office's letter to the Fort Mill district perceptively analyzed what many left unsaid in the state:

> In theory, freedom of choice is unobjectionable. The practical difficulty is that the choice open to many may not be free.
>
> School authorities who are considering freedom of choice plans have a special responsibility to assure themselves, before they adopt them, the plans can be carried out in good faith. Particularly is this true where ingrained community custom is likely to result in economic reprisals or threats to [black] parents or children.[83]

On 3 March the state paid out its first checks under the new tuition grants program, rushing to distribute the checks quickly enough to prevent the NAACP from having the action enjoined. The NAACP and the Justice Department had already filed suit to block implementation. Federal marshalls sped "up and down the state's highways to serve school officials . . . with restraining orders" that Judge Martin had issued on the ninth. Ultimately, the plan was ruled unconstitutional by a three-judge panel in 1968, and the Supreme Court refused further comment on the case.[84]

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[83]"Gov. Russell Criticizes Return Of District Desegregation Plans," *Southern School News* 11:10 (April 1965): 14.

[84]"Gov. Russell Criticizes Return Of District Desegregation Plans," *Southern School News* 11:10 (April 1965): 15; Wolters, p. 149.

Judge Hemphill's order in the Sumter case was originally somewhat different from Martin's rulings in that the five criteria for school transfer were not included. In April 1965 Hemphill modified his original order to make it more like those issued by Judge Martin. In the modification, he criticized black activists while threatening school officials with contempt rulings if they did not comply with his ruling. Governor Russell meanwhile proposed that school districts should take the government to court to prevent the "harassment and hardship" caused by the compliance rules.[85]

In May 1965, the *Southern School News* reported that almost all of South Carolina's districts would be desegregated by that fall. The Civil Rights Act, and especially Title VI which could cut off federal funds, was largely responsible for the change in the state from the previous 11 years of dilatory enforcement of the original *Brown* decision. However, even though 95 of the 108 districts had submitted compliance forms, the Office of Education had sent letters to 72 noting the inadequacy of their plans.[86]

On 8 May 1965, York County District One became the first in the state to get a voluntary plan approved. Unlike the plans developed under court order, many of which were modeled on the Darlington plan, the York plan made no reference to Judge Martin's five criteria. In York, the plan called for priority in school assignment being given to children living closer to a given school. York had also mailed a notification to the parents

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[85]"Officials Stirred by Guidelines," *Southern School News* 11:11 (May 1965): 15; "Gov. Russell Criticizes Return Of District Desegregation Plans," *Southern School News* 11:10 (April 1965): 15.

[86]"Almost All Districts May Be Desegregated in September," *Southern School News* 11:11 (May 1965): 14.

of children entering junior high or high school in September. Clarendon County's three districts remained segregated. In fact, those districts were among only ten in the state that had not filed plans with the Office of Education.[87]

Until 1961, the national trend in school desegregation was to integrate one grade per year. Cases from Georgia and Tennessee established the precedent, which was largely followed in those districts that actually began to desegregate. By 1961, however, the passage of time since the first *Brown* decision forced the federal courts to reevaluate their stance on the issue. As a result, a number of cases in 1962 and 1963 led to increasing rates of integration in states outside the Deep South, including moves toward immediate system-wide desegregation in the Border States.[88]

Thus, by 1964, there had developed two basic schemes of achieving desegregation: the freedom of choice plan and the geographical zoning plan. South Carolina districts primarily used the former system for reasons I will explore in more detail in the next chapter. Essentially, however, black parents in the rural South who might choose to send their children to all-white schools faced economic reprisals, one of the remaining weapons in the arsenal of white supremacy. Some newspapers went so far as to publish the names and places of employment of black parents who chose white schools for their children. Even when recognizing the potential for economic reprisal, however, courts continued to validate freedom-of-choice plans.[89]

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[87]"Schoolmen Struggle To Comply With Civil Rights Act," *Southern School News* 11:12 (June 1965): 18-19.

[88]Lawrence W. Knowles, "School Desegregation," in *Civil Rights and the South: A Symposium, North Carolina Law Review* 42:1 (1963): 72-73.

[89]Knowles, p. 77. *Vick v. County School Board*, 205 F. Supp. 436 (W. Dist. Tenn 1962).

When South Carolina began to integrate its schools in the fall of 1963, school district officials were armed with the prospect of economic disaster for any black parent who chose to move his children to white schools. Nevertheless, many black parents chose to move their children in any case. In districts that remained recalcitrant, blacks were more than willing to turn to the courts to enforce their freedom to choose, and to demand more equitable avenues of desegregation.

Contrary to Ernest Hollings' claim that the state was committed to firm flexibility in dealing with desegregation, it is clear that it was firm in its resolve to stave off desegregation using whatever social and legal arguments that were available. The power of the federal courts, the willingness of HEW to ally itself with black plaintiffs—thereby increasing the litigating power of the NAACP—and the increasing dependence of the state on federal dollars led to a gradual softening of the state's stand on desegregation. At this point the fear of punitive sanctions rather than respect for the rule of law governed the state's response. The next three years, 1966 to 1968, proved to be pivotal in the legal struggle over segregation in South Carolina.

CHAPTER SEVEN

"WE'VE RUN OUT OF COURTS AND WE'VE RUN OUT OF TIME": THE TRANSITION TO FULL INTEGRATION, 1965-1970

The fall of 1965 brought increased levels of integration in the state's schools, though the rate of integration remained extremely slow. Technical compliance with Title VI of the Civil Rights Act of 1964, which could be achieved as easily as submitting a plan for desegregation—even a grossly unacceptable one—increased relatively rapidly. By August, 96 of 111 districts had submitted plans; of those, 18 had been accepted. In addition, five districts were operating under court order, so there were just a bit over 20 percent of the districts in total compliance as school began that fall. For the south overall, 71 percent of the districts were in compliance. By the time the school year began the figure was over 98 percent.[1] Nevertheless, as the federal courts and HEW became more involved in scrutinizing the progress of school desegregation, more and more school districts were found wanting. Black parents continued to press their cases in court, often joined by Justice Department attorneys. Under Title VI the Department of Health, Education and Welfare became increasingly involved, as well. White South Carolinians continued to delay the onset of desegregation by keeping cases before the courts as long as possible. African Americans continued to express through their actions the belief that litigation could achieve their goals. With the full force of the federal government on their side, African Americans now could be confident of ultimate victory.

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[1]"Desegregation," *Southern Education Report* 1:1 (July-August 1965): 33; Leeson, "Desegregation," *Southern Education Report* 1:2 (September-October 1965): 32.

In July 1958 eight parents had signed a petition calling on Clarendon County District Two to "take immediate steps to reorganize the public schools under your jurisdiction on a non-discriminatory basis" on the strength of rulings from the Supreme Court in *Brown*.[2] Like its counterpart in District One, the District Two board delayed action. Finally, in August 1965, the parents of eleven children filed a complaint and moved for an injunction to force the district to desegregate.

The students had applied for transfers, but like many black students before and after them, were denied for any number of reasons. In their answer, the defendants argued "that to grant the requested transfers on the grounds of the pupil's 'rights' to attend a particular school would have discarded every educational, humane, and moral criteria, and this the Defendants decline to do."[3] Thus, the school board argued they were actually doing the students a favor by disallowing their requests.

In May 1965 a pre-trial conference was finally held in the *Brunson* case, but by that time only nine of the original forty-two plaintiffs were young enough to still be in school the following fall. The state was winning its war of delay as students who wanted to and tried to transfer grew older and graduated often before their case came to trial. Finally, in August, Judge Simons found for the plaintiffs. His order, like Judge Martin's in the Charleston case, only applied to the nine students remaining from the original case

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[2]Petition, 25 July 1958. David W. Robinson Papers, Desegregation Files, 1954-1974. File Clarendon County, *Miller v. Clarendon School District #2*, ca. 1955, 1958-1959, 1964-1970, 1973. South Carolina Department of Archives and History. Hereafter DWR Papers, Clarendon County.

[3]Answer, *Miller v. Clarendon 2*. 8 September 1965, p. 2. DWR Papers, Clarendon County.

for the upcoming school year. Any other black student wishing to transfer would have to wait until the fall of 1966.

Perhaps anticipating a situation similar to that in Charleston, Matthew Perry filed a motion to vacate the ruling, specifically the ruling that allowed for a great deal of discretion on the part of the school board in determining initial school assignments (capacity of school; availability of space in other, non-desired, schools; distance from a given school; the educational program of the student; and the ability of a given school to meet it). In short, the judge's ruling only allowed black students the right to apply for transfer, not the right to attend the school of their choice.[4]

In the meantime the federal government began to exert financial pressure on segregated districts in the South. The Civil Rights Act gave HEW the right to revoke grants of federal assistance to school districts that had not complied with orders to desegregate. In September 1965 U.S. Commissioner of Education Francis Keppel sent school districts that had not complied with the Civil Rights Act a notice that hearings would be held in Washington in October. In South Carolina, two school districts were on Keppel's list: Calhoun District Two (the town of Cameron) and Clarendon District One (the town of Summerton and the target of *Briggs v. Elliot*). Subsequently, Summerton was dropped from the hearing list because they were "moving toward compliance with the Civil Rights Act" by submitting a desegregation plan. On 20 September, however, Cameron superintendent J.P. Dufford received his notice of the hearing along with a letter

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[4]Plaintiffs' Motion to Vacate or Amend and Plaintiffs' Objections to Plan, 28 August 1965, *passim*. David W. Robinson Papers, Desegregation Files, 1954-1974. File *Brunson v. Clarendon School District #1* 1958, 1960, 1962-1970. South Carolina Department of Archives and History. Hereafter DWR Papers, *Brunson v. Clarendon School District #1*

from Commissioner Keppel reminding him of an August letter urging compliance with the Civil Rights Act. "[F]ewer than two percent" of formerly segregated school districts had required such warnings, but Cameron was nevertheless one of them, and despite repeated pleas and warnings, Dufford remained defiant. He forwarded the letter to Calhoun county state senator Marion Gressette, who asked Robinson for his advice: could the school district avoid filing a compliance document? The school board argued that, because the district was 79 percent black, "any plan which would be acceptable to HEW would totally disrupt the Public School system in that District." They preferred to run their schools under a court order rather than voluntarily submit a compliance plan.[5] Given Dufford's rhetoric, a court order's symbolic value would have been preferable to voluntary compliance. The district could argue that it was being forced to comply by an interventionist federal government and maintain the veneer of die-hard segregation.

Robinson informed Gressette of the federal government's options in the situation: it could terminate all federal assistance or, if a black parent complained bring a desegregation suit. Robinson advised the district to file a "Darlington type" desegregation plan, which HEW would find inadequate, but which would give the district a stronger case in federal court. On 1 October the board decided simply not to appear at the scheduled hearing: "having concluded that the educational interests of the pupils of the School

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[5]Order Fixing Times and Dates of Hearings. *In re Barbour County Board of Education, et al.* 10 September 1965; Supplemental Order Fixing Times and Places of Hearings, *In re Barbour County Board of Education, et al.* 17 September 1965; Francis Keppel to J.P. Dufford, (received) 20 September 1965; Gressette to Robinson, 22 September 1965. David W. Robinson Papers, Desegregation Files, 1954-1974. File Calhoun County/Orangeburg County *U.S.A. v Calhoun School District #2, U.S.A. v. Elloree School District #7* 1966, 1968-69. South Carolina Department of Archives and History. Hereafter DWR Papers, Calhoun County/Orangeburg County.

District would be better served by declining to accept Federal financial assistance [on HEW's terms, the board] decided not to file a compliance form."[6]

By 8 November 1965 only 24 of the state's 107 districts (22.4 percent) were not in compliance, 22 of those because of unacceptable plans, and two—Clarendon District One and Calhoun District Two—because they had not submitted any plan at all. By December, 80 percent of the districts of the state were in compliance, covering 88 percent of the state's pupils. Yet only 1.46 percent (3,864) of the state's black school children attended school with white children, trailing only Alabama (.43 percent), Mississippi (.59 percent) and Louisiana (.69 percent).[7] White South Carolinians, faced with mounting pressure and the force of law, still managed to delay any real desegregation. Changes in the law did not necessarily bring changes the white mindset.

By February 1966, the Justice Department had become interested in the Clarendon Two case and filed an application to intervene on the side of the plaintiffs. The same day the Department sued Lexington School District One in Columbia based on complaints from an unnamed black parent.[8] Later that month, at the pre-trial conference in the Clarendon Two case, the defense stipulated that the school district was a dual, race-based, system. At trial, Superintendent Weldon consistently referred to the white schools as

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[6]Robinson to Gressette, 23 September 1965; Return, *In re Cameron School District No. 2.*, 1 October 1965. DWR Papers, Calhoun County/Orangeburg County.

[7]Jim Leeson, "Desegregation," *Southern Education Report* 1 (November-December 1965): 32. Status of Compliance, Nov. 8, 1965 Table; Leeson, "Desegregation: Faster Pace, Scarcer Records," *Southern Education Report* 1 (January-February 1966): 30-31 (Tables II and III).

[8]William E. Rone, Jr. "Integration Plan Dismissed by Judge," *The State* 25 April 1966, p. 1-A.

"our" schools and the black schools as "their" schools, reinforcing the idea of separateness in the school system.[9]

Despite the school equalization program that was instituted in the early 1950s, black schools in Clarendon Two suffered. They were valued at less than 40 percent of the white schools of the district, and a building and improvement plan, while spending more on black schools by a margin of 5 to 3, was still not enough to completely equalize the schools. Thus, while the total value of the two separate systems was relatively equal in 1966, the greater number of black students revealed a disparity in per-student capital in the district. An even worse disparity affected per-student expenditures in the district as $305.91 was spent per white student while only $119.89 was spent per black student. Excluding teachers' salaries, which had been largely equalized through earlier litigation, from the figures revealed an even greater disparity: $18.60 for each black student; $127.80 for each white student. White students enjoyed a language lab, newer and more typewriters, more sewing machines, greater choice in course selection, hot lunches instead of bag lunches for many more white students than black students, special education classes for white children only, smaller classes, "better" teachers (based on scores on the National Teachers Exam), and more extra-curricular activities. The end result was that only one of thirty-three white students (3 percent) entering college had to take a "sub-freshman" course while ten of 15 black students (67 percent) entering college had to take such courses.[10] The relief asked for in these early stages of the case was a

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[9]Plaintiff-Intervenor's Trial Brief, 10 March 1966, pp. 3-4, referring to transcript of trial conference, testimony of Weldon, no page given. DWR Papers, Clarendon County.

[10]W.E. Durant to W.H. Weldon, 2 March 1966 (two letters of that date). The amounts were $1,023,279.71 for the black schools and $671,950.33 for the white schools; Plaintiff-

freedom of choice plan based on HEW guidelines, however, and as discussed in chapter six, such plans were hardly effective at ending the realities or the effects of discrimination.

The defense again appealed to the second *Briggs* decision of the three-judge panel in which Judge Parker opened the door for "voluntary" segregation.[11] Invoking Parker's decision, the defense asked the court to consider its freedom of choice plan, modeled on that approved for other districts in the state, including preference, educational program, school capacity, availability of space in other schools, and distance from other schools. They also brought up the educational disparities between black and white children, especially calling attention to the poor academic records of the children wanting to transfer.[12] Despite the Appellate Court's decision in *Brown v. Charleston* that such considerations were off-limits, Robinson and his fellow attorneys continued to call attention to the educational deficits—which they interpreted as intellectual deficits—suffered by black students.

On 21 April Judge Hemphill issued his order in the case. It was a scathing attack on the district which questioned their "will" to change. The district's plan for

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Intervenor's Trial Brief, 10 March 1966, pp. 5, referring to Plaintiffs Exhibit 10; Plaintiff-Intervenor's Trial Brief, 10 March 1966, p. 6, referring to Plaintiffs Exhibits 3 and 4; Plaintiff-Intervenor's Trial Brief, 10 March 1966, p. 7, referring to Plaintiffs' Exhibit 4; Plaintiff-Intervenor's Trial Brief, 10 March 1966, pp. 9-18. DWR Papers, Clarendon County.

[11] *Briggs v. Elliot*, 132 F. Supp. 776 (1955).

[12] Plan for Pupil Assignment, Transfer and Re-assignment in Compliance with Civil Rights Act of 1964 for School District Number 2, Clarendon County, South Carolina, n.d. adopted 3 March 1966; Memorandum for the Defendants, filed 25 March 1966, pp. 4-5, 10, 12. reel 948. DWR Papers, Desegregation Files, 1954-1974. DWR Papers, Clarendon County.

desegregation was "at best . . . merely a contrived 'paper tiger'" which amounted to "a needless temptation for further delay." Nevertheless, the district's lawyers (Joseph O. Rogers and David Robinson) argued that the facilities were in fact equal in spite of the figures offered by the government in its trial brief. For example, the white Spanish teacher's lab would be replicated at the black school if the black French teacher wanted one. There were fewer typewriters at the black school because there were two typing teachers, and therefore smaller classes. The lunch program was cost-prohibitive despite a higher subsidy for black students ($0.15 compared to $0.05) because only one-quarter of black students bought their lunches.[13]

Regardless, Judge Hemphill rejected the motion and required the school board to submit a revised desegregation plan to the court by 15 May. The board's plan still left room for school authorities to avoid complete desegregation, as the plaintiffs were quick to point out. Hemphill, in an "effort . . . at restraint and flexibility," had not required adherence to the HEW guidelines in his April order, but in June he stated that he did not intend "to allow a local situation to override settled principles of constitutional law."

> Defendants through their able counsel have expressed to the court their good faith, their ready will to comply, the high purpose and endeavor with which they have faced the task; but the proposal put forward implies the standard of reasonableness was either too obscure or somehow repugnant to them. . . . Choice should be an exercise of the will—not a successful strategem of administrative chess.[14]

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[13]Motion for a Rehearing, for the Amending of the Court's Findings and Conclusions, and for the Amending of the Judgment, 28 April 1966, pp. 1, 3. DWR Papers, Clarendon County.

[14]Order, *Miller v. Clarendon*, filed 14 June 1966, pp. 4-6. DWR Papers, Clarendon County.

Hemphill dismissed claims of "administrative difficulties," which school districts often invoked as reasons to further delay integration, as "non-specific" adding that "our purposes should not be limited or perverted by them. If . . . they are intended to minimize difficulty, to expedite, to economize, then who would object. They should not operate, however, to summarily dispose of applications on technicalities." However, Hemphill did allow for some discrimination: whether the student's desired educational program could be met by the school to which he or she wished to transfer. He also would not object to "the practice of separating study groups or classes into accelerated or slow sections" as that was a matter for educators. It was "'racial discrimination' in public education which must be excised here from the American culture." Hemphill denied the use of attendance zones and required the new plan to be implemented in all grades for the upcoming year, rather than for the initial grades of elementary, middle, and high school. He also required that remedial courses be made available to students who needed them.[15]

The school district issued a report subsequent to the court's order detailing the progress of the transfer plan. By the 23 July deadline, 2,275 of 3,818 letters had been returned. While, as expected, no white students requested transfers to previously black schools, 55 black students requested transfers to white schools, of which 54 were granted. However, remedial education courses could not be offered because of lack of funds as well as the lack of eligibility for funds from the state. The same situation affected the improvement of physical facilities. As far as teacher integration was concerned, token efforts were made: a white remedial reading teacher had volunteered to teach in the black

[15]Order, *Miller v. Clarendon*, filed 14 June 1966, pp. 6-10, 12. DWR Papers, Clarendon County.

schools, pending funding, and the white band leader had volunteered to organize a band in the black high school.[16]

The Department of Education refused to certify in December that Clarendon Two met the requirements for receiving federal aid. The requirements included meeting the June order's directive eliminating the "educational program" and "space available in other schools" requirements as well as other aspects of the desegregation plan. However, Hemphill confirmed that the district was attempting to comply, and the district made application for the federal funds later that month.[17]

In April 1966, with the first option in Calhoun County—the district's submission of a voluntary desegregation plan—closed to them, HEW moved to the second option—court-ordered compliance. An anonymous individual had complained of continuing segregation, and the Department moved to rectify the problem. F.O. Hutto, the chair of Cameron's Board of Trustees, wrote to John Doar, Assistant Attorney General for Civil Rights, requesting the name of the complaining parent. Doar replied that under the Civil Rights Act he was unable to comply with Hutto's request. When apprised of the Doar letter, Robinson suggested a disingenuous reply. The school district should say they were seeking out the parent's name "to see whether we could correct any difficulty that might

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[16]Report of School District Number 2, Clarendon County, To United States District Court Pursuant to Order of the Court Dated June 14, 1966, n.d. p. 4. (enclosed with Petition, 3 August 1966). DWR Papers, Clarendon County. According to the Defendants' Reply to Comments of Plaintiff-Intervenors, p. 1, n.d., the one black student whose request was denied was actually granted his first choice. The transfer to a white school was his second choice.

[17]David S. Seeley, Assistant Commissioner, Equal Ed Opportunities Program to Joseph Rogers, 12 Dec 1966; Rogers to Seeley, 14 Dec 66. DWR Papers, Clarendon County.

have arisen. . . . In this school district all pupils of school age are free to attend any school in the district which the parent wishes the child to attend. . . ."[18]

Two years after passage of the Civil Rights Act, expectations for desegregation were not being fulfilled in several areas of the state. By June 1966 in Charleston the only real "progress" that had been made was that the district had decided to adopt an equal opportunity policy in employment, though "it recognize[d] that long-standing customs and traditions in the community may constitute obstacles to a wholesale reshuffling of negro and white teachers in the system." Even as the district made token efforts toward desegregation, the dominance of white supremacy continued to have an effect on the degree to which whites were willing to move on the issue. The school board promised "to make a start in this direction for the 1966-67 school year." In the classrooms of the city, only one school had a white enrollment exceeding 25 percent. One other was 24.9 percent white, and the other eight elementary schools were all black. Of course, this reveals a central problem with desegregation: the disproportionate number of blacks in many school districts. The problem was exacerbated by "white flight" to other districts or to private schools, specifically established to give whites a refuge from integration. Only 432 of nearly 7,000 students in the district's elementary schools were white. In the high schools, a similar situation made integration difficult: of 3,623 students, only 10.6 percent, or 382, were white. Again, only one of the district's four high schools was over 50 percent white. Two were all black and the fourth over 70 percent black.[19]

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[18]Doar to Hutto, 2 May 1966; Robinson to Gressette, 10 May 1966. DWR Papers, Calhoun County/Orangeburg County.

[19]Answers to Interrogatories, *Brown v. Charleston*, 17 June 1966, pp. 1-2; Clark to Robinson. David W. Robinson Papers, Desegregation Files, 1954-1974. File Charleston

In June 1966 two school districts in the state lost their federal funding for failure to comply with desegregation plans. Orangeburg District Seven (Elloree) lost $55,000 and Calhoun District One (St. Matthews) lost $137,000. By February, twenty-one districts were listed as probably in a state of non-compliance. And in March, four more districts had their funds cut off. Finally becoming aware of the possibilities, districts throughout the state began to develop plans that would finally create unitary districts.[20]

Under a court-approved freedom of choice plan, nine black students attended Cameron High School (Calhoun County District Two) in the fall of 1966, but left after the Christmas break. No black students attended the school the following year. When the Supreme Court struck down freedom-of-choice plans in 1968, Cameron was forced to devise a new system. The new plan called for teacher transfers as well as for moving 80 black students to the Cameron school, but when the superintendent met with parents and faculty, only two white teachers volunteered to teach in the black schools. Thirteen others resigned rather than risk being assigned to the black schools. Ultimately, no white teachers appeared in the black schools when school opened that fall. The two black schools in the district remained open, though no white teachers taught there.[21]

Meanwhile, the hearing for the motion to vacate the court's decision in *Brunson* was held in June 1966, and the U.S. was allowed to participate in the hearing as *amicus*.

County *Brown v. Charleston School District #20/ Johnson v. Charleston School District #20*, 1960-66, 1968-69. South Carolina Department of Archives and History. Hereafter DWR Papers, Charleston County.

[20]Paul Wesley McNeill, "School Desegregation in South Carolina," pp. 48, 56.

[21]Interim Order, *U.S. v. School District Number Two, Calhoun County, South Carolina*. September 1968. DWR Papers, Calhoun County/Orangeburg County.

The *Brunson* case was consolidated with cases from Orangeburg, Greenville, Charleston, Darlington, and Sumter for the purposes of hearings on motions in the various cases.[22] In August, Chief Judge Martin issued his order for the cases from Greenville, Charleston and Darlington, and Judge Simons adopted that order for *Brunson*. The districts in question were to present desegregation plans within 60 days.

In the Darlington case, school board attorney Benny Greer filed a long brief outlining reasons for not allowing the U.S. to participate as *amicus* in the case. The goal of the government, he argued, was

> to put the local school boards under the full and complete domination of the "all-wise" and "all-knowing" so-called Education Department in Washington. The idea is that Washington can then impose a "police state" system of rules designed to bring to heel even the most "recalcitrant or reluctant" school system. The imagination, wisdom and desire of all local boards should be shackled. All local school personnel should be treated as persons posing as educators but known to the "all-wise" and "all-knowing" Civil Service Operatives in Washington as the true enemy of the state.

More specifically, Greer objected to the attempt by U.S. attorney Terrell Glenn to convince Judge Martin to accept the 1966 Office of Education guidelines for desegregation as his map in deciding the ultimate fate of the district. The end result would be greater federal domination of the school system, leading to disastrous consequences. Greer laid out 13 points, most of which attacked the bureaucracy that would be required to implement the 1966 Guidelines. Finally, however, in point 13 Greer argued that the guidelines "would—and may be worst of all—destroy the present good relations between

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[22]The full citations of the cases are: *Adams v. School District No. 5, Orangeburg County*, *Whittenberg v. Greenville County School District*, *Brown v. School District No. 20, Charleston*, *Stanley v. Darlington County School District*, and *Randall v. School District No. 2, Sumter County*.

the races as they have worked together to bring orderly and continued substantial progress in social reform and would substitute the creation of an atmosphere of bitterness and resentment." Again, white South Carolina had gotten caught up in its own misconception. Social dominance had led whites like Greer to believe that the relative silence of the mass of black South Carolinians implied their consent to the racial status quo. Greer followed his brief with interrogatories to Terrell Glenn which clearly accused the government of assisting the plaintiffs with their case, down to accusing him of letting the plaintiffs use his office's typewriters and Xerox machine.[23] Given his belief that most African Americans were content, Greer might have thought that the government attorneys were leading the black plaintiffs where they did not want to go.

By 1967 it was increasingly apparent that time was running out on segregation. In January Judge Simons rejected the proposed plan for Clarendon One. In February, Simons pointed out that he was satisfied with the implementation of his previous (1965) order, but that new law from the Supreme Court and the Court of Appeals made it necessary to make adjustments in the implementation of desegregation. The new plan for Clarendon and the other districts allowed for complete freedom of choice in schools, access to transportation for students choosing schools farther away from their homes, equal access to all elements of the curriculum and school activities, and desegregation of the faculty beginning with new hires.[24]

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[23]Brief of Defendants on Motion to Dismiss Amicus Curiae and in Reply to Amicus Curiae Brief, *Stanley v. Darlington*, p. 3; Answers to Defendants' Interrogatories, *Stanley v. Darlington*. David W. Robinson Papers, Desegregation Files, 1954-1974. File Darlington County: *Stanley v. Darlington, USA v. Darlington County Board of Education* 1958, 1961-69. Hereafter referred to as DWR Papers, Darlington County.

[24]Order, *Brunson v. Board of Trustees*, 20 or 28 February 1967, p. X; Modified School

In March 1967 Judge Hemphill noted that Clarendon District Two was in compliance with his order of June 1966, but that further relief was necessary under Martin's August order.[25] The new rules required any new plan to allow students to choose their own schools. All students had to express their choices on an annual or otherwise periodic basis. No reason for a change in schools had to be noted on the choice form. All aspects of school life—facilities, faculties, and transportation in addition to students in classrooms—must be desegregated. Judge Martin had ordered the districts to come up with plans within 60 days. By January, they still had not, so Martin revised the order to command the districts to develop plans by early February or have them written for them by the court.[26]

In South Carolina for 1966-67, eighty-seven of 107 districts (81.3 percent) were in compliance with the Office of Education's guidelines. However, only 6 percent of the state's black school population attended schools with white students, the fourth worst in the South following Mississippi, Louisiana, and Alabama. Of that 6 percent, 1.2 percent attended schools with between 80 and 99 percent black enrollment, 0.6 percent were in schools with between 20 and 80 percent black enrollment and 4.2 percent were in schools with between 0 and 20 percent black enrollment. For the same period in the South as a whole, 489,973 black students out of a total black school enrollment of slightly over three

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Desegregation Plan, *Brunson v. Board of Trustees*. DWR Papers, *Brunson v. Clarendon School District #1*.

[25]Order, *Miller v. Clarendon*. n. d. (24 March 1967) DWR Papers, Clarendon County.

[26]Paul Wesley McNeill, pp. 41-43.

million (about 16.5 percent) attended desegregated schools.[27] This was up from 4,308 out of over 2.6 million (less than one-tenth of a percent) in 1960-61.

The federal government continued to press, investigating the extent of student and faculty integration in Clarendon Two for 1967-68. Out of over 4,100 students in the district, only eighty-three went to a school of another race. Faculty integration was similarly insignificant: a few white teachers worked in the black schools, sometimes part-time, one African American was made Supervisor of Instruction and another Supervisor of Audio-Visual Aids for the district.[28]

By the mid-1960s, opinion regarding the issue of desegregation began gradually to change. While *Brown* had held that governments should not take account for race in any way, lawyers and intellectuals confronting racism ten years later would begin to argue that "to get beyond racism, we must first take account of race."[29] In Clarendon One, U.S. attorney Terrell Glenn prepared an amicus brief which argued that increasing numbers of black students should attend formerly white schools each year. Nationally, HEW began to assert that the 1964 Civil Rights Act required desegregation, and in 1966 the pro-integration Harold Howe II became U.S. Commissioner of Education. He supported those who believed that desegregation meant integration. Freedom of choice plans, under the

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[27]Jim Leeson, "Desegregation: Guidelines and a New Count," *Southern Education Report* 2 (Jan-Feb. 67): 31, 32. Table II, p. 31; Leeson, "Desegregation: The Pace Quickens in the South," *Southern Education Report* 2 (April 67): 35 [33-37]. Rate of Desegregation Versus Rise in Negro Enrollment, Table.

[28]Answers to Interrogatories, 25 July 1967, Schedule A and p. 2. DWR Papers, Clarendon County.

[29]*Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), p. 407 (additional opinion of Justice Harry Blackmun).

new guidelines prepared by the Commission in 1966, were therefore unacceptable unless they would definitely lead to substantial mixing. The new guidelines came under attack, and the Fourth Circuit Court of Appeals rejected them in 1967. However, the Fifth Circuit sided with the Education Commission, and rejected the notion of freedom of choice. The constitutional conflict that resulted was finally resolved in May 1968 when the Supreme Court decided the Virginia case of *Green v. County School Board of New Kent County.*[30]

The Supreme Court's decision in *Green* signalled the end of freedom of choice plans for the South. *Green* required school districts to assign students in order to achieve integration. New Kent County bore some similarities to Clarendon County, so South Carolinians took great interest in the outcome of the case. The main argument put forth by Jack Greenberg for the NAACP was that freedom of choice plans were not really free—there was no choice for most blacks. Faced with the prospect of economic or violent reprisals, and still subject to the psychological effects of segregation, blacks did not exercise, or were unwilling or unable to exercise the right of free choice in picking schools for their children. The Supreme Court, in an opinion by Justice William Brennan, agreed, and cast aside the doctrine of freedom of choice.[31]

In South Carolina, school cases accelerated even before the Supreme Court's decision in *Green*. The Darlington school district faced a new assault on their dilatory move to desegregation in April 1968, when the Justice Department initiated its own case against the district. Officials of the district had not submitted the compliance reports

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[30]Wolters, pp. 152-155. *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968).

[31]Wolters, pp. 156-158.

required by HEW, and refused to allow HEW officials to look at the district's records or conduct inspections of schools in the district. Under section 80.6(b) of HEW regulations built on Title VI, districts that received federal money were required to submit documents and allow inspections. Benny Greer had considered the attempt to inspect the records of the district "improper and illegal," especially since Darlington was operating under court order. The complaint against the board requested Judge Martin to issue an order forcing the district to submit compliance records.[32]

Greer answered the complaint by appealing to his previous arguments.

> [T]he defendants deny that the School District must be so manipulated and controlled as to assign students to public schools 'in order to overcome racial imbalance' . . . since the Congress . . . forbids any federal agency or department . . . from using the Civil Rights Act of 1964 for the purpose of promulgating Rules or practices designed to force the assignment of pupils to public schools in order to overcome racial imbalance.

HEW, he argued, had sought "to impose illegal conditions and requirements upon the defendants."[33]

Matthew Perry's appeal following the 1965 decree in *Brunson* gained strength following the 1968 *Green* decision. Despite the assertion that "[n]o choice was denied" for either white or black students in the district, figures from the spring of 1968 indicated that the junior high schools would remain totally segregated for the 1968-69 school year. The three black students who attended the white junior high school in 1967-68 were graduating and would attend the white high school. The formerly all-white high school

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[32]Complaint, *U.S. v. Darlington County School District*, filed 15 April 1968; Greer to Peter Libassi (Director of the Office for Civil Rights in HEW), 14 February 1968. DWR Papers, Darlington County.

[33]Answer, *Stanley v. Darlington*, 3 May 1968, pp. 2-3. DWR Papers, Darlington County.

would have 25 white students and six black students, while the black high school remained all black. Only ten black students chose to move to white schools following the 67-68 school year. New hires of teachers were racially segregated: of nine vacancies at the white schools, none was filled by blacks; of seven vacancies at black schools, all were filled by blacks. No teachers were transferred. Following *Green*, Judge Simons had little choice but to require the development of a totally new desegregation plan. While the school board argued that it would be impossible to achieve integration with a white school population of only 12 percent, Perry correctly pointed out that such an argument had no legal standing. The fact that whites might leave the schools in droves also had no bearing on any decision the court may issue. What mattered legally was the fact that segregation continued and was supported by the school board of the district.[34]

In Orangeburg, the case of *Adams v. Orangeburg* continued. Judge Simons had approved a freedom of choice plan in 1966, but in August 1968 District Five Superintendent W.J. Clark sent a short form to parents inquiring whether they preferred a zoning plan to accomplish desegregation. Of course, with increasing federal pressure, and growing impatience from the courts, this could be seen as merely another delaying tactic. Since most white parents could be expected to prefer freedom of choice to a zoning plan, the results of the poll could be used for political purposes later. In fact, almost all parents chose a freedom of choice plan, though the numbers indicated that about 10 percent more black parents than white parents preferred zoning.[35] Of course, black parents who

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[34]Answers to Interrogatories Propounded by the Plaintiff, 1 August 1968. DWR Papers, *Brunson v. Clarendon School District #1*; Wolters, pp. 159-160.

[35]W.J. Clark to Robinson, 5 September 1968. DWR Papers, Orangeburg County. The numbers were: 3,837 parents in favor of freedom of choice, 501 parents in favor of zoning.

preferred freedom of choice probably interpreted the idea more literally than white parents did.

Following *Green*, a joint order from the four district judges of the state was issued in September 1968. The new order required school district defendants to modify their desegregation plans to comply with the new law under *Green*, unless they believed that their plan did not require any modification. In that case, they had to submit their reasons.[36]

The school boards of Cameron (Calhoun Two) and Elloree (Orangeburg Seven) districts refused to move to a unitary school system. If a unitary system was all that HEW would accept, it would have to be done through a court order, giving the districts time to appeal. Graydon, like others in the state, hoped that, with a new administration arriving in Washington with the new year, "a change in attitude . . . may be in the offing." Although his hopes were misplaced, Graydon pressed on, noting in January that "none of the attorneys in the Civil Rights Division is under Civil Service and that if the administration has any desire to change the 'attitude' of the Civil Rights Division, all of the present personnel can be replaced." Senator Strom Thurmond, a Republican since 1964, advised school districts to hold out and await the new administration's policy, guaranteed to be more amenable to southern mores. The proposed plan Graydon devised for Elloree was "frankly a 'stall,' as [he hoped] that there [would] be some change in the attitude of the

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At the all-black schools, the percentages were 82.1 to 17.9 in favor of freedom of choice while at the (minimally) integrated schools the percentages were 95.7 to 4.3 in favor of freedom of choice.

[36]Order, *Whittenberg v. Greenville*, 13 September 1968. DWR Papers, *Brunson v. Clarendon School District #1*.

Department of Justice after January 20." Despite assuring his fellow segregationists that the plans he was developing were a stall, Graydon had insisted to U.S. Attorney Klyde Robinson in November that "we are doing what we can in those two districts [Cameron and Elloree] to obtain meaningful desegregation."[37]

The Elloree plan was a simple one in which the school board promised not to discriminate in enrollment, pupil assignments, or any number of other institutional matters. But it was very general: there were no specific plans to integrate the schools in any way—merely assurances that the school district *would not* discriminate. Essentially, it amounted to a continuation of a free-choice plan. Not surprisingly, the government objected to it. Freedom of choice had led to only nine black students in white schools in 1967-68 (one percent), and only 16 the following year (1.8 percent). Only one black teacher worked at Elloree Public School, and only one white teacher taught at Elloree Training School (the school for African Americans).[38]

In Cameron, after all the white teachers either retired or resigned after being reassigned in 1968 and no white students showed up for school in the 1968-69 school year, the district was left with only two schools to operate. St. John's went from first through twelfth grade, and Cedar Grove went through the seventh grade. White students

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[37]Graydon to Robinson, 4 December 1968; Graydon to J.P. Dufford (Superintendent, Cameron Public Schools), 4 December 1968; Graydon to Dufford, 21 January 1969; Graydon to M.G. Austin (Superintendent, Elloree Public Schools), 4 December 1968; Graydon to Klyde Robinson, 7 November 1968. DWR Papers, Calhoun County/Orangeburg County. Note: when I use "Robinson" alone, I am referring to David W. Robinson.

[38]School Enrollment Plan for Elloree District for 1969-70, *U.S. v. Elloree School District Number 7 Orangeburg County, South Carolina*; Plaintiffs' Objections to Defendants' School Enrollment Plan for 1969-70. *U.S. v. Elloree School District Number 7 Orangeburg County, South Carolina*. 29 January 1969. DWR Papers, Calhoun County/Orangeburg County.

were either going to Wade Hampton Academy or transferring out of the district, which the superintendent made quite easy. Cameron High School considered leasing its gymnasium to Wade Hampton, but was advised against it given the federal suit. However, in Elloree, teacher desegregation was proceeding, though at a glacial pace.[39]

Clarendon County officials also believed that freedom of choice was the best plan for them and filed their return in December 1968. They argued that switching to a zoning plan would not lead to an appreciable level of integration, but it is important to note that under a zoning plan, twenty-five white children would end up attending the district's black schools. (Fifty black students would go to white schools: it would have resulted in more integration in any case.) Those twenty-five white children, the board expected, would probably switch to the private school. The board also noted, predictably, that the black students lagged behind the whites, meaning that the "educational opportunities" of white students would be threatened by integration of that sort.[40]

The board also sent a note to parents asking them whether they preferred zoning or a freedom of choice plan. Eighty-five percent chose freedom of choice. Faculty and staff desegregation was minimal at best: six individuals, four of whom were white,

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[39]*U.S. v. School District Number Two, Calhoun County, South Carolina.* (Hereafter referred to as *U.S. v. Calhoun 2.*) Desegregation Plan for 1969-70. n.d; Plaintiff's Objections to Defendants' Desegregation Plan for 1969-1970. *U.S. v. Calhoun 2*; Graydon to Dufford, 17 September 1968; Graydon to Judge Donald Russell, 19 September 1968. DWR Papers, Calhoun County/Orangeburg County.

[40]Return of the School District to the Order of September 13, 1968. *Brunson v. Board*, pp. 3-4. DWR Papers, *Brunson v. Clarendon School District #1.*

worked at schools of the other race. The two black staff members worked with both black and white schools.[41]

In February 1969 Matthew Perry attacked the rationalizations of the school board as "legally irrelevant." He argued that the reasons the school board gave for continuing a freedom of choice plan—white flight, parental preference, black student achievement, and the disproportionate number of black students—simply should not matter.[42]

In Elloree, the new plan which was to go into effect for the 1969-70 school year met with the usual dismay from white officials: school attorney Augustus Graydon, in a letter to David Robinson regarding the proposed plan for Elloree, said that "[t]he thing that we cannot live with is assigning white children to the Negro school," which Graydon apparently feared might result if HEW had its way. In a letter to Leon Panetta, Graydon noted that the implementation of full integration would lead to "a monolithic Negro system of public education" in the county, as it already had in an adjoining district.[43]

The sticking point in Clarendon Two continued to be the use of any sort of freedom of choice plan, and the government lawyers called for any alternative, such as pairing or zoning, which could achieve the objective of a unitary system. School Board attorney Marion S. Riggs and Robinson responded by arguing that the changes that had taken place in Clarendon Two met with "high community acceptance," without which

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[41]Return of the School District to the Order of September 13, 1968. *Brunson v. Board*, p. 5. DWR Papers, *Brunson v. Clarendon School District #1*.

[42]Plaintiffs' Memorandum in Opposition to Defendants' Plan, 20 February 1969, p. 3. *Brunson v. Board*. DWR Papers, *Brunson v. Clarendon School District #1*.

[43]Graydon to Robinson, 19 May 1969; Graydon to Leon Panetta, 19 May 1969. DWR Papers, Calhoun County/Orangeburg County. Panetta at the time was director of the Civil Rights Office in the Department of Health, Education and Welfare.

"no public institution can render an acceptable service. School Board attorney Joseph O. Rogers remained hopeful that "the new administration [Nixon's] will not press this theory"—that *Green* "require[d] the abandonment of freedom of choice."[44]

Meanwhile, Matthew Perry also attacked the school district's response, arguing that the court should issue a decree calling for immediate implementation of a genuine desegregation plan for the 1969-70 year. The plan would be based on the report of the Office of Education, which called for the establishment of attendance zones, reassigning of teachers, and integration of all the other "services, facilities, activities and programs of the district."[45]

On 27 March 1969 the state Department of Education issued a "Status Report of School Desegregation in South Carolina" which noted that 34 districts had received federal approval of their plans. Fourteen districts had not yet received approval of their plans. Six districts, threatened with subpoenas from the Justice Department, submitted briefs to defend their plans. Of those, two districts had had their federal funds terminated. Several districts were in various phases of hearings before a reviewing board. Twelve, including the ones discussed in this chapter, were operating under court orders to desegregate.[46] Most continued to thwart desegregation through the courts. However by

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[44]Plaintiff Intervenor's Motion for Supplemental Relief, n.d.; Return, n.d., p. 5; Rogers to DWR, 11 Jan 69. DWR Papers, Clarendon County.

[45]Response to Plan of Desegregation Submitted by the United States Office of Education, n.d., Exhibit A, Proposed Decree, pp. 5-8. DWR Papers, Clarendon County.

[46]Status Report of School Desegregation in South Carolina, 27 March 1969, David W. Robinson Papers, Desegregation Files, 1954-1974. File Compliance, *Civil Rights Act of 1964—Title VI Court Orders*, Report of Program Officers OE, EEO, Title IV: Pre-Trial Conference of School Districts Under Order of Court; Status Report on School Desegregation in South Carolina, 1964-1965, 1969. The twelve districts were: Charleston

this time judges were becoming more proactive in the case of recalcitrant defendants, especially since they were under the close eye of the Appeals Court.

Judge Martin's 31 March order in the consolidated cases met opposition again from Darlington school board attorney Benny Greer. In addition to more mundane objections, Greer also contended that the order was

> in direct contradiction to the established system of separation of powers of the various departments of the United States Government. . . . [T]he cooperation of the Judicial and Executive Branches of the Government to impose any plan of operation or any decree upon a party litigant is an effective denial of the due process of law since it deprives the parties in litigation of a source of independent determination of justiciable issues.

As late as 30 May, the school board was still holding out against any desegregation plan designed by HEW. In fact, Orangeburg and three Clarendon districts also refused to adopt plans set forth for them by HEW.[47]

In Clarendon County delay built on delay. In June Robinson asked the court for a hearing on the matter, and in October he requested an extension for developing a desegregation plan to December. The board feared an "exodus" of white students from the schools if the HEW plan was used. Matthew Perry submitted a proposed decree that would end any delays and force the district to integrate its schools immediately based on

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20 (since integrated into the county); Clarendon 1, 2, and 3; Darlington, Dorchester 2 and 3; Greenville; Lexington 1; Orangeburg 5 and 7; and Sumter 2.

[47]Motion for a Rehearing, for Relief from Order or, in the Alternative, for an Amendment of the Order of the Court, *Stanley v. Darlington*, 3 April 1969; Greer to Judge Martin, 30 May 1969. DWR papers, Darlington county; Robinson to Sidney B. Jones (attorney for Dorchester county), 14 May 1969. David W. Robinson Papers, Desegregation Files, 1954-1974. File Dorchester County, *USA v. Dorchester District 1, DeLee v. Dorchester District 3, Dorchester District 2*, 1969. Hereafter referred to as DWR Papers, Dorchester County.

recommendations of the U.S. Office of Education, to integrate faculty and staff through reassignment, and to require annual reports of the progress toward desegregation.[48]

On 23 July 1969, Hemphill issued yet another order in the Clarendon Two case, in this instance discussing the notion of freedom of choice at some length:

> "Freedom-of-choice" as a process of obtaining equal (in quality) education has every connotation of justice. It gives the individual the right to choose his course. It preserves the American ideal that every individual is consequential and important, and his desires are to be respected. The very inclusion of the sacred word "freedom" incites a glow of patriotic hope and fervor. No judge could avoid its practice, if it produced the desired result: equal quality education for *all* Americans, white[,] black, red and yel-
> low. . . .
>
> Perhaps the romance of the phrase obscured the objective for which it was coined. . . . If freedom-of-choice had produced results here, this court would be quick to endorse a continuation of such a plan and practice. Not only has it miserably failed to accomplish, but the record has every appearance of deliberate effort to deny the Negro children of the school district equal education. . . . A dual system of schools, based on racial separation, has been maintained, and in *this* school district freedom-of-choice has been a subterfuge rather than a producer.
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> This is not to say that the trustees have not pursued [desegregation] in good faith. . . . It is to be remembered that they live in the communities involved. Their chief tormentors come from Washington and New York, or other distant places, and can escape from the problems at pleasure. The "school board" has to live with the problems, in the racial climate of the district, seven days a week. It would indeed be fortunate if the community gave the board the cooperation and direction necessary to accomplish that which, in the absence of voluntary response, the court must direct.[49]

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[48]Petition and Supporting Memorandum, p. 2, 3 June 1969, *Brunson v. Board*; Robinson to Simons, 28 October 1969; Response to Plan of Desegregation Submitted by the United States Office of Education, n.d. *Brunson v. Board*. DWR Papers, *Brunson v. Clarendon School District #1*.

[49]Order, 23 July 1969, pp. 7-9. DWR Papers, Clarendon County.

For 1969-70, Judge Hemphill delayed immediate implementation, but he did order the district to begin desegregating the staff, including ordering extensive in-service training during the upcoming school year. Part of this program included the establishment of bi-racial teams of teachers to assist in the implementation of the program. Teachers would ultimately spend a total of four weeks teaching in the schools of the other race. (The district objected to this on the grounds that the greater number of black teachers would have white teachers in black schools for more than one four-week period, and that students would ultimately have as many as three teachers in one year.) Hemphill also ordered that students should also participate by spending some time in schools for the other race, with activities scheduled by the professional staff. During the school year, student organizations would meet with their counterparts from the other schools. Busses would pick up all the students on a given route regardless of what school they attended.[50]

Hemphill's order required the district to fully integrate in 1970. Going further than the district would have had to if it had voluntarily desegregated, Hemphill determined what school buildings would be used for what grades. The previously white Manning High became the high school for all the district's grade 9-12 students. While the previously black Manning Training School would be zoned for the district's middle school students, the various primary schools would be zoned to accommodate as many students as possible, including the use of portable class rooms for all but the new high school.[51]

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[50]Riggs to Hemphill, 21 Aug 69; Order, 23 July 1969, pp. 10-13. DWR Papers, Clarendon County.

[51]Order, 23 July 1969, p. 14. DWR Papers, Clarendon County.

Predictably, the district objected, this time by calling for progressive integration of the schools starting with the first grade in 1970-71 and adding a grade each year thereafter. Robinson privately suggested that the district "make plans to sell the community on the plans. This might include a dignified press release, appearances before parent-teacher groups, civic clubs, etc." At the same time, he recommended that "[t]he Board should explore the possibility of submitting alternate plans for 1970-71 and thereafter. One such plan might be the assignment of pupils on the basis of impartially administered educational achievement tests." In August, Robinson wrote Riggs again, noting that in Charleston, Judge Martin allowed the district to have one high school for college prep and another for vocational work. Perhaps, he suggested, Clarendon Two could try the same thing. In September Robinson, still trying to develop alternatives to the judge-imposed plan, worried that Hemphill's plan would drive white children from the schools or lead to mass resignations of white teachers. When Riggs revealed the Board's grade-a-year plan to Robinson in October, Robinson responded that Hemphill would reject it out of hand, since other courts had consistently rejected such plans. Perry, noting that all the parties had to agree before such an alternative could be proposed, called the plan a "mockery" in his filing opposing the plan.[52]

Judge Simons also in July 1969 issued a new order in the *Brunson* case. He decided that the freedom of choice plan should remain in effect for 1969-70. In March he had ordered the district to confer with representatives from the Department of Health,

[52]Substitute Plan, filed 7 November 1969; DWR to Marion S. Riggs, 24 July 1969; DWR to Riggs, 12 Aug 69; DWR to Riggs, 12 Sept. 69; DWR to Riggs, 7 Oct 69; Plaintiff's Opposition to Plan of Desegregation Submitted by Defendant, n.d., p. 2. DWR Papers, Clarendon County.

Education, and Welfare, but they were unable to develop an acceptable desegregation plan by the summer. He did, however, address the issue of faculty desegregation, directing the board to apply to HEW for funds to improve the facilities and to supplement teacher salaries. He also directed the district to continue to meet with HEW to develop a workable desegregation plan for the fall of 1970.[53]

Conversely, by the summer of 1969, Orangeburg District Five schools still had not reached a terminal plan for desegregation. In June Judge Simons invited the parties to an informal hearing in which he directed the school board "to reopen consultations with officials from the Office of Education" in order to determine a solid final plan. W.J. Clark wrote to Jesse Jordan of the Division of Equal Educational Opportunities of the Office of Education to inform him that the school board had agreed to accept and implement the 1969-70 portion of the Office's proposed plan. The district was also currently working with the Desegregation Consulting Center established at the University of South Carolina with federal funds to develop a final plan. Clark realized that a terminal plan for 1970 had to be determined, but was daunted by the problems associated with implementation. The school board favored a unitary high school, but that would require extensive new building, as well as a change in the debt limit. Pairing of schools would also be workable—as well as more "acceptable" to the people of the district—but would also require "extensive modifications" to the existing plant. The upshot of Clark's letter was to ask for a further delay in preparation to October.[54]

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[53]Order, 18 July 1969. *Brunson v. Board*, p. 3. DWR Papers, *Brunson v. Clarendon School District #1*.

[54]Clark to Jordan, 7 July 1969. DWR Papers, File Orangeburg county.

In August 1969 Simons issued his final order in *Adams v. Orangeburg*. Adopting the HEW plan for desegregation for the district, Simons basically quoted the plan into the record. Implementation would take place over two years. In 1969-70, the plan was designed "to prepare the community for accepting school desegregation with a more positive attitude" as well as to prepare the administration and teachers to deal with a new system. Phase I of the 1969-70 transitional year consisted of summer workshops for teachers and administrative staff. Phase II required the establishment of a bi-racial advisory committee for the district, Human Relations councils for each school, pairing of faculties as much as possible to achieve greater parity, and regular meetings of administrators to map out the next year's moves, followed by "intensive curriculum workshops" in the summer of 1970. Attorneys for the plaintiffs argued that a zoning plan should be implemented in 1969, but Simons, "convinced that the defendants have acted in good faith in the operation of the District's schools under its freedom of choice plan," allowed the less-drastic 1969 plan to go forward. Simons realized that the freedom of choice plan had not achieved appreciable integration (less than seven percent black population in white schools, no whites in black schools), but the administrative difficulties of immediate implementation were, he thought, insurmountable. Nevertheless, he only gave the district until the first of November to develop a "desegregation plan conformable to the constitutional rights of all of the pupils in its school systems . . . in compliance with the prevailing law of the land. . . .[55]

The district's proposal for 1970 included plans for zoning of the elementary schools which, in most cases, would create relatively well balanced student racial

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[55]Order, 8 August 1969, *Adams v. Orangeburg*. DWR Papers. Orangeburg County.

populations. The one exception, Nix Elementary, would have a 96:4 percent ratio of black to white students. Students in middle and high schools, with the exception of rising ninth graders, would be allowed to continue at their present schools or transfer. The reasons for deciding upon this plan were that both high schools were full, curricula had differed over the years, and students were involved in extracurricular activities.[56]

With a few modifications recommended by HEW, the plan was accepted in December 1969. The *Adams* plaintiffs, joined by a group of white parents calling itself H.O.P.E. (Help Orangeburg Public Education), filed an appeal of Judge Simons' order, arguing that, "[i]n the light of *Green* . . . the Orangeburg schools should, and must be, completely integrated '*now*'." "The plan approved by the District Court . . . violates . . . Supreme Court mandates, in that the plan provides integration *in form* but creates and maintains segregation *in fact*."[57] The H.O.P.E. parents' motives must ultimately be questioned, however. The schools to which their children would go under the new plan were all schools that would have black majorities, including Nix Elementary, which would only have 27 white students in a body of 731. The parents felt "strongly that they [were] not afforded equal protection of the laws . . . by having their children used as the tokens by which token integration [was] achieved."

In the fall of 1969, the schools of Clarendon One remained virtually segregated. The black schools remained all black; the white schools had achieved no more than token integration. (Summerton Elementary had 12 black student out of 157; Summerton High

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[56]Desegregation Plan, 15 October 1969, *Adams v. Orangeburg*. DWR Papers, Orangeburg County.

[57]Brief of Amicus Curiae, August? 1970, *Adams v. Orangeburg*. DWR Papers, Orangeburg County.

had 16 out of 127.) Perry petitioned for immediate relief, demanding an end to further delay based on fears of "white flight" and requesting that the defendants be given only three days to respond to his motion.[58]

Almost desperately, Robinson wrote to H.A. Roberts in November. He proposed a plan to assign students based on zoning, but "provide that any child assigned to a school where his race was in the majority could transfer to any other school." In doing this, Robinson hoped that "the result would be a school system with which the people could live. . . ." He wrote:

> If the Negroes prefer to go to their own schools those assigned in 1970 to Summerton High and Summerton Elementary could elect to transfer out since Negroes would be in the majority in those schools (as in all other schools). This might leave a majority white in these two schools. Admittedly this plan would leave a minority white in all other schools because the Court, under existing decisions, cannot give a child who is in the minority in a school the right to transfer out. These white children might elect to go to private school. However there is a chance of keeping some whites in the public schools under this plan.[59]

In January, Robinson remained hopeful of gaining Perry's consent to continuing the freedom of choice plan, even though Perry had told him that many black parents were still opposed to continuing under it. In *Alexander v. Holmes County Board of Education*,[60] a case from Mississippi decided in October 1969, however, the Supreme Court had ruled that operation of unitary school districts must begin immediately, and Perry submitted his motion to force the immediate administration of a unitary district. Riggs' only hope was

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[58]H.A. Roberts to Robinson, 8 September 1969; Motion for Immediate Relief, n.d. *Brunson v. Board*. DWR Papers, *Brunson v. Clarendon School District #1*.

[59]Robinson to Roberts, 25 November 1969. DWR Papers, *Brunson v. Clarendon School District #1*.

[60]396 U.S. 1218 (1969).

that the hearing on the motion could not be heard in time to bring about integration for the spring of 1970. Robinson agreed that delaying the hearing to prevent transferring students in mid-term was the best approach.[61]

Judge Simons, on 6 March 1970, finally issued the order to desegregate the schools of Clarendon One: the HEW plan for a unitary system in which students would be assigned schools based on attendance zones would go into effect in the fall of 1970, but not before an appeal to the Fourth Circuit as well as to Robert Mardian, the Executive Director of the Cabinet Office on Education for the Vice President. In his letter to Mardian, Robinson reiterated much of his standard argument, and asked for "the help of [his] committee in working out some solution to this problem" though he was unconvinced of Mardian's ability to help. In the event Robinson's assessment turned out to be correct.[62]

The Nixon administration, despite its reliance on a southern strategy, did not bring about drastic changes in the federal government's school desegregation policy. When Robert Finch took over at HEW, he was certainly more willing to compromise than his predecessor had been. When funds for two South Carolina districts (along with three other Southern districts) were to be cut off, Finch allowed the districts to submit plans within 60 days and have the funds retroactively restored. Thus, although there were possibilities for compromise, the Nixon administration was not a puppet of southern

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[61]Robinson to Roberts, 22 January 1970. DWR Papers, *Brunson v. Clarendon School District #1*; Motion for Immediate Relief; Riggs to DWR, 3 Feb 70; DWR to Riggs, 5 Feb 70, DWR Papers, Clarendon County.

[62]Robinson to Mardian, 31 March 1970; Robinson to Roberts, 31 March 1970; Robinson to Roberts, 9 April 1970; Mardian to Robinson, 15 April 1970. DWR Papers, *Brunson v. Clarendon School District #1*.

segregationists either in Congress or in the states. Compromise in the form of more diplomatic enforcement, more technical assistance, and new attention to northern states, all without turning away from the real issues in the South, was the order of the day. In April 1970, Jerris Leonard, a Justice Department attorney, told the state flatly that districts still in a state of non-compliance had to submit plans in ten days or be in serious negotiations by that time or face a federal lawsuit. "[T]he plan must be completely implemented before you open your school doors next fall." The Nixon administration also funded almost $5,000,000 in grants to school districts, the Office of Technical Assistance, or to the Desegregation Consulting Center for making the transition to unitary districts.[63]

In his appeal to the Fourth Circuit, Robinson continued to argue for a freedom of choice plan as well as to appeal to his old arguments of parental preference for freedom of choice, the vast disparity in the numbers of black and white students, the educational achievement differences between the two groups, and the threat of white flight. The white children of the district would be faced with "a 'Hobson's choice'—he must stay in a class with a group two years behind him in education . . . or pay some five hundred dollars a year to go to a small parochial school." Admitting that educational achievement was irrelevant to the issue of desegregation was one thing, and Robinson had no choice, after *Brown v. Charleston,* but to do so; but, he argued, educational achievement could be used to determine what desegregation plan would be used. Robinson further argued that "in efforts to solve desegregation problems some Courts and some HEW officials have become more interested in racial balance than in education." Citing the Civil Rights Act of 1964, Robinson said that "'desegregation' shall not mean the assignment of students to

[63]Paul Wesley McNeill, 74-78. Quotation, p. 77.

public schools in order to overcome racial imbalance." By April Judge Simons had not passed on Perry's motion. Robinson promised Riggs that he would continue to push for some measure of testing, such as would allow the district to place students into different sections within a grade "in order to salvage some education for your white children. . . ."[64]

Perry countered that the case should finally be put to death: again, the arguments that Robinson depended on were not legally relevant, and to continue to rely on them was essentially a waste of time. Contending that the appeal was "frivolous," Perry argued that double costs and fees should be awarded: 16 years was simply too long a time to wait for meaningful desegregation.[65]

The Fourth Circuit, in two separate opinions, upheld Judge Simons' order. The case was heard and decided on 5 June 1970, but Robinson appealed to the Supreme Court for a writ of *certiorari*, and was given an extension to the first of October to file.[66] The Supreme Court ultimately denied the petition.

By September 1970, the desegregation plan was in place and close to implementation. However, the plans for Clarendon One and Two intersected at this point. About thirty white children who lived in Clarendon One wanted to go to school in Clarendon

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[64]Order, 6 March 1970. *Brunson v. Board*; Brief of Appellants, May 1970, *Brunson v. Board*, pp 4-5, 8, 8 note 4, 13, quoting sections 401 and 407 of the Civil Rights Act of 1964. DWR Papers, *Brunson v. Clarendon School District #1*; DWR to Riggs, 6 April 70. DWR Papers, Clarendon County.

[65]Brief for Appellees, n.d. (filed 25 May 1970) *Brunson v. Board*. DWR Papers, *Brunson v. Clarendon School District #1*.

[66]Application for an Extension of Time Within Which to File a Petition for Writ of Certiorari; Order Extending Time to File a Petition for Writ of Certiorari. DWR Papers, *Brunson v. Clarendon School District #1*.

Two. Only about fifteen white children went to school in Clarendon One, and the thirty students in question did not go to school at all, and could not afford private school. Therefore, they wished to transfer to Clarendon Two schools. Robinson considered their desire to transfer as a positive for the Clarendon Two case, however, because adding their numbers to the extremely small white population would enhance the appearance of integration. Riggs thought the transfers would be "questionable." It is not known what happened to these students, although Hemphill did schedule a hearing for later in September.[67]

Blacks were not completely confident that desegregation would actually take place. The Clarendon county NAACP branch petitioned the Education Committee of the NAACP State Conference to ask Perry to seek modifications to the plan including 30 percent black students at Summerton Elementary and Summerton High School, transfer of teachers, an advisory committee, and periodic review of the plan by Simons.[68]

Meanwhile, as a result of an order from the Fourth Circuit, Greenville developed a plan that called for a white-black ratio of 4:1 in its schools. The schools were closed temporarily, but reopened to a successful "integration with grace and style." Darlington county, however, was under the same order and did not submit a plan by the February deadline set forth by the appeals court. As a result, Darlington's schools were integrated under an HEW-designed plan. Governor Robert McNair, who in 1968 had enrolled his daughter in an integrated school in Columbia, expressed his realization to the people of

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[67]Petition, 17 September 1970; Riggs to DWR, 16 Sept 70; DWR to Riggs, 17 Sept 70. DWR Papers, Clarendon County.

[68]L.B. Rivers, Mazie Solomon, and Annie Gibson to Omega F. Newman, 13 May 1970. DWR Papers, Clarendon County.

the state in a televised address on Valentine's Day 1970: "We've run out of courts, and we've run out of time, and we must adjust to new circumstances."[69]

Despite local resistance, by the fall of 1970 twelve districts had unitary systems, forty-eight were readying HEW-approved plans, twenty-two districts operated under court-approved plans, and another eleven were waiting for court orders. Fifteen were still without plans and there were brief delays in some districts as last-minute details were worked out.[70] In the fall of 1970, twenty years after Harry Briggs filed his lawsuit against Clarendon county, the schools of South Carolina were finally desegregated—at least on paper.

In April 1970, with desegregation less than five months away, Robinson wrote, in despair over his failure to maintain segregation, that

> [i]n this country we have created a white man's civilization. That is natural because we came from white Europe and 88 percent of the people in this country are white. . . . This civilization has developed a highly industrialized society . . . [i]t has developed giant corporations and influential labor unions . . . and a democratic form of government. Its failures have also been significant—pollution, wars, poverty, unrest.
>
> Three hundred years ago we brought to this country as slaves black people. . . . These black people have different talents from the white population; talents not necessarily superior or inferior to the white majority but different. The black man excels in physical coordination as professional sports . . . demonstrate on television each week-end. He wins the dashes and the jumps but seldom competes in the distance runs. The black man is a major factor in popular music but seldom appears with a symphony or orchestra. . . .
>
> Because this is a white civilization the curriculum in our public schools is a white curriculum. The average black child has great difficulty in keeping up with the white child particularly in subjects such as mathematics,

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[69]Paul Wesley McNeill, pp. 71, 84. Quotation, p. 79.

[70]Paul Wesley McNeill, p. 82.

> physics and chemistry. The figures published by HEW show that in educational achievement he lags two to three years behind the white child of the same age. . . .
>
> It is now generally accepted that where blacks voluntarily move into a white school and do not constitute more than 30 percent the black benefits from the association with the better prepared white children. But where this percentage is higher than 30 the school rapidly becomes substantially all black and the advantage to the black child is lost and the education of the minority white is adversely affected. . . .
>
> The white child does not flee the black school because it is black but because he cannot obtain an adequate education where the majority has a substantially lower educational achievement. . . .

Among his recommendations, Robinson suggested allowing rural districts with a white population less than 20 percent of the total to retain freedom of choice. "This will result in some schools with a white majority," but "[blacks] have the power to convert the student body to a majority black school at any time." He also believed that faculty desegregation based on following district population lines was less desirable than basing it on the population of the student body at a given school. "Many of our black teachers received their education at all black colleges where educational standards are well below that of the average State University. . . . To throw these black teachers into classes predominantly white is to force them to teach more advanced pupils at a considerable disadvantage." (Of course, when Robinson was arguing for the creation of a law school at State College rather than let John Wrighten into the U.S.C. Law School, he emphasized the basic equality of the two schools.) Robinson claimed to be interested only in the improvement of education, and criticized HEW for "emphasiz[ing] percentages of racial integration. . . . Increased racial integration percentages may not mean better education for either race." To Robert Mardian he wrote:

> I am very much disturbed about the plight of the rural school district where there is not residential segregation. In my judgment the policy of the United States courts and that of HEW is effectively destroying public education for white children in these districts. I cannot believe that this is the purpose of the equal protection clause of the Fourteenth Amendment.[71]

In the final issue of the *Southern Education Report* from June 1969, W.D. Workman had written that "the threat of future discord stems not so much from the prospect of continued and accelerated compliance with the Supreme Court decisions of 1954 and 1955 as from pressures generated by zealots whose obsession for mixing the races goes far beyond the scope of the original court decrees." He went on to complain about the movement of emphasis from education to "integration *per se*," arguing that federal bureaucrats had moved away from the original emphasis to the detriment of the entire process. He quoted the argument in *Plessy* that "if the races are to meet upon terms of social equality, it must be the result of natural affinities. . . ."[72] Clearly, even if desegregation had come, attitudes of respected journalists like Workman and the continuing white flight away from the public schools revealed that attitudes, unlike the law (at least at times), are awfully slow to change.

Nevertheless, the state was finally satisfied with all its efforts to slow the pace of desegregation, or had grown officially tired of dealing with the issue. In September 1970, Robinson said he would not file a *certiorari* petition since the state would not fund it. As Robinson and many other whites had predicted, white flight from the various districts

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[71]Memorandum, Robinson to Gressette Committee, April 1970. David W. Robinson Papers, Desegregation Files, 1954-1974. File Legal Memoranda; Robinson to Mardian, 20 April 1970. David W. Robinson Papers, Desegregation Files, 1954-1974. File Correspondence.

[72]W.D. Workman, Jr. "The Decision and the Demands," *Southern Education Report* 4 (June 1969): 18, 21.

became the unfortunate reality. By the end of May 1970 only eighty-nine white students remained in Summerton's public schools. In September 1970 there were eight white students and by 1974 it was down to one. Even as late as 1980 there was only one white student in the public schools of Clarendon county.[73]

In Williamsburg County, which had never been subject to lawsuits to bring about desegregation, initial attempts at integration began in 1965. However, like most districts in the state, Williamsburg did not begin a full-scale effort at desegregating its schools until the fall of 1970. More than one thousand students left the system that fall, nearly eight hundred of them white. In the words of John Egerton, writing for the Southern Regional Council in 1976, "it appeared likely that the schools would soon be left to struggle along ineffectively with a woefully unprepared, overwhelmingly black, totally poor student body."[74]

Nevertheless, Egerton was hopeful. By 1976, Williamsburg had managed to develop an efficient desegregated system in which blacks and whites—the latter in small numbers, granted—were successfully educated in the same classrooms. Early white flight had by 1975 actually turned into an increase in the number of white students in the system. Declines in black enrollment due to emigration were also levelling out. Unlike many other school districts in South Carolina and elsewhere, Williamsburg did not close formerly all-black schools, and it did not reduce the numbers of black teachers and

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[73]Robinson to Charles N Plowden, 11 Sept 1970; Roberts to Robinson, 30 May 70; Roberts to Robinson, 18 September 1970; Robinson to Hon. J. Braxton Craven, 16 August 1974. DWR Papers, Correspondence; Wolters, p. 165.

[74]John Egerton, *School Desegregation: A Report Card from the South* (Atlanta: Southern Regional Council, 1976), p. 21.

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administrators. Discipline was no problem, and the percentage of students who went on to higher education had doubled since 1968 to 25 percent. While two of the most rural schools were still almost all black, most of the schools had reasonable black:white ratio of students and staff. District Superintendent R.C. Fennell was generally pleased, but cautioned that mere desegregation without efforts to improve education quality would not have been enough to bring about the positive changes that Williamsburg experienced. Mary Harper, who had been hired in 1968 to initiate a kindergarten program, summed it up best when she said, "I personally believe that the best thing that ever happened to the public schools was the 1954 Supreme Court decision outlawing segregation. We're very slow to internalize it, slow to change our attitudes and our behavior, but the changes are taking place, and we'll be the better for them."[75]

[75]Egerton, pp. 22-23. Quotation p. 24.

EPILOGUE

South Carolina's role in the litigation campaign for civil rights was not, with the exception of a few instances, a prominent one.[1] However, the cases brought to the federal courts of South Carolina reveal the determination of black South Carolinians to win their rights and the equally fierce determination of white South Carolinians to maintain white supremacy. When prevention proved impossible, whites used the legal machinery of the nation to delay the onset of complete desegregation. However, while South Carolina's role in civil rights litigation may have been less prominent than that of other states, the effect of litigation on both black and white participants, as well as the state itself, has been profound.

While black voting increased following the Elmore and Brown cases from the 1940s, it grew slowly. By 1970, because of increasing activism and the effects of the Voting Rights Act, there were 213,000 registered black voters in the state, though that represented less than a quarter of those eligible. Black voters, as they increased in numbers in the late 1960s, also increased in power. In 1970, African Americans elected three black representatives to the General Assembly, the first since the 1890s. Four years later there were thirteen black legislators. Black members of the state House of Representatives formed a caucus in 1974 as well. By 1990 there were 322 elected black

[1]The exceptions include the voting cases that followed *Smith v. Allwright*—*Elmore v. Rice* and *Brown v. Baskin*—and of course *Briggs v. Elliott*. Other South Carolina cases of import, but which were not examined in this work—because they were never heard in the federal district courts—are *Hamm v. City of Rock Hill*, 379 U.S. 306 (1964), which established the doctrine of abatement for sit-in prosecutions; and *South Carolina v. Katzenbach*, which established the constitutionality of the Voting Rights Act of 1965.

officials in the state.[2] The re-entry of black voters into the political system fractured the Democratic consensus in the state, but because of the state's racial legacy the fragmentation of the Democratic party did not lead to a genuine dual-party system.

A 1981 study conducted by political scientist Patrick Cotter suggests that following the Second Reconstruction in South Carolina, race, while still an important factor, became secondary in importance to class (measured by education level) in determining voter behavior. He argues that the shift toward the Republican party that characterized the South in the 1960s can be explained more effectively by class than race.[3]

The shift by white Southerners toward the Republican party, however, appears to be a reaction to growing black power in the Democratic party brought on by two factors: the shift by the party nationally to a civil rights platform begun in 1948 and the increasing participation by African Americans in the political process. While Cotter argues that lower education levels were more likely to lead to Democratic voting, it seems clear that even by 1970, black South Carolinians were more likely than whites to suffer the impediment of less education. The historical reality that African Americans were held at the bottom of the economic and educational ladder in addition to the social scale also needs to be considered in any analysis of voting even as late as the 1990s. The fact that whites who were less educated were more likely to vote Democratic could also be explained in a number of ways: the Democratic party's devotion to the eradication of

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[2]Walter Edgar, *South Carolina: A History* (Columbia: University of South Carolina Press, 1998), pp. 541-542, 563.

[3]Patrick F. Cotter, "Southern Reaction to the Second Reconstruction: The Case of South Carolina," *Western Political Quarterly* 34:4 (December 1981), pp. 543-551.

poverty could have appealed to poor, uneducated whites; more likely, voting Democratic was a conservative tradition that was difficult for individuals with less education to break until relatively recently.

At any rate, South Carolina has become a secure bastion for the Republican party, at least on the national scene. The closest a Democratic presidential candidate came to victory among South Carolina's whites since 1964 was in 1976, when Jimmy Carter carried 44 percent of the white vote (and nearly all the black vote) and won the state. By 1995, however, only 42 percent of local Democratic managers could say with confidence that their party was getting stronger; 85 percent of Republicans believed that party was improving. However, while most Republicans were confident that their party could attract black votes, Democrats were equally confident that black voters would remain predominantly Democratic. During the early 1990s, the Democratic Party hemorrhaged politicians: eighteen sitting Democratic politicians left the party, fourteen of them for the Republicans.[4] However, the prospect of a lottery, ostensibly for the purpose of improving education in the state, and the financial support of gaming interests, along with a number of political *faux pas* by the Republican incumbent, allowed the Democratic candidate for governor to win the 1998 election.

In other areas, tactics put in place to justify unequal treatment during resistance to civil rights have been legitimated as "colorblind" by conservative jurists. Teacher testing, implemented by whites then targeted in the 1940s and early 1950s for its deleterious effect on black teachers' salaries, continued to be an issue. In 1966 the Palmetto Education Association sued Clarendon County District One because the district passed a

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[4]Edgar, pp. 560-562.

resolution which gave teachers salary supplements based on their scores on the National Teachers Exam: the higher the score the greater the supplement. Judge Robert W. Hemphill ruled that the mere fact that the supplements were based on NTE scores was not enough to justify an injunction to prevent enforcement of the school board's resolution.[5] In 1977, a three-judge panel upheld the system against a suit brought by the Justice Department which the South Carolina Educational Association, the National Education Association, and several individual teachers joined. The judges—Clement Haynesworth, Donald Russell, and Charles E. Simons—were "unable to find any discriminatory intent" and concluded that "defendants' use of the NTE for salary purposes bears the necessary relationship to South Carolina's objectives with respect to its public school teaching force."[6]

School desegregation is another difficult area. Even though the state moved toward full desegregation in 1970, South Carolina continued to deal with the effects of discrimination. For example, when desegregation came to Darlington County in the fall of 1970, white students by the thousands boycotted schools. However, after a group of whites attacked and overturned a school bus the following March, an all-white jury found them guilty. Elsewhere in the state, guards were necessary to control violence as individual incidents had the potential to turn into racial unrest—and often did.[7]

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[5]*Palmetto Education Association, Inc., et al. v. School District Number 1, Clarendon County, South Carolina, et al.*, 12 Race Relations Law Reporter 2025 (1968).

[6]*United States v. State of South Carolina*, 445 F. Supp. 1094 (1977), pp. 1102, 1109.

[7]Edgar, p. 544.

One effect of the creation of unitary school districts was the frequent destruction of school-related identities for many communities, white and black. A number of high schools held their last graduations in June 1970. Some schools were combined with others to form new entities; students would then go through the process of renaming school mascots, newspapers and yearbooks. Finally, many white parents took their children out of the public school system entirely. Although it is difficult to determine which private schools were formed as a response to integration, South Carolina in 1966-67 had an estimated 44 private schools with approximately 4,500 students.[8] Nearly 200 new private schools were built during the late 1960s and early 1970s, and by 1975 South Carolina had a higher than average percentage of students attending private schools.

At Summerton, following integration in the fall of 1965, a private school run by the Summerton Baptist Church opened its doors. By 1967 there were 100 students in 12 grades in the school, and two of the five members of the public school Board of Trustees enrolled their children in the private school. However, even by 1967 some parents had returned their children to the public schools, and one confessed to Dwayne Walls of the *Charlotte Observer* that he would have taken his children out of the private school if he could do so without "losing face."[9]

Some private school graduates in South Carolina, including those of the flagship of the "integration private schools," Wade Hampton Academy in Orangeburg, received a small pin with a representation of the Confederate Battle Flag with the word

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[8]Jim Leeson, "Private Schools for Whites Face Some Hurdles," *Southern Education Report* 3 (Nov. 67): 15 [13-17]. Table on p. 15.

[9]Jim Leeson, "Private Schools for Whites Face Some Hurdles," p. 16.

"SURVIVOR" printed along the bottom of a circular frame around the flag. It symbolized the fact that they had survived a second time the incursion of the federal government into the affairs of the South.[10]

Today, South Carolina ranks near the bottom in many statistical categories that measure education, and as late as 1985, one of the many cases that went to federal court made its way back. The case of *Whittenberg v. Greenville*, which had been settled in 1963 without a trial, found its way into the courtroom of Judge George Ross Anderson in 1984. A number of groups including the NAACP attempted to intervene in the case, arguing that the county continued to operate a dual school system. Despite rulings from Judge Martin in 1970 establishing an 80:20 ration of white to black students (and a subsequent ruling in 1976 by Judge Robert F. Chapman to lower the ratio of black to white students to 76:24), several groups petitioned Judge Anderson for the alleviation of a number of grievances. Essentially, the various groups were concerned about continuing inadequacies at some schools, the alleged closing of some black schools while new schools were built or old ones expanded in white neighborhoods, the alleged disproportionality of the burden of busing on black students, the relaxation of racial ratios, and general discrimination against black students regarding educational opportunities. One of the groups represented white parents from predominantly white areas near the city of Greenville who intervened in the case to "protect their interests."[11]

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[10]Jim Leeson, "Private Schools for Whites Face Some Hurdles," p. 13.

[11]*Whittenberg v. School District of Greenville County, South Carolina*, 607 F. Supp. 289 (D.C.S.C. 1985), quotation on p. 293.

Anderson held several hearings on the matter and ordered the District to prepare student assignment plans to minimize busing, student dislocation, and costs. Public hearings held concurrently led to the adoption of a plan designed to meet Anderson's directives while making some adjustments to the racial mix in the county's schools. Anderson ruled that Greenville County was maintaining racial balances "to a remarkable degree since Judge Martin's Order in 1970." The school closings and conversions, he ruled, were not the result of discriminatory intent. Ultimately, he found that the intervenors' concerns were important, but that "they involve questions which do not rise to Constitutional status and which are properly heard in the administrative or political forum."[12] School desegregation issues, which the state had spent so much time and energy arguing should be taken out of the hands of the courts, had become so detailed and involved—and desegregation itself rather successful despite setbacks and shortcomings—that the courts were now content to allow districts to make their own way.

Racial incidents have not disappeared, but there is cautious optimism among some that South Carolina has become a biracial society. As late as 1989, a restaurant in Aiken refused to serve black customers and an integrated youth group was denied access to a pool in Saluda County. Other incidents cropped up from time to time. Each time, outrage from the public was immediate and action by the government was swift and decisive: for example, the Aiken restaurant soon found itself without a liquor license and Republican Governor Carroll Campbell, who had led a motorcade to the capital to protest the end of

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[12]*Whittenberg v. School District of Greenville County, South Carolina*, 607 F. Supp. 289 (D.C.S.C. 1985), quotations on pp. 295-296, 304.

freedom of choice plans in 1969, invited the Saluda youth group to a picnic at the governor's mansion.[13]

Differences over race and justice continue, however. In 1962 a resolution of the General Assembly called for the flying of the Confederate battle flag over the State House. It was intended, ostensibly, as a celebration of the Confederate centennial.[14] Yet the flag still flies above the capital city. Proponents of the flag argue that their position is not based on race while those who want the flag to come down contend that the symbolic racism represented by the flag insults the dignity and humanity of many South Carolinians, and not just those of African decent. The battle over interpretation and meaning will no doubt continue for some time.

The South Carolina Conference of the NAACP, which was so important in the litigation campaign throughout the thirty years covered in this work, remains an important organization in the lives of black South Carolinians. Local issues such as the mistreatment of alleged criminals in Greenville County as well as statewide issues like the Confederate flag controversy continue to mobilize members of the organization. While the organization does not enjoy a vast membership (as indeed it never has), it remains an important force for civil rights and justice in the state.

As this work deals primarily with litigation in the field of civil rights, the law itself also merits some attention. Black and white South Carolinians contended in the courts over issues of law and justice during the thirty years under discussion by appealing to their respective but differing interpretations of the rule of law. The nature of civil rights

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[13]Edgar, p. 567.

[14]Edgar, p. 538.

after 1970 supports a contention that ultimately, the rule of law triumphed. Civil rights issues continue to be heard in the federal court system while civil rights activism at the grass roots has significantly diminished. Whites seeking to challenge affirmative action couch their attacks in the language of civil rights and take to the courts, which increasingly support their claims. The legal complexities of school desegregation, as illustrated by the 1985 iteration of the Whittenberg case, have made it virtually impossible to solve such problems administratively, despite judicial admonitions to the contrary. The legal struggle over civil rights began as a simple strategy to win justice through the courts. It has left us with a noble tradition of litigation but a much less clear-cut meaning of justice.

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