

LEE V. MACON COUNTY BOARD OF EDUCATION: THE POSSIBILITIES OF FEDERAL ENFORCEMENT OF EQUAL EDUCATIONAL OPPORTUNITY

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ABSTRACT

Lee v. Macon County Board of Education shows the evolution of the role of the three branches in enforcing the equal protection clause in public education in Alabama. All three branches initially acquiesced in the separate but equal doctrine. The executive and the judicial branches rejected the doctrine in Brown, but the legislative branch remained silent until 1964. Despite Congress' failure to authorize a federal role in desegregation, the Department of Justice was an active participant in Lee beginning in 1963. When Congress finally did act in 1964 to authorize such suits, it encumbered the authorization with severe limitations. Congress also created a parallel enforcement mechanism, in Title VI of the 1964 Act. In later years, Congress and the executive have emphasized general reform of education as the answer, in legislation such as No Child Left Behind. My paper explores the role of the federal government in the statewide desegregation of Alabama's public schools. Federal court litigation in Lee v. Macon County Board of Education led to an extraordinary remedy and illustrates the potential for the Departments of Justice and Education to play a key role in reviving the quest for equal educational opportunity through desegregation.

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ARTICLE

“[T]here is nothing more difficult to plan, more doubtful of success, nor more dangerous than the creation of a new system.”¹

“He that will not apply new remedies must expect new evils; for time is the greatest innovator.”²

During my twenty two years (1964 to 1986) as a trial and appellate lawyer in the Civil Rights Division of the United States Department of Justice (“the Division”), the Division treated school desegregation as a priority issue. Today, by contrast, school desegregation has almost disappeared as a goal, reflecting “the limited focus education receives as a civil rights issue these days.”³

School desegregation, once considered the key to equal educational opportunity, is embattled. From one side, critics say that desegregation has accomplished little, pointing out that 38% of black students attend schools that enroll very few white students.⁴ Other critics challenge the very premise of desegregation, which, they claim, has destroyed a valuable institution in the African-American community, the all-black school.⁵ Critics of *Brown v. Board of Education*⁶ (*Brown*) have ranged from arguing it is poorly reasoned to suggesting it unrealistically sought more change than society would tolerate.⁷ Revisionism is rampant. The Supreme Court has placed major obstacles in the way of race-based

1. NICCOLO MACHIAVELLI, *THE PRINCE* 15 (Appleton-Century Crofts Inc. 1947).

2. FRANCIS BACON, *BACON’S ESSAYS: WITH ANNOTATIONS* 248 (Richard Whately, ed. 1858).

3. Michael Selmi, *The Obama Administration’s Civil Rights Record: The Difference an Administration Makes*, 2 INDIANA J. OF L. & SOC. EQUALITY 108, 117 (2013).

4. *E Pluribus . . . Separation*, Gary Orfield, John Kucsera, and Genevieve Siegel-Hawley, THE C.R. PROJECT/PROYECTO DERECHOS CIVILES (September 2012), http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/mlk-national/e-pluribus...separation-deepening-double-segregation-for-more-students/orfield_epluribus_revised_omplete_2012.pdf. The statistical picture is complex, but some of the racial isolation may stem from declarations of unitary status. Charles T. Clotfelter et al., *Federal Oversight, Local Control, and the Specter of “Resegregation” in Southern Schools*, 8 AM. L. & ECON. REV. 347, 381–82 (2006). *But see* U.S. Comm’n on Civil Rights., *Becoming Less Separate? School Desegregation, Justice Department Enforcement, and the Pursuit of Unitary Status* xii (2007) [hereinafter *Becoming Less Separate?*]. Neither Clotfelter’s nor the Commission’s research reflects the effect of the *Louisville* decision, which rolls back desegregation in districts that have been declared unitary. *See generally* *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist.*, 551 U.S. 701 (2007).

5. Adam Fairclough, *The Costs of Brown: Black Teachers and School Integration*, 91 J. OF AM. HIST. 43, 44, (June 2004) <http://www.umass.edu/legal/Hilbink/250/Adam%20Fairclough%20-%20The%20Costs%20of%20Brown.pdf>.

6. 347 U.S. 483 (1954) [hereinafter *Brown*].

7. *See* Michael Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 11 (1994) (noting that rather than immediately causing desegregation, *Brown* acted to crystallize white resistance to the Civil Rights Movement in the South).

efforts to desegregate school systems and has adopted rules that allow school systems that had desegregated to resegregate their schools.⁸

Fifty years ago, the federal government supported private plaintiffs in a landmark case that desegregated ninety-nine school systems in Alabama, *Lee v. Macon County Board of Education (Lee)*.⁹ The government's experience litigating *Lee* suggests that the U.S. Departments of Justice and of Education could play a key role in reviving the quest for school desegregation. These departments successfully supported private plaintiffs seeking school desegregation throughout Alabama. A similar partnership is needed today to reverse increased racial isolation in the public schools.

The core, foundational civil rights issues for African-Americans have been voting and education—both prerequisites to employment, housing, fair law enforcement, and political equality. Voting rights seem at a standstill, while the right to an equal education through desegregation has given way to acceptance of retrogression.¹⁰ The civil rights community is mounting an impressive attack on erosion of voting rights, but has been much less aggressive when it comes to attacking racial isolation in our public schools. Civil rights supporters need to formulate a strategy for responding to the Supreme Court's retrograde school desegregation decisions, as they have with respect to the Court's decision rolling back the Voting Rights Act in *Shelby County v. Holder*.¹¹

The strategy must be long-term. It should include building a judicial record of the harms of racial isolation and the benefits of inclusion. It should also opportunistically address what we can expect each branch of the federal government to do to reduce racial isolation in the public schools. This paper concludes that the most promising course may be

8. See Charles J. Ogletree Jr. and Susan Eaton, *From Little Rock to Seattle and Louisville: Is "All Deliberate Speed" Stuck in Reverse?*, 30 U. ARK. LITTLE ROCK L. REV. 279 (2008); Bd. of Educ. of Okla. Schs. v. Dowell, 498 U.S. 237, 240 (1991); see also *Parents Involved*, 551 U.S. at 709.

9. *Lee v. Macon Cty. Bd. of Educ.*, 267 F. Supp. 458 (M.D. Ala. 1967) [hereinafter *Lee*].

10. See *Shelby County v. Holder*, 133 S. Ct. 2612, 2631 (striking down the coverage formula provision of the Voting Rights Act). *But see* N. C. State Conference of the NAACP v. McCrory, No. 16-1468, 2016 WL 4053033, at *24 (4th Cir. July 29, 2016) and cases consolidated with it (reversing trial court holding that NC laws restricting voting rights did not violate Section 2 of the Voting Rights Act, or other federal laws); *Veasey v. Abbott*, 815 F.3d 958 (5th Cir. 2016) (overturning Texas Voter ID law). See also *Dowell*, 498 U.S. at 237; *Freeman v. Pitts*, 503 U.S. 467 (1992) (allowing unitary systems to reinstate racially isolated student assignments).

11. See generally NAACP Legal Defense Fund, *State and Local Voting Changes Post-Shelby*, (2016) (monitoring changes to state voter rights to prevent further civil rights violations).

to rely on federal enforcement of regulations rather than on private suits to enforce the Constitution or statutes.

The Radical Republican Congress drew the Fourteenth Amendment in exceedingly vague terms: states may not deprive persons within their jurisdiction of “the equal protection of the laws.”¹² While Section 5 of the Fourteenth Amendment arguably would have allowed Congress to help define the content of equal protection, its interpretive power today is limited.¹³ Congress has deferred to the courts. Prior to *Brown*, Congress never challenged the separate but equal doctrine of *Plessy v. Ferguson*¹⁴ (*Plessy*) through legislation.¹⁵ Not until 1964, ten years after *Brown*, did Congress take any steps to enforce *Brown*.¹⁶ As we will see, *Brown* led courts and the executive branch to require major restructuring of school systems in order to eliminate the racial dual school system. Congress continues to lack the institutional will to enact legislation to reduce racial isolation, so further change must come from the other branches of the federal government or from the state and local level.

School desegregation after *Brown* can be viewed as an example of Fourteenth Amendment federalism in action. The Fourteenth Amendment radically restructured the relationship between the federal and state governments by subjecting states to the due process and equal protection clauses. The Fourteenth Amendment also empowered each of the three branches of the federal government to enforce the equal protection clause. Section one of the Fourteenth Amendment implicitly imposes on the federal courts the duty to enforce, if a case is properly brought.¹⁷ Section five explicitly tells Congress that it “shall have power to enforce, by appropriate legislation” the provisions of the Amendment. While the Amendment does not mention the role of the executive branch, Article II of the Constitution requires that the President “shall take care that the Laws be faithfully executed.”¹⁸

12. U.S. CONST. art. IV, §2; U.S. CONST. amend. V.

13. *Oregon v. Mitchell*, 400 U.S. 112 (1970); *City of Boerne v. Flores*, 521 U.S. 507 (1997).

14. 163 U.S. 537 (1896) [hereinafter *Plessy*].

15. See U.S. House of Representatives, *Constitutional Amendments and Major Civil Rights Acts of Congress referenced in BLACK AMERICANS IN CONGRESS*, <http://history.house.gov/Exhibitions-and-Publications/BAIC/Historical-Data/Constitutional-Amendments-and-Legislation/> (last visited May 5, 2016) (showing the gap in time following *Plessy* before Congress passed the Civil Rights Act following *Brown*) [hereinafter *Constitutional Amendments*].

16. *Id.*

17. See, e.g., *Strauder v. West Virginia*, 100 U.S. 303 (1880).

18. U.S. CONST. art. II, § 3.

*Youngstown Sheet & Tube Co v. Sawyer*¹⁹ suggested the simplistic message that the legislature makes policy, the court interprets the law, and the executive enforces it.²⁰ However, the equal protection clause of the Fourteenth Amendment was vague, implicitly inviting the three branches to interpret whether and how it applied to school segregation. However, the legislature made no policy and left it to the executive and courts to fill the resultant vacuum and used the Fourteenth Amendment as a sword, reversing the Madisonian norm that “the legislative authority necessarily predominates.”²¹ President Truman and his successors had policy reasons for wanting to end the official racial caste system. The Supreme Court took a pragmatic look at the facts and the underlying policy of the Fourteenth Amendment in reaching its conclusion that separate was never equal.

The story of *Lee* illustrates both the federalism and separation of powers aspects of school desegregation. It also illustrates the operation of general principles and specific consequences of those principles. In the Voting Rights Act of 1965, Congress had declared that African-Americans and the Justice Department would no longer have to litigate voting rights cases county by county.²² In 1967, without encouragement from Congress, the federal district court in *Lee v. Macon County Board of Education* decreed that African-Americans and the Department of Justice would no longer have to litigate school desegregation cases school district by school district, and it placed on the state the burden of showing that the school systems in Alabama were following effective school desegregation plans.²³

The Macon County story from 1963 to 1972 unfolds in four chapters. Chapter One begins after over eighty percent of the county’s population was freed from chattel slavery. The State of Alabama, abetted by the federal government, imposed a racial caste system designed to preserve the subordinate position of the newly-freed slaves. In Chapter Two, increasingly assertive Macon County African-Americans, this time with the aid of the federal courts and executive, overthrow the racial caste system, despite efforts of white state

19. 343 U.S. 579 (1952).

20. *See id.* at 584–585 (1952) (stating that courts refrain from interpreting constitutional questions until called to do so, and stating that the President’s power to issue orders must come from the Constitution or from an act of Congress).

21. ALEXANDER HAMILTON, JAMES MADISON, & JOHN JAY, *THE FEDERALIST PAPERS* 176 (Mentor ed. 1961).

22. *See South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

23. 267 F. Supp. 458 (M.D. Ala. 1967).

politicians such as George C. Wallace, to interfere with change. By Chapter Three, Governor Wallace has over-played his hand, and the federal executive, this time with Congressional backing, helps Anthony B. Lee (by then a college graduate) and his lawyer, Fred Gray, obtain a statewide school desegregation order. Finally, Chapter Four tells the story of the implementation of the federal court order and of Title VI of the Civil Rights Act of 1964. This article describes the first three chapters and part of the fourth and then draws lessons from them. It concludes with a call for a revival of the federal role in seeking to end the continued racial isolation found in many school systems throughout the United States.

I. THE RACIAL CASTE SYSTEM, 1870-1954

For over 80 years, Macon County African-Americans endured separate but unequal education and poverty, and were deprived of the right to vote. However, the very institutions of separation laid the foundation for challenges to denials of equal protection of the laws.

In 1870, 17,727 people lived in Macon County, of whom 12,620, 71%, were classified as “colored.”²⁴ A quarter of the county population lived in Tuskegee, which would become the site of the Tuskegee Institute eleven years later. Booker T. Washington raised money for this school for the newly freed slaves and their descendants, but the State of Alabama appropriated money for the school from the very start.²⁵ The pattern of repression of African-Americans in Macon County mirrored the rest of the deep South, but the Tuskegee Institute’s presence brought to the county a cadre of highly educated and somewhat independent thinking African-Americans.

The federal government endorsed racial segregation.²⁶ This support, ironically, facilitated attacks on segregation, by contributing to the rise of an independent black middle class that was able to challenge the racial caste system. In 1923, the Veterans Administration (VA) opened a hospital for African-American veterans in Tuskegee that was soon staffed by black doctors, nurses, and staff, including Detroit Lee, the father of the named plaintiff in *Lee*. Congress also embraced the separate but equal doctrine in the Morrill Land Grant Act of 1890,

24. *Historical Census Browser*, Univ. of Virginia Library, <http://mapserver.lib.virginia.edu/> [hereinafter *Historical Census Browser*].

25. BOOKER T. WASHINGTON, UP FROM SLAVERY, 177–95 (Doubleday, Page & Co. 1900)

26. See 7 U.S.C. § 323 (1862) (enacting a law that considered funding for separate institutions for black students and white students legal).

extending to the former Confederate States the Morrill Act of 1862, and specifying that “the legislature of such State may propose and report to the Secretary of Agriculture a just and equitable division of the fund to be received under this subchapter between one college for white students and one institution for colored students”²⁷ “Thus, six years prior to *Plessy*, federal law endorsed the principle of legal segregation as legitimate social policy with respect to land grant colleges.”²⁸ Tuskegee Institute became one of the two African-American land grant colleges in Alabama.²⁹ The acceptance of racial segregation by all three branches led to one more dividend for Tuskegee in 1941, when the War Department established a training program there for black pilots, who became the famous “Tuskegee Airmen.”³⁰ These three institutions – the Tuskegee Institute, the VA Hospital, and the Tuskegee Airmen – employed highly educated people who were not economically dependent on white employers or property owners. They became the nucleus that challenged the existing structure of white supremacy.

Macon County has been called “the guinea pig of race relations in Alabama.”³¹ White domination was cemented by ratification of Alabama’s new constitution in 1901, which barred blacks from registering to vote as a practical matter.³² Additional legislation, such as the implementation of a poll tax continued these efforts. 96,000 of the 100,000 African-Americans registered to vote in Alabama in 1900 had been purged from the rolls by 1910.³³ By the 1930s African-Americans in Macon County had become conscious of the importance of education and of the inequalities in the current education system.

27. *Id.*

28. ALBERT L. SAMUELS, *IS SEPARATE UNEQUAL? BLACK COLLEGES AND THE CHALLENGE TO DESEGREGATION* 37 (Univ. of N.C. Press 2004).

29. Encyclopedia of Alabama, *Land Grant Colleges in Alabama*, <http://www.encyclopediaofalabama.org/article/h-1558> (last visited July 30, 2015).

30. ROBERT J. NORRELL, *REAPING THE WHIRLWIND* 97 (Alfred A. Knopf, Inc., 1985). In a more sinister move, the United States executive branch most notoriously lured Macon County African-American men into a study of the progress of untreated syphilis. The subjects were, without their knowledge or informed consent, divided into two groups. One group was treated, while the other group was given a placebo. This Public Health Service study went on from 1932 until finally exposed in the 1970’s. FRED GRAY, *BUS RIDE TO JUSTICE* 294–302 (Revised Ed., 2013) *See also* Centers for Disease Control, *U.S. Public Health Service Syphilis Study at Tuskegee: The Tuskegee Timeline*, <http://www.cdc.gov/tuskegee/timeline.htm> (last updated Feb. 19, 2016).

31. *See* Brian K. Landsberg, *Enforcing Desegregation: A Case Study of Federal District Court Power and Social Change in Macon County, Alabama*, 48 L. & SOC’Y REV. 867, 870–871 (2014).

32. *Id.* at 877.

33. VIRGINIA VAN DER VEER HAMILTON, *ALABAMA: A BICENTENNIAL HISTORY* 96 (Norton 1977).

One Macon County parent explained why he was sending his child to school: “I’m tired of mortgaging my family. That’s just the reason I’m trying to prepare my little girl.”³⁴ A Macon County minister sermonized that Paul had improved himself by going to school. Although “Most of our boys and girls don’t lak ter go ter school . . . after you git an education there is a chance fer you, you can git a position.”³⁵ As early as 1936, the Southern Regional Conference of the N.A.A.C.P., meeting in Mobile, Alabama, resolved: “We insist that Negro children receive equal training and educational opportunity in the public school system and equal university opportunity.”³⁶

In 1940, Macon County had a population of 27,654, of whom 4,946 were white and 22,708, or 82.4%, were black.³⁷ 17,288 of blacks lived on rural farms, compared to 3,332 whites.³⁸ Tuskegee had a total population of 3,937, comprised of 1,093 whites and 2,844 blacks.³⁹ 521 whites and 2,576 blacks lived in the other towns in Macon County, Shorter and Notasulga.⁴⁰ Despite the substantial numerical superiority of blacks in Macon County, whites had successfully denied them political power. Only 77 blacks were registered to vote.⁴¹

Equally troubling was the dramatic difference in quality of education. White schools stayed open longer, 173 days, compared to 146 days for African-American schools, and featured half the students per teacher, 23.8 to 50.7.⁴² In addition, in the 1938-39 year the school system spent 14.75 times more on white students than on black students in day school.⁴³ In that same year, there was no ratio for capital expenditures

34. CHARLES SPURGEON JOHNSON, *SHADOW OF THE PLANTATION* 134 (University of Chicago Press 1934).

35. *Id.* at 156.

36. NAACP PAPERS, Box G-1, Folder 1, *Resolution Adopted by Southern Regional Conference of N.A.A.C.P.* (Apr. 25–26, 1936). Three years later the Conference once again pledged support to the NAACP’s campaign “to effect an equalization of educational opportunities and of teachers’ salaries, and we urge the Branches to initiate test cases in order to accomplish that objective.” NAACP PAPERS, Box G-1, folder 3, *Report of Resolution Committee, Fourth Southern Regional Conference*, (Apr. 21–23, 1939).

37. *Historical Census Browser*, *supra* note 24.

38. U.S. CENSUS, *Census of Population and Housing*, <http://www.census.gov/prod/www/decennial.html>.

39. *Id.*

40. *Historical Census Browser*, *supra* note 24.

41. JESSIE PARKHURST GUZMAN, *CRUSADE FOR CIVIC DEMOCRACY* 3–4 (Vantage Press, Inc., 1984).

42. *Id.* at 5.

43. TUSKEGEE CIVIC ASSOCIATION, *TRENDS IN SELECTED ASPECTS OF PUBLIC EDUCATION FOR NEGROES IN MACON COUNTY, ALABAMA 1938-39, 1943-44, 1948-49* 6 (Tuskegee Institute 1950).

on black schools relative to white schools, because the district spent no money at all on improving or creating new black schools.⁴⁴ The district likewise spent no money on maintenance personnel, supplies or even fuel or water for black schools.⁴⁵

Further, more white students were able economically to attend school. In the 1938-39 school year, only 73.4% of black children were enrolled in school, and only 56.9% of those enrolled attended class on a daily basis.⁴⁶ That number declined sharply in high school, to a mere 78% of enrolled black students attending class on a daily basis.⁴⁷ In comparison, 43.8% of enrolled whites in high school attended class on a daily basis.⁴⁸ The disparity in both learning environment and the ability of black children to attend school led to important differences in education. Although only 2.3% of whites were illiterate, 22.7% of blacks were illiterate.⁴⁹

The organization that represented African American teachers in Alabama observed in 1939 that “Maintenance of separate schools makes it easy for [the Southern] states to deprive Negroes of an equitable share of public school funds Thus, through disfranchisement and the separate school system, the South has excluded the Negro from consideration in the equitable distribution of [state] funds to all citizens of school age.”⁵⁰ By the time of *Brown*, African Americans were dissatisfied with the quality of their children’s education and ready to abandon the tradition of segregation. Most whites were not.

II. INITIAL EROSION OF THE CASTE SYSTEM, 1954-1964

After World War II, African-Americans increased their attacks on the racial caste system. The federal courts ruled favorably on some of those attacks. The federal executive supported attacks on segregated transportation,⁵¹ racially restrictive covenants,⁵² deprivation of the right

44. *Id.* at 7.

45. *Id.* at 8.

46. *Id.*

47. *Id.*

48. GUZMAN, *supra* note 41, at 5.

49. *Id.* at 4.

50. NAACP PAPERS, Box C-197, folder 5, *The Report of the Education Commission of Alabama to the State Teachers Association*, (Mar. 23, 1939).

51. *Henderson v. United States*, 339 U.S. 816 (1950).

52. *Shelley v. Kraemer*, 334 U.S. 1 (1948).

to vote,⁵³ segregated higher education,⁵⁴ and, in *Brown*, the doctrine of separate but equal public schools. The Southern States took steps to protect the racial caste system, and Congress initially stayed on the sidelines. Macon County African-Americans battled both their exclusion from the political process and racial segregation of the public schools.

A. *Establishing the Right to Vote in Macon County*

The first priority of black activists was political equality, based on the theory that political participation would provide a path toward realizing other rights.⁵⁵ The Tuskegee Civic Association [TCA] and its predecessor, the Tuskegee Men's Club, encouraged Macon County African-Americans to register to vote; it sponsored litigation against discrimination in the registration process;⁵⁶ and its leader, Charles Gomillion, brought a landmark case challenging a gerrymander that excluded black registrants from voting in Tuskegee.⁵⁷ As one Macon County black activist put it, the TCA sought "to achieve a type of society in which all citizens [had] the opportunity to participate in societal affairs, and to benefit from and enjoy public services in keeping with their interests, abilities, and needs, without limitations or restrictions based on race, color, creed or national origin."⁵⁸

White leaders in Macon County pushed back. Responding to the TCA's efforts state probate Judge Varner, a leading local conservative, described the black vote as "getting to be a serious menace."⁵⁹ White passive resistance intensified. For extended periods voter registrars failed to meet,⁶⁰ attempted to conceal their location, met in inconvenient locations, and appeared unannounced in the countryside

53. *E.g.*, *Smith v. Allwright*, 321 U.S. 649 (1944).

54. *E.g.*, *Sweatt v. Painter*, 339 U.S. 629 (1950).

55. *See* C.G. Gomillion, *The Tuskegee Voting Story*, 6 *CLINICAL SOC. REV.* 22, 23 (1988) (explaining the TCA objectives as studying and interpreting national civic and political trends to "create intelligent and courageous civic and political action.").

56. *Mitchell v. Wright*, 62 F. Supp. 580, 582–84 (D. Ala. 1945), 154 F.2d 924, 927 (5th Cir. 1946); *Wright v. Mitchell*, 329 U.S. 733 (1946). On a subsequent appeal the defendants "discovered" that they had already registered Mitchell, so he no longer had a claim against them. For seventeen thousand dollars the TCA had registered a single voter. NORRELL, *supra* note 30, at 63, 68. A month after the federal court ruling, the state court also ruled against the TCA. *See Williams v. Wright*, 29 So. 2d 295, 297 (1947); *Mitchell v. Wright*, 69 F. Supp. 698, 702 (M.D. Ala. 1947); *Denied Voting Privilege: Tuskegeens File Appeal*, *PITTSBURGH COURIER*, Aug. 11, 1945.

57. Gomillion v. Lightfoot, 364 U.S. 339 (1960).

58. GUZMAN, *supra* note 41 at 11 (quoting a speech by Gomillion).

59. NORRELL, *supra* note 30, at 39.

60. *Id.* at 69, 71.

to discourage applications from rural blacks.⁶¹ At times, the board of registrars lacked a quorum to meet.⁶²

For a brief period, a registrar appointed by populist governor Jim Folsom at the end of 1948, registered hundreds of black voters before the other members of the registration board stopped attending meetings, causing the board to once again become inactive.⁶³ Although ceasing registration temporarily halted the TCA, at this point too many blacks were registered for politicians to safely ignore. In 1950, a notoriously racist sheriff, Pat Evans, was replaced by Preston Hornsby, who was chosen by virtually every voting black, in the first black political victory in eighty years.⁶⁴

As a result of black voting power, some white politicians, such as Hornsby, became more responsive to the black community. Yet whites strongly resisted the idea of a black holding office, as demonstrated when Jessie Parkhurst Guzman, a black candidate for the Macon County School Board, ran and lost on a strictly racial vote in 1954.⁶⁵

State Representative Samuel Martin Englehardt, Jr, elected in 1950, quickly became the leading opponent of black equality in Macon County.⁶⁶ Englehardt was a talented politician who used his wry sense of humor and public events, such as dove hunts, to appeal to voters.⁶⁷ His family had deep ties to Macon County, where he owned a 6,500 acre plantation near Shorter.⁶⁸ Arguing that increased black rights would lead to black domination, he campaigned on a six-word platform: “I stand for white supremacy, segregation.”⁶⁹ Upon election, Englehardt worked tirelessly to diminish and slow black voter registration in Macon County, sponsored a gerrymander to exclude most blacks from the city limits of Tuskegee,⁷⁰ and mounted an unsuccessful effort to dissolve Macon County and merge it with counties with more white population.⁷¹

61. *Id.* at 71, 122.

62. *Id.* at 90.

63. *Id.* at 74–75.

64. *Id.*

65. GUZMAN, *supra* note 41, at 85.

66. *Gerrymandering: New Use for an Old Device*, POLITICS, Jan. 13, 1958 [hereinafter *Gerrymandering*].

67. NORRELL, *supra* note 30, at 80.

68. *Gerrymandering*, *supra* note 66.

69. *Id.*

70. Ed Cony, *Negroes Boycott Town To Fight Gerrymander Voiding Their Votes*, WALL STREET J., Nov. 5, 1957.

71. TUSKEGEE CIVIC ASSOCIATION, CRUSADE FOR CITIZENSHIP, SIGNIFICANT EVENTS IN

Until 1957, African-Americans in Macon County had relied on the limited resources of the TCA and NAACP to vindicate their rights under the Fourteenth and Fifteenth Amendments. The first civil rights act of the twentieth century, the Civil Rights Act of 1957, however, authorized the Attorney General to bring voting rights suits and also created the Civil Rights Commission to investigate and report on racial discrimination. The Commission held hearings in 1958 about discrimination in Macon County voter registration. In February 1959, in its first Alabama suit under the Act, the United States sued Alabama and the Macon County Board of Registrars, alleging racial discrimination in voter registration in Macon County. In March of 1961, U.S. District Judge Frank M. Johnson found that the registrars had discriminated against African-American applicants for voter registration.⁷² As a result of the orders in the case, by 1963, three thousand black voters were registered, and although a further six thousand remained unregistered, the numbers of black and white voters were practically equal.⁷³ Thus, all three branches of the federal government cooperated to enforce the Fifteenth Amendment. The stage was set for an effort to desegregate the schools.

*B. The Federal Executive Helps Desegregate Macon County Schools
Despite Congress' Inaction*

While no branch of the federal government had yet sought to enforce equal educational opportunity, by 1950, the Alabama NAACP had switched from seeking to equalize resources between black and white schools to seeking desegregation. It disavowed the “separate but equal doctrine,” asserting “vigorous opposition to any and all forms of compulsory segregation on the basis of race”⁷⁴ At the Alabama NAACP convention in Anniston that year, NAACP executive secretary Walter White decried the “Negro-white caste system” and called for an end to discrimination in the public schools, noting that “the most direct educational discrimination against the Negro can be found in the South’s segregated school system.”⁷⁵ The following year White spoke once again to the Alabama NAACP convention, stressing

THE CRUSADE FOR CIVIC DEMOCRACY IN MACON COUNTY 1 (1965); NORRELL, *supra* note 30, at 97.

72. United States v. Alabama, 192 F. Supp. 677, 679 (1961).

73. NORRELL, *supra* note 30, at 136.

74. NAACP PAPERS, Box A542, *News Release, Segregation Condemned by Alabama Conference* (Nov. 2, 1950).

75. NAACP PAPERS, Box A542, *Achieving Our Goals of First Class Citizenship*.

the cost of segregation. He urged the “enlightened South” to “[p]ersuade churches, trade unions, parent-teachers association and others to oppose the philosophy and propaganda of fear of the Byrneses, Byrds, Talmadges and Fielding Wrights that horrible things will occur if segregation is broken down.”⁷⁶ The President of the Tuskegee NAACP branch argued in 1951 that “there can be no real elevation or equality in politics, in education, in housing, in transportation, or in the courts, until segregation is eliminated from our system and our thinking. That is our goal.”⁷⁷

White segregationists in Macon County were at the fore of the fight against desegregation. In 1952, Martin Englehardt was concerned by the potential for school desegregation, so he had the Alabama Legislative Reference Service prepare a memorandum regarding options for maintaining segregation.⁷⁸ The memo was deeply pessimistic about the ability of the state to continue segregating schools, and suggested that the only effective measure would be to use state funds to operate private schools.⁷⁹

On the eve of *Brown*, the NAACP drafted questions for candidates in the May 1954 Democratic primary, including “[w]ill you be willing to abide by the decision of the United States Supreme Court and sponsor legislation designed to carry out the spirit of this decision in the pending school cases?”⁸⁰ Jim Folsom won the primary, and the NAACP drew up for presentation to the incoming administration “a simple statement as to what the Negro in Alabama expects” from it. The expectations included “spend no public funds for the erection of segregated public schools,” but said nothing about abolishing racially segregated public schools.⁸¹ After the decision in *Brown*, the Tuskegee Branch newsletter urged that new members join so that the NAACP could “put to full use, the instruments fashioned by our highest judiciary, and work incessantly toward a true emancipation of the Negro.”

Because the NAACP and the TCA did not have resources to pursue both voter discrimination and school segregation, it was not until 1963

76. NAACP PAPERS, Box A542, *Excerpt from Remarks by Walter White* (Nov. 10, 1951).

77. NAACP PAPERS, Box A563, Folder 7, Joseph A. Berry, M.D., *The Chaff which the Wind Driveth Away* 10 (Dec., 1951).

78. Charles M. Cooper, *Segregation in Public Schools* (Legislative Reference Service 1952).

79. *Id.* at 3.

80. NAACP PAPERS, Box A543, Folder 1, *Political Yardstick* (Mar. 27, 1954).

81. NAACP PAPERS, Box A543, Folder 1, *What the Negro in Alabama Wants* (May 30, 1954).

that Macon County African-Americans brought suit to desegregate their public schools. When their attorney, Fred Gray, filed *Lee* in January 1963, not a single black student attended public school in Alabama with a white student. However, suits against some bigger school districts—Birmingham, Mobile, and Huntsville—and the University of Alabama were approaching the stage when some desegregation orders were inevitable.⁸² The wall of separation was first breached at the University of Alabama:⁸³ in the spring of 1963, when Governor Wallace symbolically barred Vivian Malone and James Hood from enrolling, after which they enrolled.⁸⁴

Through 1963, Congress had not acted to enforce *Brown*, so the executive branch had no statutory authority to sue for desegregation.⁸⁵ However, United States District Judge Frank M. Johnson, who had the *Lee* case, saw a need for a federal presence in race discrimination litigation and requested the United States to enter its appearance as an amicus curiae with all the rights of a party.⁸⁶ Assistant Attorney

82. *Armstrong v. Bd. of Educ. of the City of Birmingham*, 333 F.2d 47, 53 (5th Cir. 1964); *Davis v. Bd. of Sch. Comm'rs. of Mobile Cty.*, 219 F. Supp. 542, 542 (S.D. Ala. 1963); see also Challen Stephens, *Timeline: Race and Schools in Huntsville*, ALABAMA.COM (2014), http://blog.al.com/breaking/2014/03/timeline_race_and_schools_in_h.html (discussing Huntsville's refusal to defy a federal court order to desegregate in 1963 and the resulting partial integration of Huntsville schools).

83. In 1956 Autherine Lucy's enrollment as a graduate student at the University of Alabama had touched off a riot by a mob of 3,000 persons. Lucy "was the first black student in the history of desegregation to be greeted with organized violence." DIANE MCWHORTER, *CARRY ME HOME: BIRMINGHAM, ALABAMA, THE CLIMACTIC BATTLE OF THE CIVIL RIGHTS REVOLUTION* 99 (Simon & Schuster 2001). She protested the University's response to the riot, and the University seized on this to justify expelling her; the federal court upheld her expulsion. The federal government had played no role in the Lucy case, but President Eisenhower's assistant, Sherman Adams, had worried that the success of the rioters would set a dangerous precedent for future action. See TAYLOR BRANCH, *PARTING THE WATERS: AMERICA IN THE KING YEARS, 1954-1963* 181 (Simon & Schuster 1989); see also J. EDGAR HOOVER, *RACIAL TENSION AND CIVIL RIGHTS* 9 (Mar. 1, 1956).

84. Even before his inauguration, Wallace had told Senator John Sparkman of Alabama that although he felt impelled to appear "bodily" to resist integration of the University, he was "under no misapprehension as to his ability to accomplish anything." MICHAL BELKNAP, *CIVIL RIGHTS, THE WHITE HOUSE, AND THE JUSTICE DEPARTMENT, 1945-1968* 452 (Garland Press 1991). Before standing in the door Wallace "urged pro-segregation zealots to stay away." Bob Duke, *Keep Away, Wallace Tells Pro-Segregation Zealots*, MONTGOMERY ADVERTISER, June 1, 1963. "Wallace would contend later that his symbolic action kept disruptive elements away, keeping the peace at the University of Alabama, in contrast to the riot that left two people dead the previous September, when James Meredith enrolled at the University of Mississippi." JACK BASS, *TAMING THE STORM: THE LIFE AND TIMES OF JUDGE FRANK M. JOHNSON, JR. AND THE SOUTH'S FIGHT OVER CIVIL RIGHTS* 207 (Doubleday 1992).

85. See *Constitutional Amendments*, *supra* note 15.

86. BASS, *supra* note 84, at 162.

General for Civil Rights Burke Marshall agreed to do so.⁸⁷ In essence, the court and the executive were executing an end run around Congress' inaction.

Participation in *Lee* marked a transition of the role of the United States in school desegregation cases. While the United States had taken a substantive position in *Brown I*⁸⁸ and *II*⁸⁹ and in the recently decided case, *Goss v. Board of Education*⁹⁰, it had entered district court cases as an amicus only when beleaguered school systems or district courts had sought help in enforcing existing decrees.⁹¹ In *Lee*, the United States would, as in the past, take positions on interference with court orders. In addition, however, it would now become involved in the substance of the relief and in monitoring compliance. Recognizing the resources the federal government had at its disposal, both the Department of Justice and Judge Johnson desired that the DOJ be "deep into the supervision of the school system" and relieve the private attorney of some of the burden of monitoring compliance.⁹² According to plaintiff's attorney Fred Gray, Judge Johnson "wanted to be sure the U.S. government was a party to the action as the case progressed so that when he entered an order he could expect the U.S. government to enforce it."⁹³

Believing that orderly integration under their own control was better than the sort of detailed order issued to the board of registrars in a comparable voting discrimination case, the school board prepared to integrate the schools.⁹⁴ Despite George Wallace's bravado in his inauguration speech in January, the courts in the Birmingham, Mobile, Huntsville and Macon County cases all ordered desegregation to begin in the Fall 1963 semester.⁹⁵ In Macon County, the all-white Tuskegee high school was to be opened to applications from African-American

87. *Id.*

88. 347 U.S. 483 (1954) (holding state-imposed racial segregation of public schools unconstitutional).

89. 349 U.S. 294 (1955) (holding that school systems must desegregate "with all deliberate speed").

90. 373 U.S. 683 (1963); Brief of United States, *Goss v. Bd. of Educ.*, No. 217, 1963 WL 105481 (Oct. 1962).

91. *E.g. Cooper v. Aaron*, 358 U.S. 1 (1958).

92. John Doar, *Report on Status of School Desegregation – Macon County, Alabama*, Aug. 26, 1963.

93. GRAY, *supra* note 30, at 205.

94. GUZMAN, *supra* note 41, at 153.

95. Landsberg, *supra* note 31, at 873. Wallace had vowed, "I draw the line in the dust and toss the gauntlet before the feet of tyranny and I say segregation now, segregation tomorrow, segregation forever." George C. Wallace, *Inaugural Address* (Jan. 14, 1963).

students. The school board selected 13 of the 27 who applied. The school superintendent made plans for a smooth opening day, and Fred Gray and John Doar, deputy to Burke Marshall in the U.S. Civil Rights Division, met with the black students to prepare them for integration.

Wallace sent Alabama State Troopers to prevent school from opening as scheduled. The following week he again sent the troopers, this time to keep the African-American students from enrolling in white schools in Macon County, Birmingham and Mobile. Assistant Attorney General Marshall filed a suit against Wallace and others to enjoin interference with the school desegregation orders, and the five federal judges from the three judicial districts in Alabama convened as a court and enjoined the defendants from interfering with the court-ordered desegregation.⁹⁶ Although Congress had not specifically authorized the Attorney General to bring a suit such as this, the court in the *Wallace* case recognized the interest of the United States and did not even mention the lack of statutory authority. It ruled, “The plaintiff [the United States] is suffering and, unless an injunction is entered, will continue to suffer immediate and irreparable injury as a consequence of the impairment of deprivation of rights under the Constitution and laws of the United States.”⁹⁷

Wallace, however, continued to interfere. He helped create a private school for the white students from Tuskegee High School and arranged to transport white students to the other two white public high schools in the county.⁹⁸ His state board of education ordered that Tuskegee High be closed and that its few remaining students (all Black) be assigned to the Black high school.⁹⁹ Fred Gray joined Wallace and state officials to the *Lee* case and, with partial support from the United States, sought relief against them.¹⁰⁰ The court ordered that the Black students who had been assigned to Tuskegee High School be reassigned to the two remaining White high schools.¹⁰¹ The court, now comprised of three judges because Gray was attacking the constitutionality of

96. *U.S. v. Wallace*, 222 F. Supp. 485 (M.D. Ala. 1963).

97. *Id.* at 488. This ruling adopted verbatim the language of paragraph 32 of the Complaint. *Id.*

98. *Lee v. Macon Cty. Bd. of Educ.*, 231 F. Supp. 743, 747–48 (M.D. Ala. 1964).

99. *Id.* at 748.

100. Ironically, one of the added defendants, State Superintendent of Education Austin Meadows, had approved Fred Gray’s application for the State of Alabama to pay for his legal education out-of-state, because the University of Alabama Law School was not open to black students at the time. Testimony of Austin Meadows, Transcript of Nov. 30, 1966 hearing at 22 (1966).

101. *Lee*, 231 F. Supp. at 751.

Alabama's tuition grant statute, enjoined Wallace from further interference with school desegregation throughout Alabama and held the tuition grant statute unconstitutional.¹⁰² Although asked, it declined to order statewide desegregation. Its order, though, set the stage for the next chapter.

III. THE EXECUTIVE BRANCH AND THE ROAD TO STATEWIDE RELIEF

A. *The Federal Role Unfolds*

Lee v. Macon County Board of Education began as a suit to desegregate only one school system, as was the general practice. Given the resistance to desegregation in the Deep South, this approach could have required thousands of individual school desegregation suits. Fred Gray's motion to join the state defendants and order statewide desegregation essentially asked the court to treat school desegregation on a wholesale basis, rather than retail. He had been inspired by the Governor's intransigent actions to ask for a bold remedy that no court had to that time awarded.¹⁰³ The remedy he requested would have shifted the burden of desegregation from plaintiffs in each school district to the state. While the court was not yet ready to impose this unprecedented form of relief, its decision enjoining the state officials from interfering with court-ordered school desegregation anywhere in Alabama laid the foundation for the novel and sweeping relief that eventually emerged in the case

The court announced its ruling eleven days after the effective date of the Civil Rights Act of 1964.¹⁰⁴ The legislation added nothing of immediate relevance to the issues before the court, and the court did not mention the new statute in its opinion.¹⁰⁵ Instead, recognizing that state officials have an affirmative duty to eliminate racial discrimination in the public schools, the court rested its ruling squarely on *Brown*,¹⁰⁶ the case involving Governor Faubus' interference with

102. *Id.* at 755.

103. GRAY, *supra* note 30, at 107.

104. Compare Civil Rights Act of 1964, 78 Stat. 241 (enacted July 2, 1964) with *Lee*, 231 F. Supp. at 743 (decided July 13, 1964).

105. *Id.*

106. *Id.* at 756–57.

school desegregation in Little Rock,¹⁰⁷ and later Supreme Court and Fifth Circuit cases implementing *Brown*.¹⁰⁸

The court rendered its decision in a time of increasing racial turmoil. The “Mississippi Summer” that the Student Nonviolent Coordinating Committee (SNCC) was devoting to voter registration activities had exploded with the disappearance in June of three civil rights workers.¹⁰⁹ SNCC was also active in Selma, where black efforts to use public accommodations that the new Civil Rights Act had opened to them led to more lawless behavior by Sheriff Clark.¹¹⁰ School openings in Alabama, however, occurred without major incident, with slight increases in desegregation both in 1964 and 1965.¹¹¹ By 1965 in Macon County, 32 African-Americans were attending formerly all-white schools and eight whites were attending formerly all-black schools.¹¹² Statewide, slightly over 1,000 African-American students in Alabama (.34% of Alabama’s black students) were attending formerly all-white schools.¹¹³

Preparing for the opening of schools, in 1964, DOJ attorney Jonathan Sutin contacted school authorities, civic leaders, law enforcement authorities, and black leaders.¹¹⁴ Tuskegee High School was to be reopened, and it was unclear how many whites would show up; only a handful had signed up for the desegregated grades.¹¹⁵ Rumors were flying in the white community about a flood of black students enrolling, but in fact only 14 in grades 9-11 were expected.¹¹⁶ Sheriff Hornsby would use his limited force [two or three] to watch the school, but there was concern that the Chief of Police could not be trusted.¹¹⁷

107. *Id.* at 752.

108. *Id.* at 753.

109. HOWARD BALL, *MURDER IN MISSISSIPPI: UNITED STATES V. PRICE AND THE STRUGGLE FOR CIVIL RIGHTS*, (Univ. of Kan. Press 2004).

110. HOWARD ZINN, *SNCC: THE NEW ABOLITIONISTS* 149–66 (South End Press 2002).

111. See *Report on the Desegregation in the Schools in Alabama*, President John F. Kennedy (Sept. 9, 1963) (describing how 11 schools successfully carried out desegregation without issue).

112. Brief of the United States at App. C, Table VI, *Lee v. Macon Cty. Bd. of Educ.*, 270 F. Supp. 859, (M.D. Ala. 1967) (No. 604-E).

113. *Id.*

114. Jonathan R. Sutin, Interviews in Preparation for School Desegregation in Macon Cty., Ala., to DOJ File 144-100-2-1 (Sept. 4, 1964) (on file with National Archives and Records Administration, College Park, Md., box 1, section 3) [hereinafter *Sutin to DOJ File*].

115. See Frank M. Johnson, Jr., *School Desegregation Problems in the South: An Historical Perspective*, 54 MINN. L. REV. 1157, 1168 (1970) (explaining how only 35 out of 250 white students showed up for the first day of class after reopening Tuskegee High School).

116. *Sutin to DOJ File*, *supra* note 114.

117. Cf. *State Police Patrol 2 Alabama Schools*, CHI. TRIB., Feb. 5, 1964 (discussing how Governor Wallace sent state troops to integration sites to “keep the peace” but also “to resist”).

The school board hired a night watchman, who resigned after receiving threats; a second resigned, also citing to threats; a third was hired.¹¹⁸ In spite of all this, 19 white teachers were expected at the K-12 Tuskegee High School.¹¹⁹ It was reported that the all-white private school, Macon Academy, had over 300 enrollees and that Governor Wallace had donated \$6,000 of his campaign funds to it.¹²⁰ Although not expecting trouble, the Attorney General alerted the President; as President Johnson's assistant, Lee White, reported to him, "the Justice Department appears to have taken the necessary proper precautions and either National Guard or federal troops can be called into action if needed." The Department had twenty U.S. Marshals in the area, and the Army made plans for a backup emergency force of 1800 Alabama National Guardsmen.¹²¹

Sutin, with John Doar, returned to the county on the eve of school opening and attended a meeting of black parents and school children and a few white parents, including the sheriff and the local banker. By late October, Doar could report that white enrollment had slightly risen and that some students from the Academy had transferred back to Tuskegee High School because of concerns about educational quality, costs, and the atmosphere of hate at Macon Academy. The school had enough students to field an all-white football team.¹²² By the second semester, white enrollment had stopped its rise, amid rumored pressure on 40 Macon Academy students not to transfer back to the integrated school. Still, 95 whites were attending the high school grades at Tuskegee High.¹²³

118. *Sutin to DOJ file, supra* note 114.

119. In the spring the FBI had reported that no white teachers were expected to teach in the desegregated school in the fall. FBI Memorandum Regarding Racial Situation School Integration Matters in Macon Cty., Ala. to DOJ file 144-100-2-1 (May 26, 1964) (on file with the National Archives and Records Administration, College Park, Md., box 1, section 2) [hereinafter *FBI Memorandum*].

120. *Sutin to DOJ File, supra* note 114.

121. Letter from Lee White, Assoc. Special Counsel to the President, to President Johnson (Sept. 5, 1964), attaching the Memorandum From Nick Katzenbach, Regarding School Desegregation in Alabama Pursuant to Federal Court Order, to President Johnson (Sept. 4, 1964) (on file with LBJ Presidential Library, Box 51, Executive HU 2-5) (The President wrote, "Do I need to do anything," and White responded that he did not).

122. However, the school appears not to have fielded a team in 1964 or 1965. *Tuskegee Indians*, ALABAMA STATE FOOTBALL HISTORICAL ASSOC., <http://www.ahsfhs.org/teams2/teampage.asp?Team=Tuskege> (last visited Feb. 5, 2015). Macon Academy fielded its first football team that year. *Macon Academy Knights*, ALABAMA STATE FOOTBALL HISTORICAL ASSOC., <http://www.ahsfhs.org/teams2/teampage.asp?Team=Macon%20Academy> (last visited Feb. 5, 2015).

123. Memorandum from John Doar, Acting Assistant Attorney Gen to St. John Barrett,

The question in 1963 had been whether the schools would desegregate. Neither the private plaintiffs nor the United States had suggested what that would mean. It was not clear what the African-American community wanted: was it access to the white school or a more systemic and complete desegregation. By 1965 the question was not whether, but how and how much.

During the ten years that had elapsed since *Brown* the Supreme Court had provided little guidance on the “how” and “how much” questions. The Southern states had adopted so-called pupil placement laws, based on the premise that “[s]omebody must enroll the pupils in schools. They cannot enroll themselves; and we can think of no one better qualified to undertake the task than the officials of the schools and the school boards having the schools in charge.”¹²⁴

The Alabama law required the school authorities to consider a long list of criteria in making student assignments. Among them were “the psychological qualification of the pupil for the type of teaching and association involved,” “the possibility or threat of friction or disorder among pupils or others,” and “the maintenance or severance of established social and psychological relationships with other pupils and with teachers.”¹²⁵ Implicitly, these criteria preferred assigning black students to black schools and white students to white schools.

The question the school desegregation cases presented to the Department of Justice was whether to simply apply the Supreme Court cases allowing the use of pupil placement plans and deliberate speed or to argue in favor of more robust relief that would completely desegregate the school system.¹²⁶ As a law enforcement agency, not a civil rights organization, what should guide the Department in making that decision: the rather vague Supreme Court rulings or some vision of a desired final result? This question was not yet a burning one, as the NAACP Legal Defense Fund, the main civil rights organization litigating school desegregation claims, had been content to settle initially for the enrollment of a few African-Americans in formerly white schools.¹²⁷

Second Assistant, *Regarding School Desegregation in Lee v. Macon County School Board*, and DOJ File 144-100-2-1 (Jan. 30, 1965) (on file at the National Archives and Records Administration, College Park, Md., box 1, section 3) [hereinafter *Doar to Johnson*].

124. *Carson v. Warlick*, 238 F.2d 724 (4th Cir. 1956), *cert. denied*, 353 U.S. 910 (1957).

125. *Shuttlesworth v. Birmingham Bd. of Educ.*, 162 F. Supp. 372 (N.D. Ala. 1958).

126. *See, e.g., Shuttlesworth v. Birmingham Bd. of Educ.*, 358 U.S. 101 (1958), *aff'g mem.* 162 F. Supp. 372 (N.D. Ala. 1958).

127. *See* JACK GREENBERG, *CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF*

The Macon County school board had proposed a desegregation plan in 1964 under which desegregation would not be complete until the 1969–70 school year. Moreover, desegregation would be accomplished by allowing students to transfer schools, rather than by non-racial initial assignments. The court approved only the proposal for 1964–65.¹²⁸

In April 1965, Sutin and Fred Gray had another desegregation case before Judge Johnson. After the hearing, the three of them returned to the Judge’s chambers and discussed Macon County. Judge Johnson asked Sutin to check on the plans for next year. Sutin did so and returned to report to Judge Johnson that the school board proposed to add only the second grade to the list of desegregated grades. Judge Johnson and Sutin agreed that that was too slow, and the judge directed Sutin to prepare a plan desegregating three more grades in the fall and to cover all grades in 1966–67.¹²⁹ Judge Johnson’s proactive stance included asking DOJ to investigate the all-white Macon Academy.¹³⁰ In May 1966 the school district began distributing free choice forms.

By June 1965, the Fifth Circuit Court of Appeals answered the question of when desegregation should be completed. Judge Wisdom wrote for the court:

The time has come for foot-dragging public school boards to move with celerity toward desegregation. Since May 17, 1954, public school boards throughout the country have known that they must desegregate their schools. And as the law moved with rising tempo to meet changing conditions, school boards might have foreseen that further delays would pile up rather than spread their nettlesome problems. This Court has urged school authorities to grasp the nettle now. We have put them on notice that, ‘The rule has become: the later the start, the shorter the time allowed for transition.’¹³¹

The court also recognized and gave deference to a new player that had entered the picture—the United States Department of Health, Education and Welfare (HEW) (subsequently split into two departments: the Department of Education and the Department of Health and Human Services). HEW administered federal aid to education programs, which became a significant source of revenue for

LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION 252 (1994).

128. Order of August 7, 1964, *Lee v. Macon Cty. Bd. of Education*, (unreported).

129. *Sutin to DOJ File*, *supra* note 114.

130. *Doar to Johnson*, *supra* note 123.

131. *Singleton v. Jackson Mun. Separate Sch. Dist.*, 348 F.2d 729 (5th Cir. 1965).

local school boards when Congress passed the Elementary and Secondary Education Act of 1965.¹³² Title VI of the Civil Rights Act of 1964 proscribed federal agencies from extending federal financial assistance to programs or activities that discriminated on account of race. HEW had issued its first set of Guidelines for Desegregation in April 1965.¹³³ The court said, “There should be a close correlation . . . between the judiciary’s standards in enforcing the national policy requiring desegregation of public schools and the executive department’s standards in administering this policy.”¹³⁴

The court adopted HEW’s 1967 deadline for completion of school desegregation.¹³⁵ While the court did not address the content of the desegregation plan, it had set a precedent for looking to HEW on matters of educational policy and implementation, directing that “As to details of the plan, the Board should be guided by the [Office of Education Title VI Guidelines].”¹³⁶ Because Macon County schools were operating under a court ordered desegregation plan, they did not have to separately show HEW that their desegregation plan met HEW requirements. However, the court, following the Fifth Circuit’s decisions in *Singleton*, ordered the school system to adopt a “freedom of choice” plan, under which all students, in all grades, would choose the school they wished to attend. The order was not confined, however, to student desegregation.¹³⁷ It also required some faculty desegregation, desegregation of student activities, closing of some unequal facilities and equalization of others, and “remedial educational programs to eliminate the effects of past discrimination”¹³⁸

By the summer of 1966 Charles Gomillion was a member of the Macon County School Board,¹³⁹ and the Macon County school superintendent was struggling with faculty desegregation, with some teachers resisting assignment to schools traditionally of another race. However, at least one or two black teachers would be assigned to white

132. Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10.

133. U.S. DEPT OF HEALTH, EDUC. & WELFARE, GENERAL STATEMENT OF POLICIES UNDER TITLE VI OF THE CIVIL RIGHTS ACT OF 1964 RESPECTING DESEGREGATION OF ELEMENTARY AND SECONDARY EDUCATION, April 1965.

134. *Price v. Denison Indep. Sch. Dist. Bd. of Ed.*, 348 F.2d 1010, 1013 (5th Cir. 1965).

135. *Singleton v. Jackson Mun. Separate Sch. Dist.*, 348 F.2d 729, 731 (5th Cir. 1965).

136. *Id.*

137. *Lee v. Macon Cty. Bd. of Ed.*, 253 F. Supp. 727 (M.D. Ala. 1966). The order was signed by all three judges, though the issue was not one that required a three judge court.

138. *Id.*

139. Summary of the Deposition of Dr. C.G. Gomillion at Volume III, 290, *United States v. State of Alabama*, 252 F. Supp. 95 (M.D. Ala. 1966) (No. 2255-N).

schools. The superintendent also expressed concern that over 250 black students and 192 white students had chosen Tuskegee High School; if enrollment were over 60% black, he predicted, the whites would flee.¹⁴⁰

Two years after the first African-American students enrolled in white public schools in Alabama there were signs that resistance to desegregation was weakening. At a meeting of the Alabama Association of Secondary School Principals, a panel of speakers from desegregated districts advised “that integration can be orderly and not detrimental to the school program if enough planning is done beforehand.”¹⁴¹ In August, Auburn University sponsored a conference of school board members and school superintendents to discuss desegregation. The keynote speaker, Atlanta school superintendent John Letson, observed that there was no longer a question whether the schools would be integrated and that “the fear of this problem is much greater than the reality.”¹⁴² He added, “students are students,” regardless of their race.¹⁴³ The Birmingham News editorialized that “the only sensible course is to insure that transition [to desegregation] is handled with a minimum of disruption to the education of all young people, both white and Negro.”¹⁴⁴ A common theme at the conference was that “We are not here to discuss whether to desegregate but how to desegregate.”¹⁴⁵ School opening in 1965 was relatively peaceful compared to the prior two years. However, more storm clouds were gathering.

B. Governor Wallace’s Interference With Federal Enforcement of the Civil Rights Act Leads to A Hearing on Statewide Relief

Even before the Civil Rights Act of 1964 passed, Lee White, Associate Special Counsel to President Johnson, had urged that there be “prompt and coordinated action” by agencies to assure compliance by school districts.¹⁴⁶ HEW’s first step under Title VI was to adopt a

140. Groark-file, DOJ file 144-100-2-1, (Aug. 5, 1966) (National Archives & Records Administration, College Park, Md., box 1, section 3).

141. James Chisum, *Plans Held Key to School ‘Mix’*, THE BIRMINGHAM NEWS, July 28, 1965, at 2.

142. James Chisum, *Not So Bad, Speaker Says; Educators Told to Face Mixing*, THE BIRMINGHAM NEWS, Aug. 16, 1965.

143. *Id.*

144. *Dr. Letson’s Helpful Counsel*, THE BIRMINGHAM NEWS, Aug. 17, 1965.

145. James Chisum, *Slow White Student May Benefit by Mix*, THE BIRMINGHAM NEWS, Aug. 17, 1965.

146. Memorandum from Lee White, Associate Special Counsel to the President, to Lisle Carter, Deputy Assistant Secretary, HEW, and others (May 11, 1964) (on file with the LBJ

regulation in December 1964 that required state and local school authorities to sign an assurance that they would not discriminate based on race as a prerequisite to federal assistance. Rather than halt funding of Southern school systems, most of which were still racially segregated, the regulation allowed continued funding of school systems that were implementing a school desegregation plan HEW deemed “is adequate to accomplish the purposes of the Act and” the regulation under the Act.¹⁴⁷ But the SNCC opined that the regulation and a three page set of instructions from HEW to school systems “were at best sketchy and at worst so vague as to render them absolutely meaningless and ineffective.”¹⁴⁸

The requirement that recipients sign the assurance triggered a confrontation between Alabama’s Governor Wallace and State Superintendent Austin Meadows and HEW.¹⁴⁹ A month after the regulation was published, Meadows noted that Alabama schools stood to lose over \$32 million in federal funds if it did not comply: “We are damned if we sign, but we are twice damned if we don’t [because they could both lose federal money and be sued by DOJ under Title IV of the new Act].”¹⁵⁰ He recounted the gains in black enrollment, teachers’ salaries, new black trade schools, and other advances, and then closed by asking: “will all of this be destroyed by outsiders who either do not understand or do not care enough for either race in Alabama?”¹⁵¹

The stakes for local school systems dramatically increased with the passage of Title I of the Elementary and Secondary Education Act of 1965, a key element of President Johnson’s War on Poverty.¹⁵² Title I for the first time infused large sums of federal money into local schools, primarily to improve educational opportunities of low income students. Alabama schools were to receive \$34.6 million.¹⁵³ Title I would often benefit the same students that Title VI of the Civil Rights Act of 1964

Presidential Library).

147. 46 C.F.R § 80.4(c) (2016).

148. MARION S. BARRY, JR. & BETTY GARMAN, STUDENT NONVIOLENT COORDINATING COMMITTEE, *SNCC: A Special Report on Southern School Desegregation*, 3 (Mar. 1, 1967) (on file with the LBJ Presidential Library).

149. *Lee v. Macon Cty. Bd. of Educ.*, 267 F. Supp. 458, 467–68 (M.D. Ala. 1967).

150. Bob Ingram, *Meadows Says Threatened Loss of Federal Funds Would Cripple Schools*, MONTGOMERY ADVERTISER, Jan. 5, 1965.

151. *Lee*, 267 F. Supp. at 465.

152. GARY ORFIELD, *THE RECONSTRUCTION OF SOUTHERN EDUCATION: THE SCHOOLS AND THE 1964 CIVIL RIGHTS ACT 4* (John Wiley & Sons 1969).

153. James Chisum, *School Aid Funds Revised Upward*, THE BIRMINGHAM NEWS, Sept. 3, 1965 (discussing how \$546,105 of the funds were slated to go to Macon County schools).

was designed to protect. Yet there was a built in tension between the two laws, since the primary statutory remedy for a violation of Title VI was termination of the financial assistance. After initially publishing regulations under Title VI, HEW began requiring school systems to submit desegregation plans to show that they were in compliance.¹⁵⁴ By April 1965 HEW had received over 500 plans that it deemed inadequate. After discussion with DOJ, HEW adopted guidelines that explained what would be deemed adequate, in hopes that this would eliminate the need to evaluate plans one by one.¹⁵⁵ By the summer of 1965 HEW was geared up to enforce Title VI against school systems, requiring them to sign assurances that they would not discriminate based on race.¹⁵⁶ In July Vice President Humphrey warned President Johnson of a large backlog of school desegregation plans that had been submitted to HEW but not yet processed, due to lack of resources. Commencing in the fall, HEW provided the President with weekly reports on the status of compliance.¹⁵⁷

The question became how to ensure compliance with Title VI and continue funding under Title I. HEW issued its first set of “Guidelines” explaining its expectations for school desegregation.¹⁵⁸ Governor Wallace found administrative enforcement, backed by legislation, no more palatable than judicial enforcement. He attended a meeting of Southern Governors, who issued a statement complaining that the Guidelines were confusing, contradictory, and “so far reaching as to jeopardize the future of public education in many school districts throughout the United States.”¹⁵⁹ On June 23 the United States Court of Appeals for the Fifth Circuit not only held the Guidelines lawful, but said that courts should follow the Guidelines in fashioning school desegregation relief.¹⁶⁰ The next day the Alabama legislature adopted a resolution embracing the Governors’ statement and recommending

154. 45 CFR § 80.4(c) (2015).

155. Memorandum from Douglas Cater, Attaching An Unsigned Memorandum from April 23, 1965, to Marvin Watson (April 26, 1965) (on file with the LBJ Presidential Library).

156. ORFIELD, *supra* note 152, at 109.

157. *See, e.g., Report from Joe Califano to the President* (Sept. 2, 1965) (on file with the LBJ Presidential Library) (transmitting the Wednesday evening report on desegregation).

158. The 1965 guidelines “required that at least four grades be desegregated for the 1965-66 school year and established criteria for judging geographical and free choice systems of student assignment.” BRIAN K. LANDSBERG, ENFORCING CIVIL RIGHTS: RACE DISCRIMINATION AND THE DEP’T OF JUSTICE, 139 (1997) (discussing how these were not regulations with the force of law, so HEW could issue guidelines without the President’s signature).

159. *Text of Governors’ Statement*, SOUTHERN SCHOOL NEWS, June 1965, at 2.

160. *Singleton v. Jackson Mun. Separate Sch. Dist.*, 348 F.2d 729, 729(5th Cir. 1965); *see also Price v. Indep. Sch. Dist. Bd. of Ed.*, 348 F.2d 1010 (5th Cir. 1965).

that school systems defer compliance with the Guidelines, pending court challenges to them.¹⁶¹

By summer 1965, Governor Wallace and State Superintendent Meadows had escalated the volume and scope of their attacks. Wallace exhorted school systems that had submitted plans to HEW describing how they would desegregate to “reconsider your action in the submission of your compliance plan.”¹⁶² In 1966, Wallace called for a special session of the legislature to declare HEW’s 1966 Guidelines unconstitutional.¹⁶³ Before this call, several school systems had declined to comply with the Guidelines until, as one superintendent put it, “Governor Wallace says so.”¹⁶⁴

Although both houses of the Alabama Legislature had passed resolutions in August urging school officials to resist the illegal Guidelines,¹⁶⁵ Wallace wanted the legislature to declare the HEW guidelines null and void and to promise to appropriate money to replace any federal money that school systems might lose by refusing to follow the guidelines. The legislature promptly enacted the law that Wallace had asked for.¹⁶⁶ Wallace then threatened to use Alabama State Troopers to stop black teachers from teaching in white schools in Tuscaloosa County. Several school systems refused to follow the Guidelines because of the new Alabama law.

In response to Wallace’s actions, private plaintiffs filed a bold and sweeping motion in September to hold him in contempt for his actions or, in the alternative, to require schools be desegregated.¹⁶⁷ The court denied the plaintiffs’ contempt motion, but set the motion for statewide desegregation for hearing on November 30, 1966.¹⁶⁸

161. 1965 Ala. Acts 16.

162. The telegrams were introduced as exhibits to depositions of school superintendents that became part of the record in the 1966 *Lee* trial. Enterprise, Govt. Ex. 11; Jacksonville, Govt. Ex. 9.

163. See Trial Brief of the United States at 42, *Lee v. Macon Cty. Bd. of Educ.*, 267 F. Supp. 458 (M.D. Ala. 1967) (citing the Government Exhibit number 92, a November 1966 hearing) [hereinafter *United States Trial Brief*].

164. See *id.* at 26 (citing Government Exhibit Number 2, a May 23, 1966 call from C. C. Ring to Hugh W. Williamson).

165. See *id.* at 41, n.101 (citing Government Exhibit Number 83).

166. 1966 Ala. Acts 252. One of the sponsors of the law, Hugh Locke, testified by deposition. He objected to the guidelines as a federal invasion of state’s rights. He also opined that *Brown* was “a usurpation and tilting of the constitutional balance of power between the Federal Government and the State Government.” Examination of Hugh A. Hugh Locke Jr. by Mr. Adams at 50, *Lee*.

167. Motion for an Order to Show Cause or, in the Alternative, for Further Relief, *Lee*.

168. Order of Sept. 30, 1966, *Lee*.

The day after plaintiffs filed their motion Judge Johnson wrote to John Doar asking that he “make known, as early as possible, the position of the United States on this matter.”¹⁶⁹ Although Doar sent no formal answer, within two weeks he had mobilized a large trial team, under the supervision of one of his top assistants, St. John Barrett, the Division’s most experienced litigator.¹⁷⁰ In a meeting the following week, Doar spoke with staff about the need for complete and full desegregation of schools in Alabama and about some of the difficulties he saw. He said that desegregation would have to comply with the latest rulings of the appellate courts and should be as uniform as possible. And he worried whether the court would be able to enforce compliance.¹⁷¹

C. The Federal Government’s Expanded Role and the Proceedings Leading to Statewide Relief

At the end of September the court set the statewide desegregation motion for hearing on November 30, and although DOJ had not yet taken a position in the case, John Doar deployed a large trial team to delve more deeply and explore the extent of the State of Alabama’s complicity in school segregation. No court had yet issued statewide relief in a school desegregation case, and it seemed prudent to present proof supporting the liability of the state officials. The nature of the state control might also prove useful in fashioning relief. Although the broad outlines of the extent to which the state officials had interfered with school desegregation and the extent of their legal authority over local school districts may have been known, the CRD opted to conduct extensive discovery regarding the state’s role in school construction, assignment of faculty and staff, and transportation, always favoring racial segregation. The trial team, inspected Alabama Department of Education files, took depositions of school superintendents and divided up the analysis of the information.

In just six weeks the trial team took depositions of seven state officials and 38 local school superintendents, and inspected records at

169. Letter from Frank M. Johnson, *Regarding Lee, et al. *** United States v. Macon Cty. Bd. of Educ.*, to John Doar, Assistant Attorney Gen. Civil Rights Division and DOJ File 144-100-2-1 (Sept. 23, 1966) (on file with Library of Congress Frank M. Johnson Collection).

170. Barrett came to DOJ in 1954, after serving as an assistant district attorney in California. See ST. JOHN BARRETT, *THE DRIVE FOR EQUALITY: A PERSONAL HISTORY OF CIVIL RIGHTS ENFORCEMENT, 1954-1965* 13 (PublishAmerica 2009).

171. Handwritten Notes Taken by Brian Landsberg (Oct. 17, 1966).

state and local levels.¹⁷² Private plaintiffs participated in some of this discovery, but did not have the resources to do so in full.

A respectable argument could have been made that since the state had required the creation of racially segregated school systems the state had an affirmative obligation to dismantle them. After all, of 294,737 African-American children in Alabama public schools, only 1,009 attended school with whites.¹⁷³ The proof in the case showed much deeper state complicity in school segregation. A few examples make the point.

The Alabama Department of Education, upon request from local school systems, conducted periodic school surveys of most school systems in the state, inspecting school sites and buildings and transportation systems. The Department reports on the surveys make recommendations on future use of school sites and buildings.¹⁷⁴ CRD exhibits graphically showed how state school surveys, ostensibly undertaken to improve education in the surveyed school systems, perpetuated the racially dual school system. Two government exhibits contrasted the segregative recommendations for school use in Calhoun County with the more compact and desegregated alternatives that were available. As the court concluded, “Such a method of consolidation was for no purpose other than to perpetuate segregation of the races.”¹⁷⁵ The surveys recommended school construction separately for each race and recommended segregated transportation routes for students.

172. The defendants also conducted depositions of the U.S. Commissioner of Education and a Civil Rights Specialist in the United States Office of Education.

173. *United States Trial Brief*, *supra* note 163, at Appendix C, Table I.

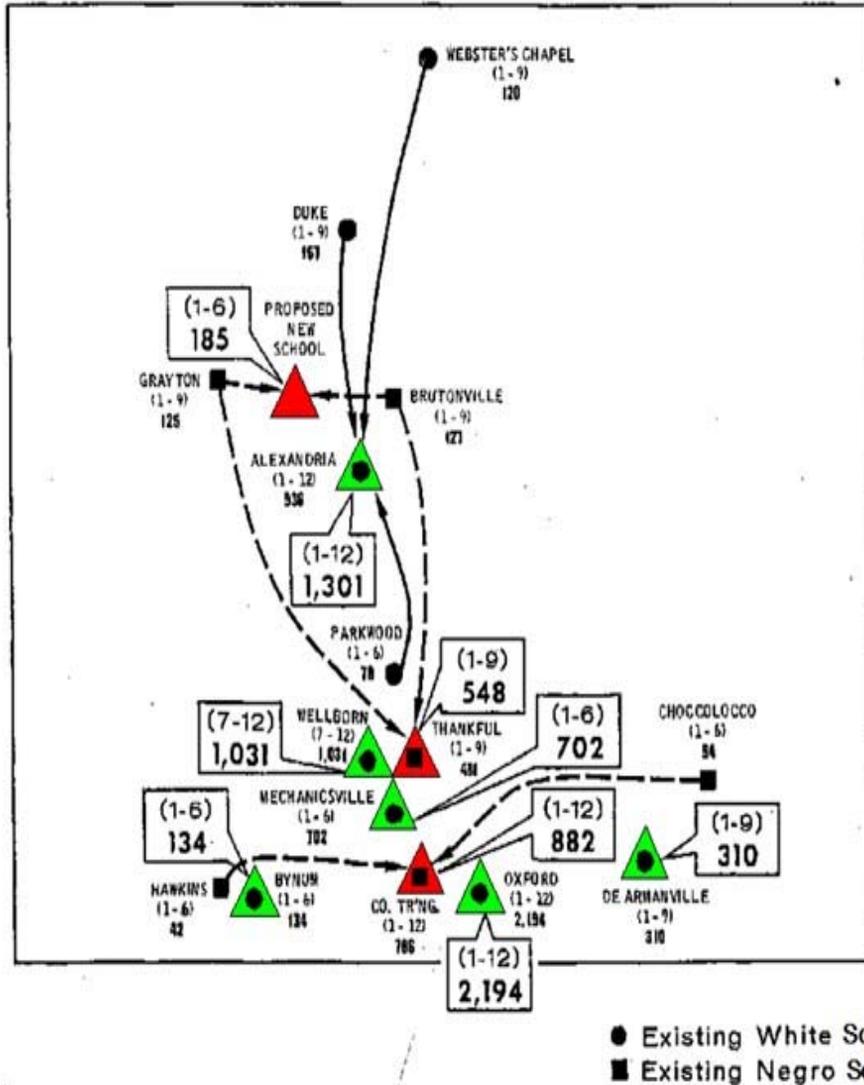
174. Direct Examination of Dr. George L. Layton, Director, Division of Administration and Finance, Ala. Dep’t of Educ. by Mr. Landsberg at 1–2, *Lee*.

175. *Lee*, 267 F. Supp. at 471

STATE SURVEY PROPOSAL

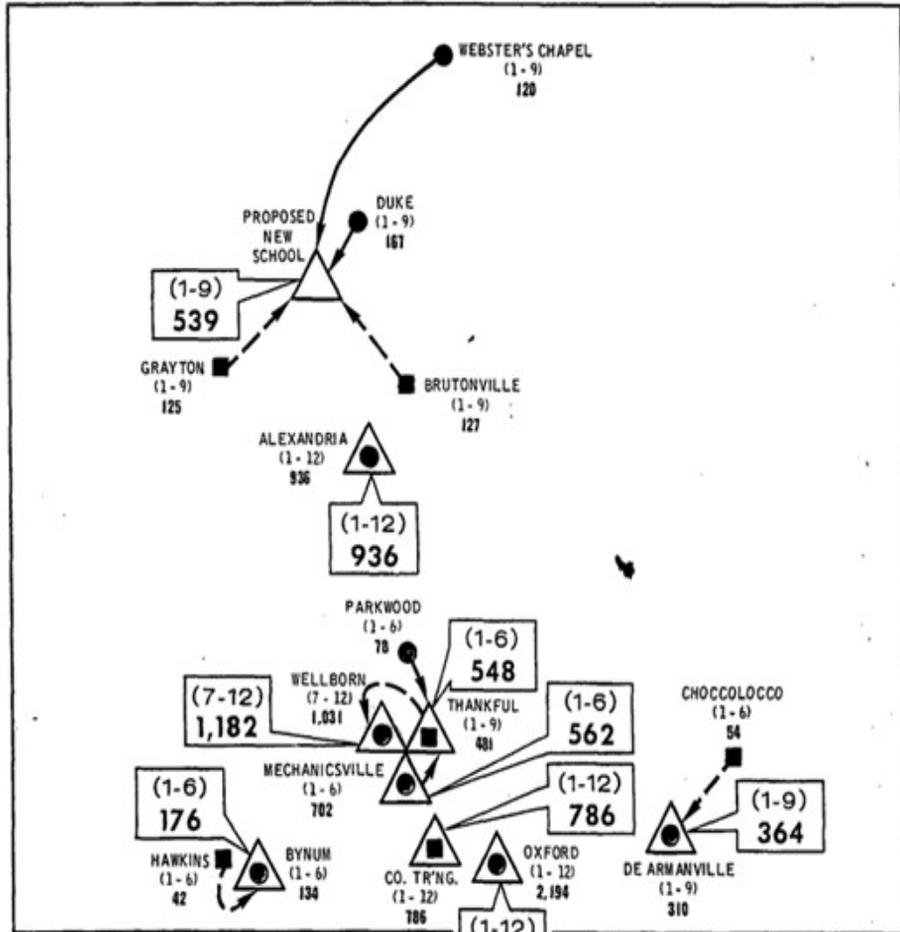
1964 - 1965

(ALL SCHOOLS NOT SHOWN)



ALTERNATE PROPOSAL

(ALL SCHOOLS NOT SHOWN)



△ Future School

The Governor and State Superintendent used extraordinary measures to carry out “the public policy of the State that Negro teachers not teach white children.”¹⁷⁶ The statistics confirmed the policy: of over 28,000 teachers in the State, only 76 were teaching in schools of the other race.¹⁷⁷

The state defendants’ deliberate interference with school desegregation was ubiquitous, constant, and both general and targeted, and it began even before the Supreme Court’s decision in *Brown*.¹⁷⁸ In 1953 the Alabama Legislature appointed a committee to prepare legislation in the event that the Court’s decision “destroys or impairs the principle of separation of the races in the public schools of this State.”¹⁷⁹ In 1956 the Legislature declared the *Brown* decision null and void.¹⁸⁰ And, of course, the Governor deployed state police to stop desegregation in 1963, as described earlier. These early actions serve as backdrop to the state defendants’ continued interference with school desegregation after the 1964 order in *Lee* enjoined them from further interference with school desegregation.

The trial began with Fred Gray, representing Anthony Lee and his co-plaintiffs, questioning Austin Meadows. The court’s 1964 order had not only enjoined the state defendants from interference, but had also ordered them to use their authority “to devote every effort toward initiating desegregation and bringing about the elimination of racial discrimination in the public school system.”¹⁸¹ Yet the records of the State Department of Education revealed no efforts to eliminate racial discrimination. This led to the following colloquy between Gray and Meadows:

Q. Can you relate to this court or refer to this court any written document in your office or release of any sort that you have sent to City and County Boards of Education in which you encouraged or promoted the elimination of segregated school systems in this State?

176. Summary of Depositions, Direct Examination of Superintendent Elliot by Mr. Landsberg at 66–67, *Lee*.

177. *United States Trial Brief*, *supra* note 163, at Appendix C, Table I & Government Exhibit Number 156.

178. See, e.g., State of Ala. Legislative Reference Service Memorandum Prepared By Charles M. Cooper, Director, Regarding Segregation in Public Schools, for Hon. Sam M. Engelhardt Jr., Representative from Macon County (Nov. 26, 1952) (on file with Alabama State Archives, LPR 111, Box 3, Folder 3).

179. 1952 Ala. Acts 894, cited in *United States Trial Brief*, *supra* note 163, at 9, n.11.

180. 1956 Ala. Acts 42, cited in *United States Trial Brief*, *supra* note 163, at 10, n.14.

181. *Lee* at 756.

A. No. I approach it from nondiscrimination viewpoint.¹⁸²

Meadows' defense was that he had been ordered to encourage the elimination of racial discrimination but not racial segregation.¹⁸³

Statistics suggested that the efforts of Wallace and Meadows largely succeeded in fending off desegregation. Alabama, with only 2.4% of its black students attending school with whites, had less desegregation than any other Southern state, less even than Mississippi.¹⁸⁴ Forty five Alabama school districts had neither a court ordered desegregation plan nor a plan approved by HEW.

In short, the evidence established that the state officials had not only failed to promote desegregation of the schools, but had actively promoted segregation and had interfered with those school systems that were willing to desegregate. The question then became how to fashion relief against the state officials.

CRD considered asking the court to appoint a special master to take over the desegregation responsibilities of the State Superintendent of Schools,¹⁸⁵ or order the State Superintendent "to require as a prerequisite to payment of state money that the recipient school board provide education on a desegregated, non-racial basis."¹⁸⁶ While supporting complete and full desegregation of Alabama schools, John Doar worried about how a court could effectively desegregate a disparate group of urban and rural school districts.

The court issued its decision on March 22, 1967. The court's lengthy opinion develops the facts to conclude:

Not only have these defendants, through their control and influence over the local school boards, flouted every effort to make the Fourteenth Amendment a meaningful reality to Negro school children in Alabama; they have apparently dedicated themselves and . . . have committed the powers and resources of their offices to the continuation of a dual school system such as that condemned by

182. Transcript of Record at 78, *Lee*.

183. *Id.* at 114. "I have never encouraged anybody to initiate desegregation plans. I have urged . . . that they not discriminate against any individuals, and if that required desegregation, then they would have to follow desegregation, but only to prevent discrimination has been my recommendation, prior to the Civil Rights Act and the U.S. Office of Education guidelines."

184. *United States Trial Brief*, *supra* note 163, at 120.

185. Landsberg notes of 8/24/66 meeting with John Doar (on file with author).

186. Letter from Frank M. Dunbaugh, Acting Chief Southeastern Division of the DOJ, Regarding Ala. State Basketball Tournament—Participation by Tuskegee High School, to John Doar, Assistant Attorney Gen. and DOJ file 144-100-2-1 at 6. (Feb. 14, 1966) (on file with the National Archives and Records Administration box 1, section 3).

Brown v. Board of Education . . . As a result of such efforts . . . today only a very small percentage of students in Alabama are enrolled in desegregated schools.¹⁸⁷

The court noted that the defendants' segregative activities had infected virtually every aspect of public education and that, accordingly, the remedy "must be designed to reach the limits of the defendants' activities in these several areas and must be designed to require the defendants to . . . disestablish" the racial dual system in school systems covered by the decree.¹⁸⁸ The court somewhat optimistically suggested that once the state coercion to resist desegregation was removed the local school systems would comply with orders from the State Superintendent to comply with the uniform state plan, and it rejected the defense argument that these school systems were indispensable parties.

IV. AFTERMATH: THE REPOSE TO AND IMPLEMENTATION OF THE STATEWIDE DECREE.

Although meeting resistance from the Governor and some school systems, the decree led to significant progress in desegregating Alabama's schools. DOJ and HEW played a key role in developing desegregation guidelines and enforcing the court's order, and HEW's unique role as a funder and enforcer led to a confrontation between local school systems and the government.

Governor Lurleen Wallace declared the decree created "an emergency which threatens our state," "with which compliance is a physical impossibility." Governor Wallace then asked the legislature to place in the hands of the Governor "all powers heretofore vested . . . in the State Superintendent of Education." She also asked the legislature to issue a cease and desist order to the judges handling *Lee*, "advising them that their actions are beyond the police power of the State of Alabama."¹⁸⁹ All that came of her speech, however, were stay motions in the trial court Court and an unsuccessful appeal to the Supreme Court.¹⁹⁰

187. *Lee v. Macon Cty. Bd. of Educ.*, 267 F. Supp. 458, 465 (M.D. Ala. 1967).

188. *Id.* at 478.

189. Governor Lurleen Wallace, Address Before the Joint Session, Alabama Legislature (Mar. 30, 1967, 7:30 p.m.), Frank M. Johnson Collection, Library of Congress, Box 21, Folder 5.

190. *Wallace v. United States*, 389 U.S. 215 (1967).

By April, only five school systems failed to present compliant plans.¹⁹¹ The court added those systems as defendants in the case, thus expanding the reach of the District Court for the Middle District of Alabama to the other two federal judicial districts.¹⁹² By late July the court noted that 98 of the 99 school systems listed in the March decree had adopted plans that complied with the decree.¹⁹³

Alabama school systems listed in the decree confronted differing requirements under Title VI and under the decree. Among other differences, Title VI required them to satisfy HEW that they were not discriminating; the decree required the State Superintendent to make this determination.¹⁹⁴ The school districts were not parties to the case, so the question became how they were to reconcile these differences. While the regulation and guidelines made sense in the abstract, the question was how they should apply in the statewide order.

The issue came to a head in the summer of 1967. The Lanett City school system consisted of two schools, a white school enrolling 1309 students and a black school enrolling 606 students. It adopted a freedom of choice plan in 1966.¹⁹⁵ Free choice would lead to minimal desegregation in the fall of 1967: 6 black students to the white school and 5 whites to the black school.¹⁹⁶ However, the plan complied with the standards established by the order in *Lee*. Lanett moved to enjoin HEW from cutting off its federal funding. The Court held that because Lanett had agreed to comply with the *Lee* order, HEW could not cut off funds based on non-compliance with the Guidelines. HEW should have first brought to the Court's attention its findings and views. It was up to the Court, not HEW, to make a final determination whether Lanett was in compliance. The Court granted the motion to enjoin HEW, noting that rather than terminating funds, HEW should bring non-compliance to the Court's attention.¹⁹⁷

191. Report of the United States on Amended Desegregation Plans Submitted Pursuant to the Court's Decree of March 22, 1967 and Court's Order of April 24, 1967 at 2, *Lee v. Macon Cty. Bd. of Educ.*, 267 F. Supp. 458 (M.D. Ala. 1967) (Civ. A. No. 604-E).

192. Order Adding Parties Defendant and Order to Show Cause, May 26, 1967 at 1, *Lee* (adding these school systems: Marengo County, Linden City, and Thomasville from the Southern District and Jasper City and Marion County from the Northern District of Alabama).

193. *Lee v. Macon Cty. Bd. of Educ.*, 270 F. Supp. 859, 860 (M.D. Ala. 1967). Only Bibb County remained non-compliant. *Id.* at 861.

194. 42 U.S.C. 2000d; *Lee* at 480.

195. *Chambers, Lanett City School Boards Approve Rights Plan: 30-Day Period Given Students to Make Choice*, THE VALLEY TIMES-NEWS, Mar. 30, 1966, at 1.

196. Letter from J.T. Greene, Superintendent, Lanett City Sch. Dist., to Harold B. Williams, James R. Dunn, Ernest Stone, and Frank M. Johnson, J. (June 30, 1967) (on file with author).

197. *Lee v. Macon Cty. Bd. of Educ.*, 270 F. Supp. 859 (1967).

DOJ and HEW began jointly reviewing school system compliance with the court order and not the HEW guidelines.¹⁹⁸ Survey teams created reports for HEW and HEW would then write letters to the systems with desegregation deficiencies under the court order and the steps needed to conform to the court order.¹⁹⁹

As the process continued, Dr. Stone, the state superintendent became more involved.²⁰⁰ Particularly after Dr. Stone reported that a county superintendent entered his office with a non-compliance letter from HEW that he had not seen before, HEW began sending Dr. Stone its communications with local superintendents.²⁰¹ Soon, in the name of efficiency, the process was revised to directly provide Dr. Stone with the letters stemming from field surveys by HEW.²⁰²

When school opened in the Fall of 1967 the percentage of black students in Alabama enrolled in white schools had increased from 2.4% to 6.3% and 871 teachers were teaching in faculties in which their race was in the minority. While far from full desegregation, Alabama had come a long way from George Wallace's inaugural promise of "segregation forever." After the Supreme Court's decision in *Green v. County School Board* in 1968, holding that school desegregation should lead to no white schools or black schools but just schools,²⁰³ the court in *Lee* necessarily turned to more individualized examination of each school system, to completely eradicate the dual school system. DOJ and HEW worked closely together, with HEW experts drafting plans showing how to maximize desegregation in the school district and DOJ presenting the plans to the court. The result was that, while some one-race schools remained, the schools of Alabama became among the most racially integrated in the country.²⁰⁴ The *Lee* case lingered on. There

198. See Memorandum from author to Frank M. Dunbaugh, Att'y for the Southern Section 1 (Oct. 25, 1967) (on file with author).

199. See *id.*

200. Memorandum from Walter Gorman to Frank M. Dunbaugh, Att'y for the Southern Section (Jan 29, 1968) (on file with author) (August 2, 1967 decree required Dr. Stone to report itemized inequalities in the school districts and plans toward eliminating inequalities).

201. "Lee v. Macon – Enforcement of Decree through State Superintendent's Office" memorandum from Frank P. Allen, Att'y for the Southern Section, to Frank M. Dunbaugh, Att'y for the Southern Section (Feb. 5, 1968) (on file with author) ("the first [Dr. Stone] heard about [the non-compliance letter] was when an irate county superintendent came into his office with the letter").

202. "Conference with HEW Officials on Enforcement" memorandum from Frank D. Allen to Investigation File (Feb. 8, 1968) (on file with author).

203. 391 U.S. 430, 442 (1968).

204. By 1970 36.5% of African-American students in Alabama public schools attended majority white schools, up from 8.6% two years earlier. Nationwide, 33% attended majority white

were more efforts of Alabama to thwart desegregation legislatively. Second generation issues of in-school discrimination, discrimination by athletic leagues, and discrimination against black faculty and staff generated more litigation. Eventually the individual school systems were joined as defendants and sometime later their cases were sent to the judicial district where they were located.

V. THE SIGNIFICANCE OF *LEE V. MACON COUNTY BOARD OF EDUCATION*

A. *Stretching Boundaries of Enforcement*

The story of the statewide expansion of *Lee v. Macon County Board of Education* took place in a much different era than today's. The Warren Court was a far cry from the Roberts Court, and back then the nation thought of school segregation as a regional problem that needed a federal solution. The segregation in Alabama had been required by law, and *Brown v. Board of Education* required that it end. George Wallace and Austin Meadows engaged in flagrant interference with desegregation. *Lee* nonetheless instructs us about the potential for federal enforcement of the right to equal educational opportunity today. Although *Lee* was a private suit, the government played several important roles that the NAACP Legal Defense Fund lawyers (LDF), acting alone, would have had difficulty performing. In the early stages of the case the government stood as an enforcer, ready to deploy whatever law enforcement assets might be required. In the statewide phase, the government put together a large trial team to discover evidence and used HEW experts to show how state surveys could be used to integrate rather than perpetuate segregation. DOJ monitored compliance and participated in countless hearings regarding individual school systems, and HEW, now DOE, developed desegregation plans where local school systems failed to produce acceptable plans. Although the government and the civil rights groups did not always agree on the remedy, overall the groups were glad to have the government on their side.

schools. Department of Health, Education and Welfare, Office of the Secretary HEW, *News for Release in A.M. Papers, Friday, June 18, 1971*. In 1980, 44.3% of black students attended predominantly white schools, above the national rate of 37.1%. Gary Orfield, *Public School Desegregation in the United States, 1968–1980*, 6 (1983), http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/public-school-desegregation-in-the-united-states-1968-1980/orfield_american-desegregation-1983.pdf.

The United States' participation in the case preceded the Civil Rights Act of 1964. The district court and DOJ found a non-statutory basis for this, enlarging the scope of the well accepted custom of government acting as *amicus curiae*. The Civil Rights Act for the first time gave statutory authority to the Attorney General to bring school desegregation suits, but only upon receiving a complaint from a parent that his or her child was denied equal protection of the laws by a school board.²⁰⁵ *Lee* enabled DOJ to expand the scope of its work to avoid the necessity of bringing suits school district by school district.²⁰⁶ The presence of the United States defeated any possibility that Anthony Lee's graduation from high school in 1964 might call into question the continued justiciability of the case.²⁰⁷ *Lee* became the precedent for later DOJ statewide school desegregation cases.²⁰⁸

Lee also demonstrates how HEW/DOE can provide the courts with expertise needed to resolve public education issues. Not only did the initial decree draw heavily on the guidelines, but the court also relied on HEW. HEW monitored compliance and provided alternative plans for school systems where freedom of choice did not bring about the required level of desegregation. DOJ and HEW were able to work together, despite some differences of opinion.²⁰⁹ The DOJ lawyers became lawyers not only on behalf of the government as Plaintiff but also on behalf of HEW when its officials were joined as Defendants.

In short, *Lee* stretched the boundaries of the possible. The flexibility of equity allowed the court to do many things: join the United States as an *amicus* with the rights of a party, join state Defendants who interfered with desegregation, shape a remedy that initially required the State Superintendent of Education to act as an agent of the court, bring in additional parties as needed, ship the cases of individual school systems to other judicial districts, and to retain jurisdiction until the dual school system had been eradicated. In essence, the court's

205. See 42 U.S.C. § 2000c-6(a)(i) (2012). The Act also authorized the Attorney General to intervene in private suits alleging a deprivation of equal protection of the laws based on race. See 42 U.S.C. § 2000h-2 (2012).

206. See Lamar Alexander to Bryce Harlow, A New School Desegregation Policy, 4 (undated) (on file with the Richard Nixon Presidential Library).

207. See *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 430 (1976).

208. See David L. Norman, *The Federal Government and the Promise of Brown*, 93 YALE L.J. 983, 987 (1984) ("The statewide approach was eventually used in several states, including Texas, Georgia, Arkansas, Mississippi, and South Carolina.")

209. See Geoffrey F. Aronow, *The Special Master in School Desegregation Cases: The Evolution of Roles in the Reformation of Public Institutions Through Litigation*, 7 HASTINGS CONST. L.Q. 739, 756 (1980).

enlistment of the Department of Justice enabled it to expand the case from one involving one small rural school system, to all school systems in Alabama, not already under court order.

B. Development of Systemic Relief

Lee is notable for the expansiveness of the relief. In Title IV of the Civil Rights Act of 1964, Congress for the first time recognized the need for federal enforcement of *Brown*. George Wallace's predecessor as Governor, John Patterson, had followed a strategy of emphasizing local rather than state responsibility for schools, as a delaying tactic requiring plaintiffs to sue one school district at a time,²¹⁰—and Title IV seemed to envision a similar approach for DOJ suits. *Lee* opened the possibility of suing one state at a time instead of one school district. Though brought as a private suit, *Lee* likely would not have grown into a statewide suit without the Department of Justice. The private Plaintiffs' attorney, Fred Gray, twice sought statewide relief. In 1964, the Department of Justice did not support that part of Gray's prayer for relief, and it was not granted. In 1966, the court sought the view of the United States. The government poured significant resources into the case, resources that the private Plaintiffs lacked, and it filed a brief strongly supporting statewide relief. The court could rest assured that if it granted the statewide relief, the government would enforce the order.²¹¹ It is also true that Title VI meant that the resources and fund-cutoff powers of HEW could be deployed.

Historically, support for racial equality has waxed and waned in each branch. Congress forced Reconstruction on a reluctant President.²¹² After the Hayes-Tilden Compromise, the three branches all supported racial segregation, with occasional departures by the courts and the executive.²¹³ This lasted until the late 1940's, when the

210. See GENE L. HOWARD, *PATTERSON FOR ALABAMA: THE LIFE AND CAREER OF JOHN PATTERSON* 99–100 (2008).

211. BASS, *supra* note 84, at 233–34 (1993) (quoting Owen Fiss: “Johnson wanted to count on the government backing him up when the going got tough. . . . Most of the . . . discovery was always done by the Department of Justice, and I think Johnson always needed to have that predicate before he did anything tough.”).

212. RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 44–49 (Vintage Books 2004) (1976).

213. See *id.* at 65; see also *Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled by Brown v. Bd. of Educ. of Topeka, Shawnee Cty., Kan.*, 347 U.S. 483 (1954); BRIAN K. LANDSBERG, *FREE AT LAST TO VOTE: THE ALABAMA ORIGINS OF THE 1965 VOTING RIGHTS ACT* 21 (Univ. Press of Kansas 2007).

Court and the President began to chip away at segregation in housing,²¹⁴ the armed forces,²¹⁵ railroads,²¹⁶ and higher education.²¹⁷ Congress refused to confront the issue until 1964, when it came into accord with the other two branches. Presidential support for school desegregation fluctuated from the 1970s, depending on which party held the presidency.²¹⁸ The court's support for desegregation gradually eroded; today, even voluntary measures to ameliorate racial separation are subject to strict judicial scrutiny.²¹⁹ When all three branches agreed on the validity of segregation, practices in the Southern states effectively separated the races. When all three branches supported desegregation, public schools in the South became the least segregated in the country. Today, the Court opposes race conscious efforts to minimize racial isolation; the executive branch mildly supports those efforts; Congress is silent on the subject; no one is vigorously pushing it.

In *Lee v. Macon County Board of Education*, we may trace the gradual growth of understanding of how to desegregate a school system.²²⁰ When the case was first decided in 1963, the Alabama Pupil Placement Law essentially placed on black students the burden of seeking to transfer to a white school.²²¹ This was replaced by freedom of choice, and finally by the *Green v. County School Board* requirement that the desegregation plan result in no black schools or white schools, but just schools.²²² In addition to these student assignment developments, came growing recognition of the importance of desegregated faculty, classrooms, transportation, athletic programs, and other extracurricular activities.²²³ Then came recognition that

214. *Shelley v. Kraemer*, 334 U.S. 1 (1948).

215. MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 181 (Oxford Univ. Press 2004).

216. *Henderson v. United States*, 339 U.S. 816 (1950).

217. *See, e.g., Sweatt v. Painter*, 339 U.S. 629 (1950).

218. *See* JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY* 153, 171 (2001).

219. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007).

220. 490 F.2d 458 (5th Cir. 1974).

221. *See Lee v. Macon Cty. Bd. of Educ.*, 231 F. Supp. 743, 757 (M.D. Ala. 1964).

222. 391 U.S. 430, 442 (1968). "The detail has grown from a simple order to desegregate, to a specified form of plan, to a specified plan, to a plan that includes magnet schools, tracking, transportation, police services and the like." Aronow, *supra* note 209, at 758.

223. *See Lee v. Macon Cty. Bd. of Educ.*, 490 F.2d 458, 472-73 (5th Cir. 1974); *id.* at 473-74 (transportation); *id.* at 488 (athletics and extracurricular activities); JEANNIE OAKES, *TWO CITIES' TRACKING AND WITHIN-SCHOOL SEGREGATION, BROWN V. BOARD OF EDUCATION: THE CHALLENGE FOR TODAY'S SCHOOLS* 81-90 (Ellen Condliffe Lagemann & Lamar P. Miller eds. 1996) (classrooms).

curriculum should be multicultural,²²⁴ and that student discipline must be fairly applied.²²⁵ These lessons emerged over decades of fleshing out the meaning of *Brown v. Board of Education*. *Brown II* had emphasized the need to “desegregate” and to “admit to public schools on a racially non-discriminatory basis,”²²⁶ but only gradually did the systemic nature of school segregation become apparent. Indeed, not until 1968 would the Supreme Court refer to disestablishment of the racially “dual school system.”²²⁷ Perhaps the most dramatic example of the dual school system was the evidence regarding the state school surveys, which clearly established that every school district in Alabama was operating two school systems, one for each race. The school surveys showed that it was not enough to order admission to schools on a non-racial basis. Because the racial segregation was systemic, the violation could be cured only by systemic relief.

C. *Desegregation and the Future of Equal Educational Opportunity*

What does this mean for the future of equal educational opportunity? The state of federal constitutional law seems stuck in an unhelpful place. As a matter of policy, desegregation remains as a key to finally eradicating the effects of the past racial caste system. Equal opportunity, regardless of race, requires equal education. Where racial isolation persists, unequal education usually results. The most reliable path to equal education is desegregation. Although research suggests that desegregation improves the education of African-Americans without degrading the education of other students,²²⁸ the Supreme Court in *Parents Involved in Community Schools v. Seattle School District No. 1*, has placed significant barriers to elimination of racial

224. See *Lau v. Nichols*, 414 U.S. 563, 566 (1974).

225. See *Lee*, 490 F.2d at 459–61.

226. *Brown v. Bd. of Educ.*, 349 U.S. 294, 298 (1955).

227. *Green v. Cty. Sch. Bd.*, 391 U.S. 430, 438 (1968). Lower courts had used the term in six cases before *Lee* disestablished the “dual public school system.” See *Lee v. Macon Cty. Bd. of Educ.*, 267 F. Supp. 458, 478 (M.D. Ala. 1967); *United States v. Jefferson Cty. Bd. of Educ.*, 372 F.2d 836, 852 (5th Cir. 1966), *on reh’g*, 380 F.2d 385, 390 (5th Cir. 1967) (en banc); *Kemp v. Beasley*, 352 F.2d 14, 21 (8th Cir. 1965); *Downs v. Bd. of Educ.*, 336 F.2d 988, 995 (10th Cir. 1964); *Ross v. Dyer*, 312 F.2d 191, 195 (5th Cir. 1962); *Bush v. Orleans Parish Sch. Bd.*, 308 F.2d 491, 492 (5th Cir. 1962); *Dall. Indep. Sch. Dist. v. Edgar*, 255 F.2d 455, 457 n.1 (5th Cir. 1958).

228. See, e.g., Brief of the American Educational Research Association as Amicus Curiae at 14, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (No. 05-908). But see *The Benefits of Racial and Ethnic Diversity in Elementary and Secondary Education*, U.S. Comm’n on Civil Rights 3 (Nov. 2006), <http://www.usccr.gov/pubs/112806diversity.pdf> (concluding that “[t]here is little evidence that racial and ethnic diversity in elementary and secondary schools results in significant improvements in academic performance.” A dissent to the report criticized its methodology and conclusions.).

isolation²²⁹ The executive branch has pushed back, providing a road map for school districts to navigate through the difficult course set by that case, which disapproved most race-based programs for combatting racial isolation in the schools.²³⁰ Civil rights advocates need to develop a multi-pronged strategy.

Strategy should be tied to the objective, which is minimizing racial isolation. While the Supreme Court has narrowed the paths to equal educational opportunity, certain paths remain. One path is enforcement of the Fourteenth Amendment. However, the Court has also interpreted the equal protection clause as restricting race-based student assignments in unitary school system. It has carried that notion so far in the *Louisville* case, that the school system was required to dismantle the system that had been put in place as a remedy for the dual school system. At the statutory level, the Court has construed Title VI as forbidding only deliberate race-based discrimination and not practices that have an adverse racially disparate impact.²³¹ However, that limitation does not extend to the regulatory level. As in *Lee*, achieving the objective may require going beyond existing precedent.

There are several possible approaches to achieving equal educational opportunity. The most promising approach combines public and private advocacy.

1. Racially neutral approaches

While the federal government could provide funding, accompanied by performance standards, to improve schools, that effort thus far has failed to erase racial disparities.²³² School systems could take steps on their own to end isolation of students in poor socio-economic status. Congress could use its spending power to encourage school systems to minimize isolation of students from lower economic strata, but will most likely continue to defer to the other branches. Advocates of eliminating racial isolation could wait for changing housing patterns to bring about desegregation. This could sentence children to racial

229. 551 U.S. 701 (holding the school board's use of race in order to avoid racial isolation in schools was unconstitutional because it was not narrowly tailored to achieve a compelling state interest).

230. U.S. Dep't of Justice, Civil Rights Div. & U.S. Dept. of Educ., Office for Civil Rights, *Guidance on the Voluntary Use of Race to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools*, U (Dec. 2, 2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201111.html> [hereinafter *Guidance on the Voluntary Use of Race*].

231. See *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001).

232. See *infra* note 276 and accompanying text.

isolation for years to come, because “even if school segregation declines at the same rate as residential segregation from this point forward (by no means a certainty), the resulting progress will be frustratingly slow.”²³³

2. Race-based approaches; attacks on racial discrimination

As Justice Blackmun pointed out in his separate opinion in *Regents of the University of California v. Bakke*, “In order to get beyond racism, we must first take account of race. There is no other way.”²³⁴ School systems could make limited use of race, as outlined by Justice Kennedy’s concurrence in *Seattle*. Whether such efforts would be upheld will depend on a closely divided Supreme Court taking an expansive view of permissible measures. As discussed below, a more promising approach would be for the federal government to apply disparate impact regulations of DOE to student assignment.²³⁵ Just as the Supreme Court in *Brown* liberated courts from *Plessy*, the executive branch could liberate the courts to confront school board practices that result in racial isolation.

Going a step further, the federal government could apply the disparate impact regulations to challenge a state’s maintenance of virtually one-race school districts.²³⁶ It may be possible in some instances to desegregate schools by bringing housing discrimination cases. In the Carter Administration the DOJ Civil Rights Division merged the section responsible for enforcing the fair housing act with the section responsible for school desegregation enforcement, because of the inter-relationship of housing and schools. The merged section brought one case that joined housing and education.²³⁷ It may sometimes be possible for plaintiffs to rely on state rather than federal law. The Lawyers Committee for Civil Rights Under Law has recently

233. Nicholas O. Stephanopoulos, *Civil Rights in a Desegregating America*, 83 U. CHI. L. REV. 64 (forthcoming 2016).

234. 438 U.S. 265, 407 (1978).

235. See 34 C.F.R. §§ 100.3, 100.5 (2016).

236. The DOJ successfully sued under the Fourteenth Amendment to merge the all-black Kinloch, Missouri school district with neighboring predominantly white districts, thus establishing state responsibility for the maintenance of segregated school districts. *United States v. State of Mo.*, 515 F.2d 1365, 1370 (8th Cir. 1975) (en banc); see also *United States v. State of Tex.*, 321 F. Supp. 1043, 1057 (E.D. Tex. 1970), supplemented, 330 F. Supp. 235 (E.D. Tex. 1971), *aff’d as modified*, 447 F.2d 441 (5th Cir. 1971), and *aff’d*, 447 F.2d 441 (5th Cir. 1971) (citing *Lee v. Macon County Board of Education* in support of requiring State of Texas to consider merging all-black school systems with adjoining majority white school systems).

237. *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1184 (2d Cir. 1987) (upholding trial court order).

filed a case in North Carolina state court “to challenge the maintenance of three racially identifiable and inequitably resourced school districts in Halifax County, North Carolina,” based on the right to education under the state constitution.²³⁸ An adverse decision is on appeal.²³⁹

It is also still possible to litigate under the Fourteenth Amendment where it is possible to prove that racial isolation results from deliberate race-based government decisions. Such showings were made in the past, and it seems likely that deliberate discrimination still explains some racial isolation. These cases require considerable resources to develop the facts, resources that DOJ could deploy again as it did in the past, in Yonkers, Pasadena, South Holland, Illinois, and Indianapolis.²⁴⁰

Finally, litigants could seek to overturn some or all of the Supreme Court cases that stopped desegregation dead in its tracks. This last option probably depends upon a track record of failure of the other options. Just as *Plessy*'s overthrow depended upon the accretion of case law and the development of facts, so also the holdings in cases like *Seattle* and *Dowell* could be eroded over time, concurrent with change in the composition of the Supreme Court.²⁴¹

Private litigation in federal court to promote racial desegregation would most likely have to be based on constitutional violations,²⁴² a resource-intensive strategy that deserves more attention.²⁴³ This paper addresses the role of the federal government, which may rely on federal regulations in addition to enforcing constitutional and statutory bans on race discrimination in public education.

238. *Silver et al. v. Halifax Cty. Bd. of Comm'rs*, No. 15-cvs-767, 2016 WL 1732092 (N.C. Super Ct. Feb. 2, 2016).

239. The trial court dismissed the complaint on January 28, 2016, and the plaintiffs have appealed. *Id.* The Mexican American Legal Defense Fund (MALDEF) has also relied on a state disparate impact law. *See McFadden v. Bd. of Educ. for Ill. Sch. Dist. U-46*, 984 F.Supp.2d 882, 890 (N.D. Ill. 2013).

240. *See United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181 (2d Cir. 1987); *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424 (1976); *United States v. Sch. Dist.*, 286 F. Supp. 786 (N.D. Ill. 1968); *United States v. Bd. of Sch. Comm'rs*, 503 F.2d 68 (7th Cir. 1974).

241. “A majority of the Supreme Court emerged from the crucible of resistance to *Brown* and the civil rights acts of the 1960s. Fortunately, it is a slim and possibly temporary majority.” William R. Yeomans, *The Politics of Civil Rights Enforcement*, 53 WASHBURN L.J. 509, 543 (2014).

242. Private plaintiffs may not enforce the disparate impact regulations in a suit under Title VI. *See, e.g., Alexander v. Sandoval*, 532 U.S. 275 (2001). But the Tenth Circuit has allowed private enforcement of the regulations in a Section 1983 suit. *See Robinson v. Kansas*, 295 F.3d 1183, 1187 (10th Cir. 2002), and the Supreme Court denied certiorari, *Kansas v. Robinson*, 539 U.S. 936 (2003), despite a circuit split. *See S. Camden Citizens in Action v. N.J. Dep't. of Envtl. Prot.*, 274 F.3d 771, 774 (3d Cir. 2001); *see also Save Our Valley v. Sound Transit*, 335 F.3d 932, 944 (9th Cir. 2003).

243. *See Stephanopoulos, supra* note 233, at 65–66.

3. Role of the federal government

In the 1950s and early 1960s, school desegregation confronted hostile state governments and an indifferent Congress.²⁴⁴ The Department of Justice sued hundreds of racially segregated school districts in the 1960s and 1970s.²⁴⁵ Since the 1980s DOJ has changed its focus; most, if not all, of its activity regarding racial segregation in public education takes place in pending cases, including *Lee v. Macon Cty. Bd. of Educ.*, rather than in new cases.²⁴⁶ New desegregation cases ended when President Carter left office over thirty years ago; from President Reagan to President Obama, the work of the Civil Rights Division's Educational Opportunities Section has focused on disability and sex discrimination, race discrimination in student discipline, and occasional segregation issues in pending cases.²⁴⁷ A speech drafted for the first Associate Attorney General in the Clinton Administration to give to a branch of the NAACP LDF paints the picture:

The Administration will continue to revive the Educational Opportunities Section, allowing it to monitor more closely the progress of school desegregation. The Department will pay closer attention to determinations that a school district has achieved unitary status, and in increased coordination with the Office of Civil Rights at the Department of Education, we will aggressively challenge those determinations with which we disagree. School districts will only be able to escape court supervision when they have demonstrated that vestiges of prior discrimination have been eliminated in all critical areas of their schools' operation.²⁴⁸

Conspicuously absent is any mention of bringing new school desegregation cases. DOJ filed briefs in *Seattle* and *Louisville* arguing that the desegregation plans in those cases were unconstitutional quota

244. See J.W. PELTASON, FIFTY-EIGHT LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION 41-55 (Univ. of Ill. Press 1971) (1961).

245. *Annual Report of the Attorney General*, 68 (1973) (noting that Education Section involved in over 230 school desegregation cases involving over 540 school districts).

246. See Dep't of Justice, *Educational Opportunities Cases*, <https://www.justice.gov/crt/educational-opportunities-cases#race> (last updated July 27, 2016) (list of actions in pending CRD race discrimination cases involving schools).

247. See *Becoming Less Separate?*, *supra* note 4, at 25 (noting that since FY 1991 the DOJ "has not initiated any new traditional desegregation lawsuits and has indicated that they are not aware of any such federal suits being instituted by other parties").

248. Webb Hubbell, *Address Before the New England Committee of the NAACP Legal Defense Fund* (Oct. 21, 1993); see also Edward M. Kennedy, *Restoring the Civil Rights Division*, 2 HARV. L. & POLICY REV. 211, 226-27, 233 (2008) (pointing out that under President George W. Bush, CRD was "not a principal player in efforts to desegregate school systems." CRD should "take a leadership role in formulating effective approaches and strategies to promote integration in light of" *Seattle* and *Louisville* decisions).

plans, while seeming to anticipate Justice Kennedy's concurring thoughts that strict scrutiny need not be fatal in fact.²⁴⁹

Today, the challenge may seem greater than it was in the 1960s and 70s: a Supreme Court hostile to race-based remedies, an indifferent Congress, and passive executive. The executive branch under the Obama administration sympathizes with the need for educational equality, including the need to minimize racial isolation. It continues to litigate a few ancient desegregation cases, and it has released guidelines for voluntary desegregation of public schools within the narrow framework of the *Seattle* and *Louisville* cases.²⁵⁰ The NAACP LDF, which created the road to *Brown* and was at the forefront of implementation of *Brown*, now lists its educational priorities as: "increase equity in education by increasing graduation rates (K-12 and college) among African-Americans, foster adoption of racially equitable and research-based approaches to school discipline."²⁵¹ LDF did release a manual in 2008 explaining how school districts could voluntarily integrate despite the *Seattle* and *Louisville* cases.²⁵²

School boards are unlikely to pursue voluntary race-based steps in today's climate; their lawyers will point to the Supreme Court cases and advise that race-based steps are risky. Moreover, history has shown that entrenched privilege finds it difficult to take voluntary steps to widen opportunity. Future steps, whether in litigation or voluntary, must be grounded on facts and legal theory showing government complicity in racial separation in public schools, just as the attack on *Plessy* was based on facts and legal theory showing the impossibility of running schools that were both separate and equal. These are arguments that civil rights groups could be addressing to all three branches of the federal government. They could push school boards to test the limits of the *Seattle* decision, looking to Justice Kennedy's concurrence for

249. Brief for the United States as Amicus Curiae Supporting Petitioner at 12, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (No. 05-908) [hereinafter *United States' Parents Involved Brief*]; Brief for the United States as Amicus Curiae Supporting Petitioner at 12, *Meredith v. Jefferson Cty. Bd. of Educ.*, (No. CIV.A. 3:02CV-620-H), 2007 WL 3342258, at *1 (W.D. Ky. Nov. 9, 2007).

250. See *Guidance on the Voluntary Use of Race*, *supra* note 230.

251. *Who We Are*, NAACP LDF, <http://www.naacpldf.org/about-ldf> (last visited Sept. 2, 2015).

252. *Still Looking to the Future: Voluntary K-12 School Integration*, NAACP LDF, <http://www.naacpldf.org/document/still-looking-future-voluntary-k-12-school-integration> (last visited Sept. 2, 2015).

guidance.²⁵³ However, if they want to pursue desegregation, they will need to consider the litigation and fund cut-off options, if all else fails.²⁵⁴

The DOJ and DOE in the 1960s and 1970s followed a proactive approach, without waiting for parents to complain that their children's school system was unlawfully segregated. After Congress rejected Attorney General authority to bring equal protection cases in 1957 and 1960, DOJ sued segregated school districts receiving federal impact aid based on the number of children who were dependents of federal employees.²⁵⁵ Although Title IV of the Civil Rights Act of 1964 imposed a complaint prerequisite to DOJ suits, the DOJ of the 1970s relied on state-wide litigation to finesse the need to proceed school district by school district. Similarly, HEW's enforcement of Title VI did not rely on complaints from parents. Moreover, DOJ and HEW collaborated on a joint strategy. Undoubtedly, the priority that these agencies gave to school desegregation came in part from pressure from civil rights organizations. While the politics of race are beyond the scope of this article, it is worth noting that at a recent conference at Duke Law School the former director of the NAACP Legal Defense Fund expressed the opinion that it would be futile to ask DOJ and HEW to pursue a disparate impact test in school desegregation suits, as suggested below.²⁵⁶

Lee can be looked to as an example of a productive relationship between the private civil rights bar and the federal government, which found avenues of federal action to end segregation statewide, even when there was no precedent for this. This shows that each branch of government can play a role in eliminating the racial caste system and its effects, sometimes acting independently and sometimes in concert with other branches. It also shows how digging deep into the facts to prove what may seem obvious can concretize a violation in a way that generalities, even if they are obvious, cannot. If racial discrimination explains the persistence of racial isolation it should be possible, though undoubtedly difficult, to prove.²⁵⁷

253. *Parents Involved*, 551 U.S. at 782 (Kennedy, J., concurring).

254. *Spurlock v. Fox*, 716 F.3d 383 (6th Cir. 2013) is an example of a case where the court found student assignment policies did not violate the equal protection clause, but application of a disparate impact standard might have led to a different result.

255. *See United States v. Madison Cty. Bd. of Educ.*, 326 F.2d 237 (5th Cir. 1964), *cert. denied*, 379 U.S. 929 (1964); *see generally United States v. Cty. School Bd. of Prince George Cty.*, 221 F. Supp. 93 (E.D. Va. 1963).

256. Oral Response of Theodore Shaw to this paper at Duke Law School conference, November 20-21, 2015.

257. As this article was being finalized the General Accounting Office (GAO) released a

In the innovative spirit of *Lee*, the U.S. should consider the suggestion of Kimberly Jenkins Robinson that DOE apply its disparate impact regulations to practices that result in racial isolation in schools.²⁵⁸ Her suggestion finds support in the opinion of Justice Powell, concurring in part in *Keyes v. School District No. 1, Denver, Colorado*:²⁵⁹

I concur in the Court's position that the public school authorities are the responsible agency of the State, and that, if the affirmative duty doctrine is sound constitutional law for Charlotte, it is equally so for Denver. I would not, however, perpetuate the de jure/de facto distinction, nor would I leave to petitioners the initial tortuous effort of identifying "segregative acts" and deducing "segregative intent." I would hold, quite simply, that, where segregated public schools exist within a school district to a substantial degree, there is a prima facie case that the duly constituted public authorities . . . are sufficiently responsible to warrant imposing upon them a nationally applicable burden to demonstrate they nevertheless are operating a genuinely integrated school system.

While the Court rejected Powell's formulation of school district obligations under the equal protection clause, DOE has room to adopt Powell's formulation under Title VI. The Court has assumed that DOE may impose disparate impact regulations on recipients of federal financial assistance.²⁶⁰ Where schools are racially isolated, it is always possible to point to school board policies that cause the racial isolation: policies relating to school construction, grade structure, and student assignment. While the *Seattle* and *Louisville* cases, fairly read, would prevent DOE from requiring racial balance, they do not prevent DOE from adopting an approach like Justice Powell's: imposing an affirmative obligation on school systems to take steps to avoid racial isolation.

Applying disparate impact analysis in light of Justice Powell's suggestion above, DOE could create a presumption against a school system's choice to assign students in a way that would lead to racial

report reflecting growing racial segregation in the nation's schools. Neither the GAO nor DOE or DOJ suggested that the report should lead to greater scrutiny to determine whether the segregation is the result of racial discrimination. Instead, they focused on other forms of discrimination. See General Accounting Office, *K-12 Education: Better Use of Information Could Help Agencies Identify Disparities and Address Racial Discrimination* (April 2016).

258. Kimberly Jenkins Robinson, *Resurrecting the Promise of Brown: Understanding and Remediating How the Supreme Court Reconstitutionalized Segregated Schools*, 88 N.C. L. REV. 787, 862-68 (2010).

259. 413 U.S. 189, 224 (1973).

260. See *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001).

isolation, where non-isolating steps are available. This choice should be allowed only if the school system can show the educational need for it. Justice Kennedy’s concurring opinion in the *Seattle* and *Louisville* cases can be read to allow school systems (and, by extension, DOE) to ensure “all people have equal opportunity regardless of their race.”²⁶¹ The Court endorsed that Kennedy concurring opinion in a fair housing case this past term.²⁶² Justice Kennedy’s majority opinion in that case graphically portrays the stakes: “The FHA must play an important part in avoiding the Kerner Commission’s grim prophecy that ‘[o]ur Nation is moving toward two societies, one black, one white—separate and unequal.’”

The Civil Rights Act of 1964 and the Equal Educational Opportunities Act of 1974 (EEOA) support the power of DOE to require more than the Constitution requires. Although Title IV restricts the Attorney General’s power to require “assignment of students to public schools in order to overcome racial imbalance” in suits to enforce the Fourteenth Amendment, Title VI only requires that there be one uniform policy for de jure segregation throughout the United States and one uniform policy for de facto segregation.²⁶³ In any event, the effects test would not require assignment of students to overcome racial imbalance, but would simply require the school district to explain why it adopted policies that led to the imbalance.

The 1974 statute was an anti-busing law. It constitutes Congress’s first and only effort to define equal educational opportunity without regard to race, color, sex, or national origin. While the EEOA forbids race-based assignment of students to schools that result in increased segregation, it does not forbid consideration of race to reduce racial isolation.²⁶⁴ Arguably the EEOA may apply to DOE action under Title VI, though that is not completely clear. The EEOA defines both equal educational opportunity and denial of equal protection, and it provides that in devising a remedy for either, “a court, department, or agency of the United States shall seek or impose only such remedies as are essential to correct particular denials of equal educational opportunity

261. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 708 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

262. *See Texas Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2525 (2015) (citation omitted) (“race may be considered in certain circumstances and in a proper fashion”).

263. 42 U.S.C. § 2000c(b) (2012); *see also* 42 U.S.C. §§ 2000c-6, 2000d-6 (2012).

264. 20 U.S.C. § 1703(c), (e) (2012).

or equal protection of the laws.”²⁶⁵ DOE is a department of the United States, but other language in the EEOA suggests that it is a self-contained law, with little overlap with Title VI. The law declares the neighborhood is the appropriate basis for determining school assignment, and says that the purpose of the EEOA is “to specify appropriate remedies for the orderly removal of the vestiges of the dual school system.”²⁶⁶ The findings and remedial sections stress the harm of excessive busing and limit the amount of busing that can be required.²⁶⁷

The DOE regulation provides that a recipient of federal financial assistance may not “utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin.” The regulation includes as an example the determination of where to build a school: the recipient “may not make selections with the effect of excluding individuals from, denying them the benefits of, or subjecting them to discrimination under any programs to which this regulation applies, on the ground of race, color, or national origin; or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the Act or this regulation.”²⁶⁸ In addition, “[e]ven though an applicant or recipient has never used discriminatory policies, the services and benefits of the program or activity it administers may not in fact be equally available to some racial or nationality groups. In such circumstances, an applicant or recipient may properly give special consideration to race, color, or national origin to make the benefits of its program more widely available to such groups, not then being adequately served.”²⁶⁹ However, it is not clear that DOE still pursues cases of racial isolation in assignment to school. The DOE website on its race discrimination policies includes this Q and A:

Q. What types of cases does OCR handle?

265. 20 U.S.C. § 1712 (2012); *see also* 20 U.S.C. § 1714 (also referring to “any court, department or agency of the United States”).

266. 20 U.S.C. § 1701 (2012).

267. 20 U.S.C. §§ 1702(a), 1713, 1714 (2012).

268. 34 C.F.R. § 100.3 (2016).

269. 34 C.F.R. § 100.5 (2016).

A. OCR handles cases of discrimination in issues such as discipline, racial harassment, and denial of language services to national origin minority students who are English language learners.²⁷⁰

A Clinton Administration statement on Title VI mainly discusses in-school discrimination issues. Its treatment of student assignment is limited to this:

“School districts may not segregate students on the basis of race, color, or national origin in assigning students to schools. In some areas, the population distribution of a school district enrolling large numbers of minority and nonminority students may result in schools with substantially disproportionate enrollments of students of one race. Although school districts must ensure that students are not assigned on the basis of race, color, or national origin, the law does not require that each school within a district have a racially balanced student population.”²⁷¹

An OCR report issued in May 2016 reflects that race discrimination accounts for only 21% of the complaints received.²⁷² The section of the Report that addresses compliance with Title VI does not list a single desegregation investigation. Instead the Report discusses actions OCR has taken respecting racial harassment, access to courses, discriminatory discipline, retaliation, and the education of English learners.²⁷³ These are the topics that yielded the most complaints received. OCR’s staff has been cut in half since 1980, while the number of complaints has increased twenty-fold, so that it may now be impractical for OCR to investigate racial segregation even though it has the statistical evidence that segregation persists.²⁷⁴

The working assumption of this paper is that the social science is correct in finding that education is better where schools are racially integrated. If so, the current passive and reactive stance of civil rights organizations and the federal executive will not bring about equal educational opportunity. Still, a mixture of private and public advocacy could lead to change. First, the creation of voluntary guidelines by the

270. U.S. Dep’t of Educ., Office for Civil Rights, *Questions and Answers on Race Discrimination*, <http://www2.ed.gov/about/offices/list/ocr/qa-race.html> (last visited Sept. 14, 2015).

271. U.S. Dep’t of Educ., Office for Civil Rights, *Student Assignment in Elementary and Secondary* (Revised Sept. 1998), <http://www2.ed.gov/about/offices/list/ocr/docs/tviassgn.html>.

272. Catherine E. Lhamon, U.S. Dep’t of Educ., Office for Civil Rights, *Delivering Justice 8* (May 2016), <https://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2015.pdf>.

273. *Id.* at 18–25.

274. *Id.* at 8.

government and the LDF will have little if any effect unless it is accompanied by grass roots pressure on local school boards. Civil rights organizations will need to choose strategically which school boards are most likely to respond to citizen pressure to do more. Second, civil rights organizations will need to pressure DOE and DOJ to enforce the disparate impact standard where school board policies lead to racial isolation. They cannot realistically expect the federal government to make school desegregation a priority if the civil rights community is viewed as placing little importance on desegregation. Third, DOE could issue guidance explaining that the disparate impact regulation incorporates Justice Powell's approach in *Keyes*.

One obvious flaw with reliance on the executive branch is that its position depends on a mixture of law and policy. Starting with President Reagan and continuing under Presidents Bush, the executive branch has rigidly opposed race based measures to combat racial isolation. For example, the Solicitor General's brief in the *Seattle* case, while seeming to acknowledge the desirability of lessening isolation of minority students, argued that the Seattle plan failed to satisfy the strict scrutiny standard that applies to governmental decisions based on race.²⁷⁵ However, under President Obama the executive once again supports race based measures to combat racial isolation in public schools. The joint DOJ-DOE statement, reads the *Seattle* decision as still allowing some room for race-based decisions.²⁷⁶

Some of the most extreme racial isolation occurs in large urban school districts. For example, in San Antonio Independent School District less than 2% of the students are white.²⁷⁷ The existence of large school districts with miniscule white enrollments will not initially be cured by this approach, given the Supreme Court's resistance to requiring suburban districts to participate in city desegregation plans²⁷⁸ The logic of *Lee v. Macon County Board of Education*, though, could in time lead to extension of the disparate impact test across school district lines, because it is state law that establishes school district lines.

275. *United States' Parents Involved Brief*, *supra* note 249, at 18.

276. *Guidance on the Voluntary Use of Race*, *supra* note 230.

277. *Fisher v. Univ. of Texas at Austin*, 758 F.3d 633, 650 n.98 (5th Cir. 2014), *cert. granted*, 135 S. Ct. 2888, 192 L. Ed. 2d 923 (2015), *and aff'd*, 136 S. Ct. 2198 (2016).

278. *Milliken v. Bradley*, 418 U.S. 717, 744 (1974).

CONCLUSION

DOE's focus these days has been on improving the No Child Left Behind Law, successor to the 1965 Elementary and Secondary Education Act.²⁷⁹ The Secretary of Education, while noting progress in equal opportunity under NCLB, also has pointed out remaining problems in the education of black and Hispanic students, such as drop-out rates and discipline rates. His speech does not mention segregation, but presents this startling fact: "a third of black students attend high schools that don't even offer calculus."²⁸⁰ As the LDF's attack on segregation in *Brown* showed, separate schools are not equal schools; to deny black students the right to take calculus is to deny them an equal education. In January 1951, an African American mother asked the Macon County School Superintendent to either provide her son at the black high school in Tuskegee a geometry course or allow him to take that one course at the nearby all-white Tuskegee High School.²⁸¹ That request was an early salvo in the effort of Macon County African-Americans to get an equal education. It seems apparent that there is unlikely to be equal educational opportunity so long as there are racially isolated schools in multi-racial areas.

Owen Fiss saw in *Lee v. Macon County Board of Education* "something as ingenious, as path-breaking, as innovative as something like *Marbury v. Madison*."²⁸² Supporters of equal educational opportunity need to find an equally innovative path forward today. The carrot of federal funding has failed to bring equality. It is time for civil rights organizations and DOJ and DOE to renew legal efforts to overcome racial isolation in the schools.

279. 20 U.S.C. § 6301 (2012).

280. Arne Duncan, U.S. Dep't. of Educ., *America's Educational Crossroads: Making the Right Choice for Our Children's Future*, (Jan. 12, 2015), <http://www.ed.gov/news/speeches/americas-educational-crossroads-making-right-choice-our-children%E2%80%99s-future>; see also Gary Orfield & Chungmei Lee, *Historic Reversals, Accelerating Resegregation, and the Need for New Integration Strategies*, THE CIVIL RIGHTS PROJECT 5 (Aug. 2007), <https://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/historic-reversals-accelerating-resegregation-and-the-need-for-new-integration-strategies-1/orfield-historic-reversals-accelerating.pdf> ("From the 'excellence' reforms of the Reagan era and the Goals 2000 project of the Clinton Administration to the No Child Left Behind Act of 2001, we have been trying to focus pressure and resources on making the achievement of minority children in segregated schools equal. The record to date justifies deep skepticism.").

281. Dan Cobb, *Macon Negroes Demand Equal School Rights*, BIRMINGHAM NEWS, Feb. 10, 1951.

282. BASS, *supra* note 84, at 235.