A Negro child—let us call her Mary Jones—entering first grade that fall of 1954 probably had her thoughts elsewhere than on the Supreme Court and Brown v. Board of Education. Whatever she might have heard about Brown was less absorbing than her new teacher and schoolmates and the novel environment of the school-yard. And it was just as well. This noisy crowd of children would be together for years to come, adding and subtracting, reading and writing, studying maps and pictures of faraway lands. Twelve years later at graduation, some of Mary Jones’s luckier first grade friends would still be standing beside her. Chances were, however, there

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would be no white faces among them. And chances were too that the best jobs or colleges did not await them. But they would scatter all the same, many for whatever labor the Northern metropolis might hold. Because as Mary Jones and her friends began to sense more fully with each passing year, Brown v. Board of Education scarcely even mattered. A generation—Mary Jones’s generation—of black schoolchildren in the South grew up and graduated after Brown: in segregated schools.

Where during this time, one might ask, was the United States Supreme Court? And the answer, not much exaggerated, is that from 1955 to 1968 the Court abandoned the field of public school desegregation. Its pronouncements were few,2 given the proportions of the problem. And its leadership was almost nonexistent. The question of history is whether the Court’s low profile can ever be adequately justified.

What follows is a study of the Supreme Court’s approach to Southern school integration in the years after Brown. It is not a conventional study, in part because the school cases were not conventional decisions. There did, of course, develop over time a set of constitutional principles concerning school desegregation. But the principles themselves were often the creation of events beyond the courtroom: the South reacted to Court rulings, the Court in turn responded to the South. No set of cases, in fact, better illustrates the nonjurisprudential side of the Supreme Court’s job. In one sense, the school cases are moral statements. No single decision has had more moral force than Brown; no struggle is morally more significant than racial integration of American life. Yet school desegregation also may be the most political item on the Court’s agenda. The outcome affects many thousands of people; success for the Court’s position depends mightily on political support; the management of public schools traditionally has been a local political prerogative; and, the nature of equitable remedies is discretionary and hence somewhat political. Moreover, both Brown decisions eschewed legal reasoning: Brown I for a short moral statement, Brown II for yet a briefer pragmatic one. Thus examining the wisdom of the Court’s policies on race and education requires more than legal analysis alone.

Southern school desegregation after Brown progressed through four successive stages. The first might be termed absolute defiance, lasting from 1955 until the collapse of Virginia's massive resistance in 1959. The second was token compliance, stretching from 1959 until passage of the 1964 Civil Rights Act. With that Act, a third phase of modest integration began in the efforts of Southern school officials to avoid fund cutoffs by the Department of Health, Education, and Welfare. The 1968 Supreme Court decision of Green v. County School Board of Montgomery County, Ala.5 commenced a fourth phase of massive integration during which the South became the most integrated section of the country. Yet even as the fourth phase developed, a fifth—that of resegregation—was emerging in some Southern localities.

Breaks in history, of course, are never so neat as their chroniclers might wish. During the defiant stage, for example, North Carolina, Tennessee, Texas, and Florida practiced token compliance.4 And during much of the token compliance stage, Mississippi, Alabama, and South Carolina practiced total defiance. The different phases thus express only regional momentum as a whole and not the progress, or lack thereof, of a particular state. Even as a gauge of regional momentum, moreover, these phases are imperfect, given wide differences in temperament between the Deep and Upper South. These differences, particularly at first, were important. "In terms of immediate progress toward desegregation in the South," noted Numan Bartley,

there was precious little to choose between the complex machinations of upper South states and the bellicose interposition of Virginia and the Deep South. But in terms of the future of the Brown decision, the difference was considerable. States of the upper South, with the exception of Virginia, accepted the validity of the Supreme Court decree and aimed to evade its consequences; Deep South states refused to accede any legitimacy to the decision.5

Prior to the Kennedy presidency, this division "helped to keep alive the principle of Brown v. Board of Education in the South."6

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5 391 U.S. 430 (1968).

4 See generally McKay, "With All Deliberate Speed:"

A Study of School Desegregation, 31 N.Y.U.L. REV. 991 (1956); McKay, "With All Deliberate Speed:"


6 Id.
I. ALL DELIBERATE SPEED: Brown II and its Critics

The 1954 Brown decision, in most unusual fashion, refrained from setting forth a remedy or issuing a remand. Instead, because of the "wide applicability" and "considerable complexity" of the school cases, the question of how desegregation was to be accomplished was postponed until the following term.7 Because of the death of Justice Robert Jackson and misdirected grumblings of Southern Senators over his replacement, John Harlan, oral argument did not begin until April 11, 1955. Integration, the NAACP's lawyers insisted, must begin at once in the affected localities, preferably in September 1955 but in no event later than September 1956. What the Court had declared, Negro children must exercise: not tomorrow or the next day, but now. "They are graduating every day," as Thurgood Marshall put it. Then "'gradual' has no place in your thinking as far as the decree is concerned?" asked Mr. Justice Reed. That's correct, Marshall in effect replied.8

But the South sought gradualism approaching infinity. Representatives of six former Confederate states were heard by the Court, an exercise not without redundancy. Their object was to frighten the Court into caution. Immediate integration, Attorney General J. Lindsay Almond of Virginia warned darkly, would be "provocative of unending chaos, engendering of racial bitterness, strife and possible circumstances more dire."9 A similar message was less delicately delivered by Archibald Robertson, a tough, veteran litigator from Virginia's most prestigious law firm:

Negroes constitute 22 per cent of the population of Virginia, but 78 per cent of all cases of syphilis and 83 per cent of all cases of gonorrhea occur among Negroes.

... .

Of course the incidence of disease and illegitimacy is just a drop in the bucket compared to the promiscuity [;] . . . the white parents at this time will not appropriate the money to put their children among other children with that sort of background.10

On May 31, 1955, a full fifty-four weeks after the initial Brown decision, the Court spoke to its implementation. Brown II11 demon-

7 347 U.S. at 495.
9 Id. at 492.
10 Id. at 428.
strated, if demonstration were ever needed, the vast political potential of American courts of law. Not only did Brown II bear the political earmarks of Brown I: a unanimous Court, speaking briefly, almost soothingly, through its Chief Justice in language laymen could understand. Brown II sought to cajole the South, not to overrun it. The function of law was to persuade and mediate, not to dictate or demand. And acquiescence need not be immediate; Brown II set no definite date for desegregation to occur. There was only that final, capping phrase: black plaintiffs must be admitted to public schools on a racially nondiscriminatory basis "with all deliberate speed."12 In the grand tradition of politics, there was in that phrase something for everyone. "Speed" was promised the long-denied Negro. And the South was permitted to "deliberate," to move, as was its wont, in the fullness of time.

The real political feat of Brown II came in saying one thing and meaning another. Desegregation might not be accomplished right away, the Court announced, because of "problems related to administration," such as the physical conditions of the schools, the school transportation system, personnel problems, and the revisions of school district boundaries and local laws.13

Yet that greatly exaggerated the logistics of conversion, which, by themselves, posed no insurmountable problem. All that had to be done in most of the South was to divide the existing school population into geographic rather than racial groupings.14 Though geographic zoning invites the gerrymander and would not achieve much integration in areas segregated residentially, it certainly would have put pupil assignments on a nonracial basis and thus in compliance with the original Brown decision. Indeed this was precisely the course of action the Court suggested, at least for rural areas, thirteen years later.15 Brown II's deference to administrative difficulties thus seems all the more curious; where constitutional rights hang in the balance, the Court often has dismissed administrative convenience

12 Id. at 301.
13 349 U.S. at 300-01.
14 Take, for example, a Southern county with two elementary schools. Half the elementary students in the county might attend school A, the other half school B. If school A (the formerly all-white school) were bigger and better than school B (the formerly all-black one), then two-thirds of the children might go to A, just so long as neighborhood and not race was the basis of attendance. Or the schools might be paired, A serving grades one through three, B grades four through six. In fact, the sudden presence of white students in formerly all-black B might be just the incentive needed by the school board for capital improvements.
as an insufficient state concern.\textsuperscript{16}

There had to be, then, some other basis for the patient tenor of the \textit{Brown II} opinion. And that basis, as even the least artful soul might guess, was the continued prospect of Southern obstruction. Yet the Court in \textit{Brown II} insisted otherwise. "[I]t should go without saying," observed Chief Justice Warren, "that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them."\textsuperscript{17} But that was precisely the reason they were yielding, because to whites in a large section of the country, those principles simply were not acceptable.

Not surprisingly, the South was audibly relieved by \textit{Brown II}, a victory of sorts snatched from the defeat of only a year ago. It was, as the New Orleans \textit{Times-Picayune} noted, "pretty much what the Southern attorneys in general had asked for."\textsuperscript{18} The Tampa \textit{Tribune} was moved to lurid compliment: "The Court's wisdom, we think, will dissipate the thunderhead of turmoil and violence which had been gathering in Southern skies since the Court held school segregation unconstitutional a year ago . . . ."\textsuperscript{19} \textit{Brown II}'s sole discernible shortcoming in Southern eyes lay in not repealing \textit{Brown I}.

In all other particulars, the opinion humored the South. Despite its disclaimer, \textit{Brown II} implied that local resistance might indeed delay desegregation. For the Court \textit{thrice} suggested that varied local problems and obstacles might require a varied pace of school desegregation,\textsuperscript{20} a dangerous encouragement to volatile racial feelings in rural, black belt communities in every Southern state. But it was those to whom the Court now handed over the problem that most delighted the South. Local school authorities were to bear primary responsibility for dismantling segregation, subject to supervision by local federal district judges. "We couldn't ask for anything better," exulted attorney Tom J. Tubb of West Point, Mississippi, "than to have our local, native Mississippi federal district judges consider [the integration problem] . . . . Our local judges know the local situation and it may be 100 years before it's feasible."\textsuperscript{21} Better still, the "hometown" boys were left virtually without guidance. All they


\textsuperscript{17} 349 U.S. at 300.

\textsuperscript{18} Southern School News, June 8, 1955, at 8, col. 1.

\textsuperscript{19} Id. at col. 2.

\textsuperscript{20} 349 U.S. at 298, 299, 300.

\textsuperscript{21} R. Sarratt, \textit{The Ordeal of Desegregation} 200 (1966).
were told was to go forward in the spirit of equity that "has been characterized," said the Court, "by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs."  

The paradox of Brown II was that it summoned the South’s nobler instincts, even as it indulged its darker, more violent side. If Southerners—school boards and local judges—bore responsibility for desegregation, so the hope went, the South would meet the challenge on its own, just as the border states had in the preceding year. How that hope miscarried is one of the saddest stories in American history. Sad for the Court, sad for the South, saddest of all for the schoolchildren affected.

For the segregationist South held out longer even than its Civil War predecessor. As late as 1962 not a single Negro attended white schools or colleges in Mississippi, Alabama, or South Carolina. By 1964—one decade after Brown—a scant 2.3% of Southern blacks were attending desegregated schools. That was hardly what the Court had wished or anticipated. "Brown never contemplated," wrote Justice Goldberg in 1963, "that the concept of 'deliberate speed' would countenance indefinite delay in elimination of racial barriers in schools . . . ." Even Southerners on the Court had lost patience. "There has been entirely too much deliberation and not enough speed" in complying with Brown, Justice Black wrote for the Court in 1964. Indeed, the adjective of Brown II’s famous phrase had become more operative than the noun.

The mounting impatience of the Court’s rhetoric served only to unmask its own miscalculations. Many insisted that the Court had only itself to blame for Southern foot-dragging. "I cannot acquit the Court of having made a terrible mistake in its 1955 ‘all deliberate speed’ formula," Professor Charles Black observed. "There was just exactly no reason, in 1955, for thinking it would work better than an order to desegregate at once." In deciding to oversee the pace of desegregation," wrote Robert Carter, "which was what Brown II

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22 349 U.S. at 300 (footnotes omitted).
23 See text accompanying note 41 infra.
24 B. Muse, Ten Years of Prelude 228 (1964).
entailed, the Warren Court took upon itself an unnecessary responsibility for the South’s failure to respond.”29

To Loren Miller, a former NAACP vice president, “[t]he harsh truth [was] that the first Brown decision was a great decision; the second Brown decision was a great mistake.”30 “[C]hange,” contended Miller,

would have been gradual in any event. Negroses habituated to segregation would have moved slowly. As the chosen instrument of Negroses seeking change, the NAACP lacked financial resources and manpower to proceed in any other than a gradual manner, district by district . . . . [I]t could not have wrought a revolution.31

Delay would have been present anyway, Professor Black agreed, “for many specious evasive schemes—‘pupil assignment,’ fictionally ‘private’ schools, ‘freedom of choice,’ ‘tracking,’ ‘gerrymandering,’ and so on—had to go through litigation.”32

That argument, however, may underestimate the resources at the disposal of the Court. Had the Court been determined, it might have shortened both the litigation and the desegregation process: by setting a fixed date for integration to take place,33 by approving only those plans that resulted in substantial integration, by requiring that desegregation proceed in certain ways (for example, through pairing of schools or geographical zoning), by excusing black plaintiffs from state administrative remedies, by permitting the joinder of state defendants (because Southern segregation statutes at the time of Brown were of statewide effect), by consolidating appeals, and by summarily reversing laggard district judges and generously supporting active ones. Indeed, from 1968 to 1970, the Court took just such a forward course, with stunning effect.34 As it was, the Court in 1955 seemed content to let litigation act both as a time of catharsis and a period of adjustment in which the inevitability of at least some integration would slowly sink in.

For its delay, some have argued, the Court paid a terrible price.

31 Id. at 356.
32 Black, supra note 28, at 22.
33 That course actually was considered by the Court in Brown II. See R. Kluger, supra note 1, at 738-39.
Normally, constitutional rights may be exercised at once. Yet *Brown II*, insisted Professor Black, "asked of the laity an understanding of which lawyers are scarcely capable—an understanding that something could be unlawful, while it was nevertheless lawful to continue it for an indefinite time."\(^{35}\) For the Court, argued Black, to declare a constitutional right and then in this one instance to so postpone its enjoyment was to do more than mistreat the black man; it was to undermine in the eyes of all Americans respect for fundamental law. Yet respect for law is equally undermined when it overshoots human capacities to adjust. For the Court to have issued decrees that the public thought abrupt and disruptive, that the political branches were reluctant to support, and that the South might successfully evade, defy, and in the end ignore would visibly have diminished the authority of law and the standing of the Court.

But perhaps it was *Brown II* that invited "white dissent and obstruction,"\(^{36}\) a theme Dr. Kenneth Clark had sounded only shortly before. "In practice," Clark contended,

\[Brown II\] seems to have led to more rather than to less disruption . . . . [P]rompt, decisive action on the part of recognized authorities usually results in less anxiety and less resistance [than] a more hesitant and gradual procedure. It is similar to the effect of quickly pulling off adhesive tape—the pain is sharper but briefer and hence more tolerable.\(^{37}\)

The alternative to "deliberate speed," critics of the second *Brown* decision thought, was a quicker, more moral, and possibly more peaceful way to end segregation and subdue the South. If only the Court had proceeded promptly, the nation might have been spared its ordeal and the Court its dishonor. Whether they were right, of course, will never be known. Theirs, historically, was the road not taken. But was it the road of wisdom or just another of the pat solutions that overlooked both the complexity of racism and the psychology of the American South?

Arguments can be made that the Court's gradualist judgment in *Brown II* was correct. That while the Court might have been firmer and more definite in laying down guidelines, any head-on challenge of the segregated South in 1955 would have produced civil strife

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\(^{35}\) Black, *supra* note 28, at 22.

\(^{36}\) Id.

\(^{37}\) Clark, *The Social Scientists, the Brown Decision, and Contemporary Confusion*, in *Argument, supra* note 8, at xxxi, xxxii.
sufficient to make Little Rock and Birmingham seem gatherings of
good will. Was it not better to have given the South time to adjust
to the inevitable, to understand that closed schools did not attract
new industry or prepare children for future citizenship? Better to
have set in motion a course of steadily mounting federal pressure,
which allowed the South its filibusters and fulminations, but all the
while forced private reckonings that Southerners were, after all, a
part of the nation and that segregation was not the hallowed good
it was proclaimed to be?

Even the tiniest tear in the fabric of segregation was certain to
alarm. The presence of a single black in white Southern schools was
for some shock treatment. After centuries of caste contact, the off-
spring of planter and sharecropper were to meet on equal terms and
learn to see one another with a different eye. Gradualism, by its
nature, set an educative course. The races would first learn to live
together in the least stressful, most agreeable circumstances and
ease into more intimate, extensive contacts later on. But for integra-
tion on a broad scale to succeed, the shoots and buds of the experi-
ence had to please. Substantial forced contact at the beginning
might generate mutual withdrawal and hostility, hardly the atmos-
phere for human exploration to begin. Robert Penn Warren put the
idea best in a self-interview a year after Brown II:

Q: Are you a gradualist on the matter of segregation?
A: If by gradualist you mean a person who would create delay for
the sake of delay, then no. If by gradualist you mean a person who
thinks it will take time, not time as such, but time for an educa-
tional process, preferably a calculated one, then yes. I mean a pro-
cess of mutual education for whites and blacks. And part of this
education should be in the actual beginning of the process of deseg-
regation. It's a silly question, anyway, to ask if somebody is a grad-
ualist. Gradualism is all you'll get. History, like nature, knows no
jumps. Except the jump backward, maybe.38

Professor Bickel advanced a related argument for gradualism, not
touched upon by the Brown II Court. "[S]ince Negro schools had
seldom been fully equal to white ones," he contended, "and since
many Negro pupils came from economically and culturally de-
pressed families, differences in educational background and apti-
tudes would be found between Negro and white pupils, and allow-
ance might have to be made for these in the process of integra-

38 R. Warren, Segregation 65 (1956).
tion.  \[^{39}\] That proposition presents several difficulties, however, including that of permitting past wrongs against the Negro to excuse present and future delays. Moreover, differences in aptitude would be present whenever blacks first entered white schools, whether in one, five, or twenty years. What reason was there not to face the problem now? "All deliberate speed" may have contemplated that only blacks academically and socially prepared for white schools could enter. But in light of the large numbers of culturally depressed whites already there, that notion also is suspect.

The real argument for Brown II supposes that the South in 1955 was prepared to resist aggressive judicial action at almost any cost. Some rhetoric, of course, created that impression, like the predictions of Southern attorneys general before the Court in Brown II. There were also those unable to resist political advantage. "On May 17, 1954, the Constitution of the United States was destroyed because the Supreme Court disregarded the law and decided integration was right," Senator James O. Eastland exhorted constituents at Senatobia, Mississippi on August 12, 1955. "You are not required to obey any court which passes out such a ruling. In fact, you are obligated to defy it."\[^{40}\] Such talk, so heavy in the Southern air the decade after Brown, could hardly be allowed to dictate terms to any court. Its purpose, in part, was to bluff the "federals" to back off. Yet the Court still had to take silent cognizance of the Southern mood. Not to have done so would have been foolish. What the Court had to evaluate in the mid-1950's was the extent to which the South's bark presaged its bite.

The experience of the border states was often offered as evidence of integration's achievability in the South. In the year after the first Brown decision, the border states had voluntarily taken large strides toward desegregation. "When schools opened in September 1956," wrote Benjamin Muse,

``desegregation was far advanced in Missouri and Oklahoma, and in West Virginia public schools remained segregated in only two small counties on the Virginia border. In Delaware, Maryland, and Kentucky desegregation was proceeding more slowly, though on a scale which would have looked revolutionary in any of the states farther south."\ldots\ldots"


\[^{40}\] LOOK, April 3, 1956, at 24.
The desegregation accomplishments of Wilmington, Baltimore, Washington, Kansas City, St. Louis, and Louisville demonstrated that peaceful elimination of school segregation in large cities of substantial Negro population was possible. They were hailed as illuminating pilot operations for Southern cities.41

Yet the South, most assuredly, was not the border states. There was one overriding difference: the percentage of Negroes in the population. At the time of Brown, border state black populations ranged from West Virginia with 6% Negroes to Maryland with 17%. Every Southern state, save Texas (13%), had a considerably larger percentage of black inhabitants, from Virginia with 22% to Mississippi with 45%.42

But the total number of Negroes in a Southern state mattered less than their distribution. The more blacks there were within a given jurisdiction, the more stubborn and resistant were white racial attitudes. In the South, the contiguous bands of coastal or river delta counties with heaviest Negro concentration were known as black belts,43 partly for their majority black populations and partly for the dark, rich soil that once supported the plantation aristocracy and its slaves. Generally whites in the black belt possessed political power quite out of proportion to their actual numbers.

For example, whites in Southside Virginia—that state’s black belt—formed, both in votes and leadership, the backbone of the Byrd machine.44 In Alabama, one 1957 study reported, “16 Black Belt counties with 13.5 per cent of the state’s total population have 27.3 per cent of the House representation and 28.5 per cent of the Senate seats.”45 Similar malapportionment existed in the legisla-

41 B. Muse, supra note 24, at 31, 33.
43 The regions of heaviest black population were usually, though not always, on the banks of the Mississippi River or along the Atlantic Coast. The black belts of Alabama and Georgia are exceptions and run through the middle of those states.
45 McCauley, Be It Enacted, in With All Deliberate Speed 130, 134 (D. Shoemaker ed. 1957). The author also notes that
the Black Belts send the same representatives to the legislatures over greater numbers of years than do other sections. This gives the Black Belts added influence in terms of prestige, committee and leadership appointments and in greater parliamentary experience. To some extent the same may be true also of rural constituencies generally and not only of Black Belts.

Id. at 135.
tures of most Southern states. Whether black belt influence owed more to the single-mindedness of its convictions, the luxuriant courtliness of its leaders' style, the political status attached to large landholdings, or historical habits of agrarian rule is unclear. But it had forever been clear that the fullest force of black belt influence was reserved for matters of race.47

Perhaps this was so because the power of black belt leaders was most directly threatened by the mass of mute Negroes within their own constituencies. "[I]n the southern black belts," V.O. Key noted, "the problem of governance is . . . one of the control by a small, white minority of a huge, retarded colored population."48 Most dreaded was the prospect of Negro domination in all its forms: political, economic, social, and sexual. If the Negro ever voted his numbers, he might control local office, soak whites with high taxes and assessments, fill white schools with black teachers and principals, form a black police force, and call whites to answer before the law. Thus poll taxes and literacy tests, white primaries, and grandfather clauses had been widely adopted at the turn of the century to make certain the black man never would tell the white man what to do.49

But schooling, even more than voting, raised the specter of black rule. The literate Negro was a demanding Negro, asking and getting who knows what. Education did not produce good domestics or farmhands but only grumblings with one's economic lot. Yet the driving fear was the least rational, and it was social, not economic. The Southerner, wrote Look editor William Attwood in 1956,

will tell you that sooner or later, some Negro boy will be walking his daughter home from school, staying for supper, taking her to the movies . . . and then your Southern friend asks you the inevitable, the clinching question: "Would you want your daughter to marry a Nigra? . . ." [S]exual neurosis makes many white[s] impervious to logic. They are obsessed by the notion that Negroes, given a chance, will take over their women as well as their golf clubs and legislatures.50

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46 McCauley found, however, that "Virginia, North Carolina, and South Carolina Black Belts are not greatly over-represented in their lower chambers." Id. at 135.
47 "The impressive—and unfortunate—political victory of the large slaveholders came in their success, despite their small numbers, in carrying their states for [civil] war." V. KEY, SOUTHERN POLITICS 6 (1949).
48 Id. at 5.
50 Attwood, Fear Underlies the Conflict, LOOK, April 3, 1956, at 26.
The whites of the black belt knew well that the burdens of compliance with Brown were uneven. Integration, for example, would be least traumatic for the upcountry and mountain counties of the South where Negroes were few. Adjustment would be most difficult where blacks were in the majority. What the black belt feared most was a policy of "rolling surrender," beginning in those areas of slight black population, spreading slowly across the state, and at last leaving the black belt isolated in opposition. Thus opposition to integration had, of necessity, to be rigid and absolute; even gradualism held its special terrors. "Integration, however slight, anywhere in Virginia, would be a cancer eating at the very life blood of our public school system," insisted Mills Godwin, a state Senator from the heart of Virginia's black belt. "The [Brown] decision is either right or wrong. If we think it is right, we should accept it without circumvention or evasion. If it is wrong, we should never accept it at all. Men of conscience and principle do not compromise with either right or wrong." 51

How was it that this most extreme faction even of Southern opinion came to exert such leverage on national racial policy and force even the Supreme Court to counsels of caution? The answer plumbs further the folkways of Southern politics. When a black belt Senator rose to address his colleagues, it was often a case of the defiant talking to the only slightly less defiant. Blacks did not have to be the majority in a locality to pose a threat. Even where they lacked the numbers to install black local government, they still might "rule" white politics by playing whites off against one another to win black votes. 52 Literate Negroes, in the black belt or outside of it, would want jobs and rights heretofore exclusively white. As for social and sexual contact, well, that took only two. Thus across the post-Brown South, apprehension rose. Nowhere in the region did black rights make good white politics. Seldom in the Upper South and almost nowhere in the Deep South did the black man have an open white friend. The most moderate Governors, such as Luther Hodges of North Carolina, Frank Clement of Tennessee, and LeRoy Collins of Florida, hardly favored integration. Political courage in the late 1950's meant standing for open schools, refusing to sign the Southern Manifesto, or admitting that Brown, however hateful, still was the law. 53

51 Richmond Times-Dispatch, Sept. 5, 1956, at 1, col. 3, 8, col. 1.
53 N. Bartley, supra note 5, at 142-43.
Thus with the black belt purposeful and determined and opposition meek or nonexistent, one might guess who carried the day. The South after Brown closed ranks and turned inward. Tolerance and humanity succumbed to “the cause.” “Here, on the surface at least,” wrote Harry Ashmore, the editor of the Arkansas Gazette in 1959,

the South’s oneness shows again. Despite our growing diversity we stand together on this issue, segregation, or pretend to. This is the inner shrine, where the mildest dissent is treason, the one place where that vaunted individuality that is so much part of the Southern style is denied. No one can know whether the dedicated keepers of the shrine are a majority or in fact a small minority; what we do know is that they exploit a tradition so deep-rooted, and exercise a social sanction so powerful, they have largely silenced, or driven out, all those Southerners . . . who have dared to suggest that the rigid racial status quo would have to yield . . . .

Rabid segregationists sought, after Brown, to hammer “southern opinion into an embattled, unified state of feeling which will brook no compromise.” One hypocrisy of massive resistance was that Virginia, which claimed the right to go its own way on segregation, refused to allow its more moderate urban localities to do likewise. “We cannot allow Arlington or Norfolk to integrate,” insisted Congressman William Tuck, from the heart of Virginia’s black belt and a member of the innermost circle of the Byrd machine. “There is no middle ground, no compromise. We’re either for integration or against it and I’m against it. . . . If they won’t stand with us then I say make ‘em.” So together they stood, until massive resistance collapsed under court edicts in the winter of 1959.

Blacks paid a high price in the post-Brown South for stepping forward as plaintiffs in school desegregation suits. Sometimes the sanctions were economic, as in Orangeburg, South Carolina:

Those [Negro plaintiffs] who worked for white employers were fired. Those who rented from white landlords were evicted. Those who bought from white merchants and suppliers were denied further credit and asked to settle outstanding accounts at once. Some were no longer able to buy in some places, even for cash.

55 S. Lubell, Revolt of the Moderates 197 (1956), quoted in N. Bartley, supra note 5, at 190.
56 Richmond Times-Dispatch, July 28, 1956, at 1, col. 7-8.
57 The Rep., Jan. 24, 1957, quoted in B. Muse, supra note 24, at 83. In this particular instance, Negroes were successful in organizing a counterboycott.
But the sanctions were not all monetary. On occasion, newspapers listed names and addresses of all Negro plaintiffs, an open invitation for shameless elements in the community to work their will.\footnote{J. Peltason, Fifty-Eight Lonely Men 60 (1961).}

But the spleen of the South was saved for the white moderate, the ultimate betrayer of his region and his race. The upstart Negro was understood to be brainwashed by Northern agitators and the NAACP; the deviant white could not be so easily explained. As Roy Harris, president of the Citizens’ Councils of America, put it to one Florida audience: “We are engaged in the greatest cause and the greatest crusade in the history of mankind. If you’re a white man, then it’s time to stand up with us, or black your face and get on the other side.”\footnote{Chattanooga Times, Sept. 22, 1958, at 8, col. 5, quoted in N. Bartley, supra note 5, at 192.} Governor Herman Talmadge of Georgia warned: “Anyone who sells the South down the river, don’t let him eat at your table, don’t let him trade at your filling station and don’t let him trade at your store.”\footnote{Birmingham News, June 23, 1955, at 1, col. 7, 2, col. 2, quoted in N. Bartley, supra note 5, at 193.} The moderate Southerner, noted one observer, “became first an isolated figure, then more and more the subject of comprehensive efforts to silence him. Those who spoke out in opposition were pasted with the labels of ‘traitor’ and ‘nestfouler,’ ‘Red’ and ‘nigger lover’ and coveter of ‘Yankee dollars.’ The device was greatly effective.”\footnote{H. Carter, The South Strikes Back 18 (1959).} Dissenting books as well as voices were hounded and pursued. \textit{Time}, \textit{Life}, and \textit{Look} were banned from high school libraries in several Louisiana parishes. The South Carolina legislature adopted a resolution requesting the State Library Board to remove from circulation “certain books such as \textit{The Swimming Hole} . . . that are inimical to the traditions and customs of our state.”\footnote{B. Muse, supra note 24, at 171.} The sin of \textit{The Swimming Hole} lay in illustrations of white and black boys swimming together. “The First Amendment,” noted Hodding Carter with some accuracy, “is probably in more danger in the South today than are either our white or Negro children.”\footnote{Id. at 161. Hodding Carter was the editor of the Greenville, Mississippi \textit{Delta Democrat-Times}, a winner of the Pulitzer Prize, and one of the few balanced observers of the Deep Southern scene in the years after \textit{Brown}. He had been branded a liar by a lopsided vote in the Mississippi House of Representatives for an unflattering article on the Citizens’ Council movement in the state. His observations in 1959 captured well the difficulties in the Deep South:
With its ranks thus forcibly locked and its loins girded, the South, most especially the Deep South, prepared to do battle. The hopelessness of the struggle only made it the more necessary. "The Southerner's trouble," wrote Harry Ashmore, "in the middle of this disturbed twentieth century may be that too many generations have passed since the South won a victory—that we have rationalized defeat to the point where the hallmark of Southern success is a magnificent failure." For the failure to be magnificent, it must also be proud, principled, protracted, and violent, in the true tradition of the Southern spirit—that stubborn, defiant, outrageous cussedness that may lead a man into error but never prompts him to prudently count the odds. I think often these days of Douglas Southall Freeman's story of the ragged, wounded, starving Confederate soldier left on the field for dead after the last fighting before Appomattox. A spruce Federal soldier came upon him in a henhouse, where he crouched holding a scrappy chicken by the neck. The Yankee leveled his musket and cried, "I've got you." The battered Rebel could still grin through his whiskers and drawl, "Yes, and what a hell of git you got."

I mention Southern stubbornness because it is the only reply possible to critics of "all deliberate speed," who advocated a markedly more aggressive judicial course. It was not resistance on the part of the Supreme Court that amplified the volume of Southern protest in the years after Brown. The impulse of obstruction was too indigenious, too deeply embedded politically, historically, socially, psychologically, economically, sexually, and in every other way. Defiance, and with it some violence, was to any realistic observer a price to be paid for moral progress. Exorcism of so rooted an evil as school segregation would not come free of pain.

The question facing the Supreme Court was how to contain and

Certainly in much of the South today it is far more difficult and much less fruitful for whites and Negroes to meet openly than it was five years ago. The only common denominator of most white and Negro leaders today is mistrust.

... Any clergyman, any editor, any professor in a state-supported institution who gets out of step—and a considerable number nevertheless do—can testify to the social and political and economic pressures that follow . . . . Anti-Semitism, in a region where its expression has historically been slight, is being fanned through the identification of Jewish organizations and individuals with the Negro's drive for civil rights.

Carter, Problem and Prospect, SATURDAY REV., May 23, 1959, at 12, 14.

" Ashmore, supra note 54, at 16.

* Id. at 46.
minimize what was certain to come. There was one way not to contain it. The Court could not march south preaching "integration forthwith" and have the crisis over in one brief but agonizing gasp. The South was accustomed to not winning, but not to tame or easy defeat. Thus the Court had to subtly outwit the black belt and its allies. "All deliberate speed" in the hands of Southern federal judges meant that tokenism, in one form or another, would provide the alternative to massive resistance for a few years to come. That, the Court sensed, was the safest way to breach the principle. It turned the diehard over time into an empty and ludicrous posturer, not just in the eyes of his less crazed fellow Southerner but in the eyes of the nation on whom the Court would have to depend for Southern compliance. Were school closings and fund cutoffs, standing in the schoolhouse door and drawing lines in the dust, cursings, bombings, and all the warped paraphernalia of diehard histrionics really worth denying a single Negro or a tiny clutch of black children admission to white schools? Put that way, the question would come to answer itself. And "all deliberate speed" meant that was the way in which the question would be put. Like the black philosophy of passive nonviolence in the spring days of the civil rights movement, "all deliberate speed" outsmarted the South, because "right" in the larger court of public opinion came to be seen increasingly on one side.

But even if "all deliberate speed" was the least disruptive and most persuasive way of beating the segregated South, the question still remains why courts should subordinate racial justice to sectional peace. "We rationalize this travesty [of delay]," charged Carl Rowan,

by saying that we want "peaceful change" and by convincing ourselves that to comply enthusiastically with the court's decision would cause "trouble." And, of course, everybody's against trouble!

But does any American know of any great social advance in the history of mankind that was not accompanied by "trouble"? When we Americans reach the point of soft indifference where we hate trouble more than injustice, we shall have reached the dawning of our era of greatest troubles."

Perhaps the Court would have risked violence and righteously stormed the barricades, had it possessed something with which to storm them. But for so major an undertaking as the transformation

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Rowan, The Travesty of Integration, Saturday Evening Post, Jan. 19, 1963, at 6, 8.
of Southern society, the Court needed help. Constitutional principle was a rallying point, but what if the nation refused to rally? To induce widespread compliance, or to weather a crisis, the judiciary needed executive leadership and support. Yet the initial Brown decision somewhat offended President Eisenhower, who cherished the rights of states and who did not believe “you can change the hearts of men with laws or decisions.”67 From the moment Brown I was announced, the President stood aloof; aloof, that is, when he was not sympathizing with the “great emotional strains” white Southerners suffered from the decision.68 The amicus brief of the Government in Brown II reflected the President’s coolness: the Government in essence agreed with the South that compliance must come through a process of localized gradualism.69 Nor was Congress, with its senior Southern contingent, ready to move forward, as the timorous Civil Rights Act of 195770 indicated.

For a Court bent on great social reform, such considerations mattered. “[T]he Court,” Alexander Bickel wrote,

was entitled to consider that those institutions [Congress and the Presidency] are uncomfortable in the presence of hard and fast principles calling for universal and sudden execution. They respond naturally to demands for compromise, . . . [and] can most readily be expected to exert themselves when some leeway to expediency has been left open. Therefore, time and an opportunity for accommodation were required . . . to form part of the invitation that the Court might be extending to the political institutions to join with it in what amounted to a major enterprise of social reform.71

69 Chief Justice Warren believed that much of the racial conflict that followed Brown would have been avoided if President Eisenhower had actively and publicly supported the Supreme Court’s decision. E. Warren, The Memoirs of Earl Warren 291-92 (1977).
70 For the possible varying interpretations of the Government’s brief, see R. Kluger, supra note 1, at 726-27; F. Wilhoit, The Politics of Massive Resistance 143 (1973). Kluger generally views the brief as a middle position between the Southern states and Negro plaintiffs, Wilhoit as only a slightly toned down version of the Southern position. In fact, the Government’s brief resembled the Southern position more in critical points of substance than in style.
71 Pub. L. No. 85-315, 71 Stat. 634. The Act’s chief accomplishment was to establish a nonpartisan Civil Rights Commission to gather evidence on voting violations. Two observers note: “The law enacted by the 85th Congress on September 9, 1957, was the first civil rights bill since 1875. . . . It was not a far-reaching measure in substance, but it was a clear indication the legislative branch was at last undertaking responsibilities that had previously been left to the executive and the judiciary.” Civil Rights and the American Negro 471 (A. Blaustein & R. Zangrando eds. 1968).
72 A. Bickel, supra note 39, at 252.
Hence, it is argued, "all deliberate speed."

Even for a Court certain of presidential backing, the phrase "deliberate speed" would still have made sense. The thing to be avoided was a test of wills, regardless of who won. The Supreme Court in the midfifties dealt with two distrustful peoples: black and white Southerners. Ending segregation would help restore each to fuller participation in the nation's life. Yet how it ended was important. Too protracted a process would disillusion the Negro and echo the infamous abandonment of 1877, when the promise of equality was all but repudiated.72 Too precipitous a process would realign a part of the country whose sectional estrangement was only just beginning to heal. Federal force, the Court knew, would recall Civil War and Reconstruction like nothing else. "Deliberate speed," then, tried to balance the historical realities, to redeem the injustices of history without reopening its wounds. The Court later erred tragically in implementing and monitoring that famous phrase, but not in formulating it.

Ironically, Brown II came in the midst of an era of blind national pride and prowess, when little seemed beyond American ingenuity and reach. Yet the Court managed to see that absolute justice was not immediate, that "the law proposes but, for a time at least, the facts of life dispose." It was only fitting that the American South ocassioned the lesson. "For Southern history, unlike American," wrote Professor Woodward,

includes large components of frustration, failure, and defeat. It includes not only an overwhelming military defeat but long decades of defeat in the provinces of economic, social, and political life. Such a heritage affords the Southern people no basis for the delusion that there is nothing whatever that is beyond their power to accomplish.74

Human nature, the Southerner believed, was like a roadside mule that could be prodded, cajoled, sweet-talked, and downright cussed but not pushed infinitely against his will. "All deliberate speed" accepted, a bit too completely, this Southern view. The mule came too close to lying down in the road. Thus Brown II can be justified, but just barely. Deliberate speed was better at first for the nation than full speed ahead. Yet the Court's true-to-life politics imposed

72 The best account of the Compromise of 1877 is C. Woodward, Reunion and Reaction (1951).
73 A. Bickel, supra note 39, at 250.
terrible moral costs. Those who bore the costs of prudence were those who pay the toll for much political compromise: the poor and powerless. In the South of the recent past, this meant those black schoolchildren who began their education in that fall of 1954. We must all, before leaving, ask forgiveness from Mary Jones.

II. THE COLLAPSE OF DEFIANCE: THE COMING OF TOKENISM

From 1955 to 1968 the Supreme Court remained largely inactive in school desegregation. It would not be fair to say the Court did nothing significant in race relations during this time. In a series of per curiam orders, the Court struck down segregation in public facilities other than schools. It broadened the concept of the public facility subject to constitutional restrictions. It protected the NAACP against demands of Southern officials for disclosure of its membership lists, because "on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." The Justices also reversed trespass and breach of peace convictions of black sit-in protesters and mass demonstrators. And in 1967 the Court even nullified state statutes prohibiting interracial marriage, though by this time fears of "mongrelization" had receded, and the decision "was so unsurprising that it was given only passing attention in the nation's newspapers."

Yet these pronouncements, important as they were, failed to touch the real problem, which was understood all along to be school desegregation. On this question, the Court ducked a leading role by

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refusing even to review most rulings of the lower federal courts. The Court spoke mainly when it absolutely had to: at the point of crisis when obstruction was so apparent, delay so prolonged, or violation of constitutional principle so manifest that quiet was no longer feasible. But for the most part, silence prevailed.

The job of desegregation after Brown II, then, fell to the lower federal courts, principally the forty-eight district judges in the eleven Southern states and their immediate superiors, mainly on the Fourth and Fifth Circuit Courts of Appeals. Handing the lower federal courts this task without telling them how to accomplish it had several crucial consequences. First, it ensured a lack of uniformity among localities in the pace of desegregation. Only the Supreme Court could have promoted uniformity with frequent and specific rulings, which it steadfastly declined to do. As it was, the district judge possessed virtually limitless options: dismissing the complaint, remitting black plaintiffs to administrative remedies, admonishing school boards to take “positive” action at some future time, requiring school authorities to submit a desegregation plan to the court, or actually ordering school boards to admit a certain number of Negro pupils to specified white schools by a particular date. Thus the governing factor at trial became, not surprisingly, the personal leanings of the federal district judge. These varied markedly, all the way from Judge J. Skelly Wright who, in the face of at least thirty-six motions for delay, ordered the New Orleans School Board in the fall of 1960 to implement “his personally devised desegregation plan” to Judge T. Whitfield Davidson who declared at the end of a suit to desegregate the schools of Dallas, Texas, that Negroes must understand “the white man has a right to maintain his racial integrity and it can’t be done so easily in integrated schools . . . . We will not name any date or issue any order. . . . The School Board should further study this question and perhaps take further action, maybe an election.”

82 See generally id. at 162-73.
83 E.g., Cooper v. Aaron, 358 U.S. 1 (1958).
84 E.g., Griffin v. County School Bd., 377 U.S. 218 (1964).
86 The figures are those for the year 1960. Circuits other than the Fourth and Fifth dealt on the edges of the school desegregation problem. Arkansas was in the Eighth Circuit, Tennessee and Kentucky in the Sixth, and Delaware in the Third.
87 See J. Peltason, supra note 58, at 114.
88 F. Wilholt, supra note 69, at 183. See J. Peltason, supra note 58, at 221.
89 AP Dispatch (July 30, 1959), quoted in J. Peltason, supra note 58, at 118-19.
If an uneven pace of school desegregation was the first consequence of Brown II, a more or less cautious pace was the second. Brown II left federal district judges much too exposed. The nebulous nature of the Court's decision stripped from them much of the majesty of the cloak of law and the collective authority of legal institutions. Very often a district judge making an unpopular ruling can point upward, confess personal displeasure at the decision, but regret that appellate rulings leave him no choice. Community vengeance is thereby deflected from the district judge to the more faceless and numerous judges of the Supreme Court or courts of appeals. Some limited shifting of responsibility was attempted in the wake of Brown. As Judge Hobart Grooms explained his order to admit the first black student to the University of Alabama: "There are some people who believe this court should carve out a province, man the battlements and defy the U.S. Supreme Court. This court does not have that prerogative."90

But Brown II gave trial judges little to wrap in or hide behind. The enormous discretion of the trial judge in interpreting such language as "prompt and reasonable start"91 and "all deliberate speed" made his personal role painfully obvious. If the judge did more than the bare minimum, he would be held unpleasantly accountable. Bold movement meant community opprobrium. Segregationists were always able to point to more indulgent judges elsewhere. Brown II thus resembled nothing more than an order for the infantry to assault segregation without prospect of air or artillery support. That some of the infantry lacked enthusiasm for the cause only made matters worse. District Judge E. Gordon West of Louisiana, for example, regarded "the now-famous Brown case as one of the truly regrettable decisions of all times. . . . As far as I can determine, its only real accomplishment to date has been to bring discontent and chaos to many previously peaceful communities, without bringing any real attendant benefits to anyone."92 Given the vague and sparse character of Brown II and the Court's low profile thereafter, stagnation was inevitable.

Judge John J. Parker of North Carolina most influenced school desegregation in the years following Brown. Parker had been nominated in 1930 to the Supreme Court by Herbert Hoover but was

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90 R. Sarratt, supra note 21, at 203.
92 R. Sarratt, supra note 21, at 201-02.
rejected for being "unfriendly" to labor and for an unfortunate statement, made in the heat of a race for governor, that "the participation of the Negro in politics is a source of evil and danger to both races and is not desired by the wise men in either race or by the Republican Party of North Carolina."93 But Parker proceeded to become a respected and moderate jurist who issued several racially progressive rulings from his position on the Fourth Circuit Court of Appeals.94 His interpretation of Brown, however, could not be so categorized. That decision, Parker declared in July 1955, had

not decided that the states must mix persons of different races in the schools . . . . What it has decided . . . is that a state may not deny to any person on account of race the right to attend any school that it maintains. . . . The Constitution, in other words, does not require integration. . . . It merely forbids the use of governmental power to enforce segregation.95

The distinction between "Thou Shalt Integrate" and "Thou Shalt Not Segregate" is all important. If Brown was read to require integration, Southern school boards would be under an immediate duty to submit plans for substantial racial mixing. If, as Parker contended, Brown merely prohibited segregation, then the question becomes what evidence courts will accept that school boards are no longer doing so. At first, very little evidence sufficed. For at least five or six years after Brown, "tokenism was allowed where the local authorities were prepared to symbolize their acceptance of the principle of desegregation by the actual physical introduction of Negro pupils into white schools."96 Certainly there was "no requirement that the school population be generally reshuffled."97 Anything other than outright defiance stood a fair chance of judicial approval. Many federal judges sought only to move the South from the first, impermissible, stage of absolute defiance to the second stage of token compliance. The aim was for a breach of the principle, a beachhead, however narrow, that might widen over time. In the late 1950's that was seen as no mean task.

94 E.g., Rice v. Elmore, 165 F.2d 387 (4th Cir. 1947).
95 Briggs v. Elliott, 132 F. Supp. 776, 777 (E.D.S.C. 1955) (per curiam). Although Briggs is a per curiam decision, many scholars state that Judge Parker wrote it. See, e.g., R. KLUGER, supra note 1, at 751-52.
Southern legal resistance to Brown was of two kinds. Most extreme were school closing and fund cutoff laws, adopted by many Southern states but most spectacularly put into practice by Virginia. In Virginia, the Governor was required by law to seize and close any school threatened with racial integration. If, by some chance, a school dared or was ordered to reopen on an integrated basis, state funds promptly would be terminated to all schools of that class within the district. Funds then would be made available to localities as tuition grants for pupils attending private (and segregated) schools.88

What, one asks, were such enactments to accomplish? For a state to deprive itself of public education seems only masochistic. Some commentators suggested that Virginia segregationists “hoped that the governor could persuade Negro students to withdraw voluntarily” their applications once schools were shut down.89 More likely, school closings and fund cutoffs were designed by state officials to convince both diehards in their own constituencies and the rest of the nation how far they would go to maintain segregation, even to the point of abandoning public schools. Finally, the Virginia plan owed much to Senator Harry F. Byrd, determined in his last years to reap the drama and glory of another Lost Cause. “Let Virginia surrender of this illegal demand [i.e., Brown],” said Senator Byrd to a gathering of the faithful at his apple orchards at Berryville, “and you’ll find the ranks of the South broken. . . . If Virginia surrenders, the rest of the South will go down too.”100

But the school closing experiment was reckless and foredoomed. In the first place, improvised private education proved an inadequate substitute for a public school system, especially in larger jurisdictions. In Norfolk, Virginia, where six white high schools closed in the fall of 1958, one private class

used a vacant store. Others met in basements, attics or living rooms of private homes. The majority met in the twenty-seven churches and synagogues that had made rooms available. Many classes had been organized simply by groups of mothers, who would bring together a dozen or two dozen children, then find a classroom and a teacher for them. . . . Between 2,500 and 3,000 [of the 10,000 dis-

100 B. Muse, supra note 98, at 29.
placed Norfolk children] were receiving no education or tutoring of any kind.  

Second, school shutdowns generated strong public opposition to the bitter-enders, primarily from parents and businessmen for whom public education and appeal to new industry proved more important even than segregation.  

Finally, such schemes, enacted in open contempt of Brown, stood little chance of court approval. And on January 19, 1959, a three-judge federal district court pronounced Virginia's selective school closings unconstitutional. "[T]he Commonwealth of Virginia," held the court, 

having accepted and assumed the responsibility of maintaining and operating public schools, cannot . . . close one or more public schools in the state solely by reason of the assignment to . . . that public school of children of different races or colors, and, at the same time, keep other public schools throughout the state open on a segregated basis.  

To do so was to deny to citizens and taxpayers of that school district the equal protection of the laws.  

More popular, more ingenious, and more successful by far than the school closing laws were pupil placement statutes, which ten Southern states enacted shortly after Brown. In complexity and length they varied considerably, from less than a page in Louisiana to over seven in Tennessee. The placement laws were supposed to help Southern states make a gradual adjustment to Brown. In theory at least, they comported with Brown. Students were to be assigned by local authorities to public schools on nonracial criteria "to provide for the orderly and efficient administration of such public schools, the effective instruction of the pupils therein enrolled, and the health, safety, and general welfare of such pupils."  

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101 Id. at 112, 111. A three-judge district court noted that [t]he plight of the school children and the teaching personnel who would have been in attendance at the six schools has been adequately described as "tragic." Children who would be in their last year of high school are at a loss as to what to do, and those who had planned to attend college are completely frustrated.

104 For a careful evaluation of the pupil placement statutes, see McKay, "With All Deliberate Speed:," Legislative Reaction and Judicial Development 1956-1957, supra note 4, at 1214-21.
105 Meador, supra note 97, at 527.
In practice, pupil placement laws suited segregationist aims quite nicely. They were an ideal delaying device, a bramble of administrative hearings and appeals through which Negroes on an individual basis had to wind before reaching federal court. And the loose, multiple criteria in the statutes allowed officials to hold to an absolute minimum the number of blacks setting foot in white schools. "In short," wrote one commentator, the statutes, functioning as intended, make mass integration almost impossible, place the burden of altering the status quo upon individual Negro pupils and their parents, establish a procedure that is difficult and time-consuming to complete, and prescribe standards so varied and vague that it is extremely difficult to establish that any individual denial is attributable to racial considerations. \(^{107}\)

Where the statutes were transparent devices to maintain rigid segregation, as in Louisiana and Virginia, federal courts struck them down. \(^{108}\) But where they promised even the slightest forward movement, some courts were anxious to bestow approval. In the leading 1956 case of *Carson v. Warlick*, \(^{109}\) Judge Parker pronounced North Carolina's pupil placement statute—in both its criteria and procedures—constitutional on its face. "They [pupils]," noted Parker, 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. It is to be presumed that these will obey the law, observe the standards prescribed by the legislature, and avoid the discrimination on account of race which the Constitution forbids. Not until they have been applied to and have failed to give relief should the courts be asked to interfere in school administration. \(^{110}\)

The Supreme Court declined to review Judge Parker's ruling. \(^{111}\)

With North Carolina thus blessed and sent on its way, observers waited to see what would happen. To some limited extent, Judge Parker's confidence proved justified. North Carolina was often re-

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\(^{109}\) 238 F.2d 724 (4th Cir. 1956), cert. denied, 353 U.S. 910 (1957).

\(^{110}\) Id. at 728.

\(^{111}\) 353 U.S. 910 (1957).
garded as the model of an enlightened Southern response to the Brown decision. Real differences existed between that state and Virginia. Governor Luther Hodges stood for open schools, and shapers of public opinion, headed by former Governor and Senator Frank Graham, literary celebrities Harry Golden and Paul Green, and most of the North Carolina press, counseled orderly adjustment to Brown.\textsuperscript{112} Local option (rather than statewide resistance as in Virginia) allowed three North Carolina cities—Charlotte, Winston-Salem, and Greensboro—to enroll Negroes for the first time in the fall of 1957.

Yet it soon became obvious that North Carolina was going nowhere fast. Charlotte, for example, had three blacks in white schools in 1957-1958, four in 1958-1959, and exactly one in 1959-1960.\textsuperscript{113} Durham kept Negro entry in white schools at a trickle until in 1963 the local federal judge was “[f]inally persuaded that the ‘pupil assignment’ plan was intended to discriminate against Negroes rather than to further sound educational programs . . . .”\textsuperscript{114} And the rural areas of the state lagged behind the Piedmont cities. As a rule, however, adjustment was less traumatic in North Carolina than in Virginia and the Deep South. Token compliance often “succeeded” where total defiance fell flat.

But the North Carolina way was not gratefully received by the nation’s Negroes. “[I]n the tradition of the old guards,” wrote Martin Luther King, Jr., in 1962,

who would die rather than surrender, a new and hastily constructed roadblock has appeared in the form of planned and institutionalized tokenism. Many areas of the South are retreating to a position where they will permit a handful of Negroes to attend all-white schools or allow the employment in lily-white factories of one Negro to a thousand whites. Thus, we have advanced in some places from all-out, unrestrained resistance to a sophisticated form of delaying tactics, embodied in tokenism. In a sense, this is one of the most difficult problems that the integration movement confronts.\textsuperscript{115}

What hurt most was that tokenism won the tacit approval of the black’s supposed friend: the United States Supreme Court. “For

\textsuperscript{112} B. Muse, supra note 24, at 113; N. Peirce, The Border South States 141 (1975).
\textsuperscript{113} Dykeman & Stokely, Integration: Third and Critical Phase, N.Y. Times, Nov. 27, 1960, § 6 (Magazine), at 24.
\textsuperscript{114} Gellhorn, A Decade of Desegregation—Retrospect and Prospect, 9 Utah L. Rev. 3, 6 (1964).
\textsuperscript{115} King, The Case Against ‘Tokenism,’ N.Y. Times, Aug. 5, 1962, § 6 (Magazine), at 11.
eight years after its implementation decision," lamented Robert Carter, "the Court refused to review any case in which questions were raised concerning the validity of pupil placement regulations or the appropriateness of applying the doctrine of exhaustion of administrative remedies to frustrate suits seeking to vindicate the right to a desegregated education."116 One-grade-a-year desegregation plans also were left standing.117

One can argue that Virginia’s massive resistance, North Carolina’s passive resistance, and the cautious course of federal judges closest to the problem all confirmed the need for a period of Southern adjustment and thus justified tokenism. The token blacks that whites first encountered would be elite members of the race, carefully selected by white pupil placement boards from those blacks courageous and determined enough to apply to white schools in the first place. Thus favorable first impressions would be formed; integration would brightly begin. That rationale, of course, was insulting. Integration, it implied, was a one-way process of black supplication and white approval. In the South of the late 1950’s, that was exactly how it was seen.

Yet the Court’s prolonged patience with tokenism was its greatest mistake. “To describe [tokenism] as gradualism,” wrote Walter Gellhorn in 1964, “is to overlook its true nature. It is in fact sheer obstructionism, using the public treasury to protract the processes of adjudication rather than using adjudication to determine genuinely uncertain questions of law.”118 For the Supreme Court to allow the legal process to be used solely to frustrate its own lawful mandates seemed anomalous at best. The Court’s great error lay not in the formulation of “all deliberate speed,” but in not monitoring “deliberate speed” after Brown to ensure that genuine progress actually took place.

Of tokenism, as with all previous racial policies, blacks bore the brunt. In many ways the tokenism of 1960 was no better than total

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118 Gellhorn, supra note 114, at 6.
segregation prior to 1954. In some ways it was worse. It was certainly just as profitless; the mass of black schoolchildren still lacked an equal education. And because tokenism was more sophisticated, it was more likely to be condoned. But tokenism was roughest of all on the token. There he sat, a conspicuously black face in a classroom of forty or an auditorium of one thousand. Sitting there was insulting and uncomfortable. "We'll accept one or two of you if we must," the message of tokenism went, "but not too many." And that, in fact, was tokenism's calculated effect: to make entry into white schools so unpleasant and disagreeable that few blacks would want to apply. "I have had many a Negro parent tell me now that the Negro has won his fight in the courts they would prefer that their children go to all Negro schools if they are improved to the point of near-equality with the white schools," wrote Hodding Carter. "Much of the white South is banking on this understandable reaction . . . "119

White hostility, however, was the lesser of tokenism's burdens. The first black entrants into white classrooms represented not only themselves but the entire black race. Theirs was indeed the burden of racial worth. Their performance would determine whether Negroes generally were intelligent; their personalities whether Negroes were worth befriending; their adaptability whether Negroes could "fit in." The token was expected to prove himself the equal that courts were now proclaiming him. Though for some black students this posed a welcome challenge, others it placed under intolerable pressure and strain. The tragedy was that the Court's commitment to gradualism overlooked the cruelties of tokenism.120 The emotional impact of these cruelties placed an unduly steep price on the exercise of basic constitutional rights.

119 Carter, Desegregation Does Not Mean Integration, N.Y. Times, Feb. 11, 1962, § 6 (Magazine), at 21, 72.

120 The poignant story of one token black, Dorothy Counts, tells a good deal. In the fall of 1957 she was the one black student to enter previously all-white Harding High School in Charlotte, North Carolina. Charlotte's first day of "integration" took place without incident, except, that is, for Miss Counts. Walking home after classes, "she was pursued by a rowdy crowd of juveniles—evidently indoctrinated by adult racists—jeering, spitting, and throwing pebbles, sticks, and paper balls. A white girl, who spat in [her] face, and a white boy, who threw a stick, were arrested." Throughout the ordeal, Miss Counts kept her poise. "A comely young lady of unmistakable gentleness and breeding, in a neat plaid dress," wrote Benjamin Muse, "she walked in front of the bawling mob with a quiet dignity that made theories of Negro inferiority seem grotesque." Yet there were limits to what she might endure. After one week, apparently "seeing no hope of enjoying tolerable relations with her white schoolmates," Dorothy Counts left Harding High for a biracial school in suburban Philadelphia. B. Muse, supra note 24, at 114-15.
Thus tokenism could never be permitted to become the accepted state of racial affairs. Black leaders, in the face of growing restlessness and anger, still tried in the early 1960's to project optimism and hope. "I am confident," wrote Martin Luther King, Jr.,

that this strategem [of tokenism] will prove as fruitless as the earlier attempt to mobilize massive resistance to even a scintilla of change.

... Many of the problems today are due to a futile attempt by the white South to maintain a system of human values that came into being under a feudalistic plantation system and that cannot survive in a democratic age.121

III. Little Rock

Although the Supreme Court avoided the routine of school desegregation for thirteen years after Brown II, it could not escape its melodrama. The Court's involvement in these years will largely be remembered through two crises: Little Rock and Prince Edward. In both, the Court reaffirmed, with near-unanimity and a flourish, its commitment to the principles of Brown v. Board of Education.122 Yet its lustrous pronouncements on Southern trouble spots, divorced from precise and meticulous desegregation guidelines, were of limited effect, much like a President with a stirring inaugural but no program.

The Little Rock school crisis was largely the doing of Arkansas Governor Orval Faubus who demonstrated the rich political profit in racial theatrics. No visceral racist,123 Faubus needed a lively issue in his quest for an unusual third term. School integration was near to hand.124

121 King, supra note 115, at 11.
122 See Griffin v. County School Bd., 377 U.S. 218 (1964) (Prince Edward); Cooper v. Aaron, 358 U.S. 1 (1958) (Little Rock). Justice Frankfurter's concurrence in Cooper, id. at 20, was a personal elaboration of the views held by the majority. Justices Clark and Harlan disagreed in Griffin with the part of the Court's holding that federal courts might be empowered to reopen public schools in Prince Edward County, 377 U.S. at 234, but, probably because of the tradition of unanimity in school desegregation cases, declined to elaborate.
124 Several friends begged him to resist the race issue. "I reasoned with him, argued with him, almost pled with him," not to intervene in the Little Rock affair, recalled Winthrop Rockefeller, then on good terms with the Governor as head of Arkansas's industrial development effort. Rockefeller reports (and Faubus denied) that Faubus told him: "I'm sorry, but I'm already committed. I'm going to run for a third term, and if I don't do this, Jim Johnson

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Race, of course, had been used cynically in Southern politics before Faubus. Like war, the issue had the wondrous capacity to divert attention from other pressing problems. It was the great welder of white solidarity. At the turn of the century, white supremacy was the cry used to submerge differences between upcountry populist and lowland planter. And after Brown, race would revive the fortunes of men and political machines otherwise facing obsolescence and decline. But though the issue had often been turned to local political profit, seldom was it employed at such great national cost as at Little Rock Central High.

Arkansas, though opposed to integration, was not the Deep South. Even before the Brown decisions, several Negroes had been enrolled at the University of Arkansas. By the end of 1955, ten Arkansas school districts had announced plans for gradual desegregation. That same year, Negroes enrolled in five of the six state-supported white colleges, all without intervention from Governor Faubus. Little Rock, especially, did not seem the place for racial politics to prosper. It was, wrote Anthony Lewis, “a city of the New South, a middle-class, moderate town with an enlightened mayor (Woodrow Wilson Mann), congressman (Brooks Hays), and newspaper (the Arkansas Gazette, edited by Harry Ashmore).” Thus when the school board proceeded under a court-approved plan to admit nine Negroes to Little Rock Central High School in the fall of 1957, nobody expected unusual trouble.

But nobody reckoned on Governor Faubus. On the night of September 2, 1957, with schools set to open the next day, Orval Faubus told his fellow Arkansans that it would “not be possible to restore or to maintain order if forcible integration is carried out tomorrow” at Little Rock. But the maintenance of order proved scarcely more than a pretext. On September 3, “Little Rock arose to gaze upon the incredible spectacle of an empty high school surrounded by National Guard troops called out by Governor Faubus to protect life

and Bruce Bennett [two hard segregationists] will tear me to shreds.” N. Peirce, The Deep South States of America 132 (1974). Former Governor Sid McMath remembers that Faubus “made no bones about it. He said he had to have an emotional issue . . . . He knew he was making a choice between entrenching his machine, or pushing the state ahead. He knew what he was doing when he made the choice.” R. Sherrill, supra note 123, at 89.

125 See V. Key, supra note 47, at 8-9.
126 See J. Wilkinson, supra note 44, at 153-54.
127 Yates, supra note 123, at 271.
128 A. Lewis, Portrait of a Decade 47 (1964).
129 Id.
and property against a mob that never materialized."\textsuperscript{130} That same day, the federal district court ordered the school board to proceed with desegregation, despite the Guard’s presence. But when, on September 4, the black students attempted to walk through a now assembled mob and enter Central High, guardsmen “‘stood shoulder to shoulder at the school grounds and thereby forcibly prevented the 9 Negro students . . . from entering,’ as they continued to do every school day during the following three weeks.”\textsuperscript{131} 

Not until September 20, when federal district Judge Ronald Davies enjoined Faubus from preventing the attendance of Negro children at Central High, did Faubus remove the troops. And on Monday, September 23, 1957, the nine Negroes entered Central High, to the distress of the assemblage outside. “I tried to see a friendly face,” recalled Elizabeth Eckford, one of the nine. “I looked into the face of an old woman and it seemed friendly, but when I looked at her again, she spat on me.”\textsuperscript{132} “They’ve gone in,” a white man shouted. “The niggers are in our school,” six young girls wailed hysterically. A mother threatened to enter Central High School and bodily remove the blacks. With the mob demanding that white students in the high school leave and with parents withdrawing their children to the cheers of the multitude, the police announced shortly after noon that the Negroes had been withdrawn. Little Rock had experienced roughly three hours and fifteen minutes of racial integration.\textsuperscript{133} 

The rest is well known. President Eisenhower, while hoping that Little Rock would “return to its normal habits of peace and order and [that] a blot upon the fair name and high honor of our nation in the world will be removed,”\textsuperscript{134} promptly dispatched troops to that city to assist the execution of federal law. By nightfall of September 24, “twenty-six vehicles, including trucks, half trucks, and jeeps—filled with troops dressed in battle fatigue[s]—drove up to Central High School.”\textsuperscript{135} The following day, under the aegis of one thousand paratroopers and a federalized National Guard, the nine

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\textsuperscript{130} N. Peirce, supra note 124, at 132.

\textsuperscript{131} Cooper v. Aaron, 358 U.S. 1, 11 (1958) (quoting Aaron v. Cooper, 156 F. Supp. 220, 225 (E.D. Ark. 1957)).


\textsuperscript{133} A. Lewis, supra note 128, at 51-54.

\textsuperscript{134} Radio-television address by President Eisenhower (Sept. 24, 1957), quoted in B. Muse, supra note 24, at 141.

\textsuperscript{135} B. Muse, supra note 24, at 140-41.

\normalsize
Negro children reentered the school.

But the ensuing year at Little Rock Central High was not a happy one. In many ways, the school became an intense and hellish microcosm of the South at large. Gangs of segregationist toughs enforced conformity and made sure that new black students received no kindly glances from "aberrant" whites. They patrolled the halls and cafeteria loudly warning "anyone approaching the Negroes, lunching alone to 'stop that if you don't want to get beaten up.'" Against the small contingent of Negro students, the segregationists practiced a steady harassment, "kicking the colored children, banging them against their lockers, spitting on them, tripping them in halls, pushing them downstairs, stepping on their heels, sticking nails on their seats, and pouring soup over one of them." Only the guardsmen patrolling the school appeared to protect them from more serious harm.136

Against this background, in February of 1958, the Little Rock school board returned to district court asking that the Negro students be withdrawn from Central High and reassigned to segregated schools, and that its desegregation program be postponed for two and one-half years. The district judge, citing conditions of "chaos, bedlam and turmoil," "repeated incidents of more or less serious violence directed against the Negro students and their property," a deterioration in the "educational program," and the need for continued "military assistance or its equivalent" for Central High to operate, agreed to the postponement.137 The Court of Appeals for the Eight Circuit reversed but stayed its mandate so the school board might petition the Supreme Court.

The stage thus was set for a test of wills. The basic question, which could not be evaded, was whether the ploy of a demagogue might delay a desegregation plan approved in federal court in furtherance of Brown. The Supreme Court answered, as it absolutely had to: No. To do otherwise was to concede the fate of Brown to extremists in the South. The Court might tacitly accommodate the South with "all deliberate speed" and denials of certiorari on challenges to pupil placement laws.138 But Faubus left the Justices no

139 See pp. 488-505, 510-13 supra.
graceful avenue of retreat. True, the Governor himself was not party to the proceedings before the Supreme Court and had been careful not to disobey a lower court injunction forbidding him from blocking black attendance at Central High. Yet Faubus’s show of force had disrupted a plan of integration theretofore proceeding smoothly, and Faubus, by the school board’s own admission, was responsible for the poisonous climate existing at the high school.140

The Court sensed keenly the challenge to its authority. Little Rock commanded its immediate attention; lawyers were given but two weeks notice to submit their briefs.141 The Court convened in special session to hear oral argument. Judgment was announced on September 12, 1958, just in time for the scheduled opening of school. Seventeen days later, on September 29, the full opinion was released in Cooper v. Aaron,142 signed, in an unprecedented show of solidarity, by each of the nine Justices. John Marshall’s famous sentence from Marbury v. Madison143 was quoted (as the Court likes to do when stakes are high and its authority is questioned): “It is emphatically the province and duty of the judicial department to say what the law is.”144

Little Rock’s plea for postponement was resoundingly denied. “The constitutional rights of respondents,” the Court announced, “are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and Legislature.”145 Justice Frankfurter’s concurrence put it best: The school board’s request for postponement meant essentially that

law should bow to force. To yield to such a claim would be to en-throne official lawlessness, and lawlessness if not checked is the precursor of anarchy. On the few tragic occasions in the history of the Nation, North and South, when law was forcibly resisted or systematically evaded, it has signalled the breakdown of constitutional processes of government on which ultimately rest the liberties of all.146

On the facts of the case—that no state official may forcibly frustrate the execution of a federal court order—the Supreme Court was

140 Cooper v. Aaron, 358 U.S. 1, 12, 15 (1958).
141 See Miscellaneous Order No. 1, 358 U.S. 27 (1958).
143 5 U.S. (1 Cranch) 137 (1803).
145 358 U.S. at 16.
146 Id. at 22.
unquestionably correct. In the drama of the occasion, the Court went somewhat overboard with a sweeping and unprecedented assertion of its own authority and place.147 The Constitution, said the Court, was "the supreme Law of the Land"; it was the duty of the Court to interpret that supreme law. "Every state legislator and executive" was said to be bound by this interpretation and sworn to uphold it.148

Taken literally (and not merely as a rhetorical flourish), such statements imply that all state officials, whether or not party to a case, are obliged to immediately support, both in word and in deed, whatever the Court has said. That view is both unrealistic and undesirable. It is unrealistic because elected officials do not rush into line behind unpopular decisions on such matters, for example, as abortion and school prayer. It is undesirable because the edicts of our least democratic branch of government must enjoy some period of testing before they become, in the most pervasive sense, the law of the land. At a minimum, verbal dissent to Court decisions is to be welcomed. But should there not also be what Professor Bickel once termed the dissenter's option to wait for litigation. He waits to see how intensely others are concerned to have the rule enforced; the speed and extent of litigation will reveal that . . . . He waits to assess the reaction, in the interstitial area left to them to react in, of the Supreme Court's first constituency—the lower federal and state judges. And he waits to allow time for the agitation of public opinion, since he knows that if he turns out to be in the majority, or to feel intensely where all others are merely indifferently acquiescent, he can change the law, or make it a dead letter, without recourse to the extremely cumbersome process of amendment. . . . [The dissenter] ought . . . to be brought around in time; and it gives rise to no contradiction, merely to some untidiness, to hold also that in the meantime, while the issue is in doubt and subject to settlement by political means, coercion does also take place, as litigation succeeds and produces specific decrees.149

That, of course, is how it happens, whatever the Court may wish. Democracy moves by consensus, or not at all. The indispensable ingredient of that consensus must be, as Cooper v. Aaron recog-

148 358 U.S. at 18.
149 Bickel, supra note 96, at 200-01. See also A. BICKEL, supra note 39, at 254-72.
nized, respect for law as embodied in a specific court decree. But we are too independent a people not to haggle and dispute that with which we disagree. Our Constitution blesses our contumaciousness, individually through the first amendment, collectively through our system of federalism and the rights of the states. It is the duty of the Supreme Court to prick consciences, to ruffle settled modes of practice and behavior, to rally allies, and to win converts to its cause. But that, on the gravest matters, is the challenge of a generation, not the work of a day.

The wonder is that *Cooper v. Aaron* did not provide momentum for a renewed assault on segregation in the South. The country had been aroused over Little Rock, the President had acted, the Court's own role had been reaffirmed, and Southern intransigence was laid shameless and bare. Yet after *Cooper*, the Court rehibernated; five long years would pass before another major school case.\(^{156}\) Why the Court did not seize the initiative after *Cooper* is, of course, a speculative matter. It always is easier, moreover, to speculate on why the Court did act than on why it did not. Possibly the Court felt more secure confronting direct, rather than subtle, challenges to its authority. Only official lawlessness, the Justices may have sensed, would generate sufficient public backing of the Court's position. The very turmoil of Little Rock may, ironically, have persuaded the Court that gradualism was the wisest course, that insistence on more integration would only make Faubusism more commonplace.

Further explanation may lie with Justice Felix Frankfurter, a dominant influence on the Court of the 1940's and 1950's.\(^{151}\) *Brown* always had posed for Justice Frankfurter a difficult dilemma. Declaring segregation unconstitutional was morally congenial; implementing that declaration was something else again. Aggressive judicial action risked the Court's enforcement capabilities and, perhaps worse, abridged the rights of states and localities to manage their own schools.\(^{152}\) Two of Justice Frankfurter's favorite opinions, *Wolf v. Colorado*\(^{153}\) and *Colegrove v. Green*,\(^{154}\) had helped establish that state systems of criminal justice and legislative redistricting were not normally the concern of federal courts or the Constitution. During the 1960's, states' rights would become rather a quaint concern;


\(^{152}\) *See G. Dunne, supra* note 27, at 319-24; R. Kluger, *supra* note 1, at 598-602.

\(^{153}\) 338 U.S. 25 (1949).

\(^{154}\) 328 U.S. 549 (1946).
in the late 1950’s, they mattered still. It is often thought that *Brown*
and the school cases loosened the Court’s inhibitions in such areas
as reapportionment and criminal justice.\textsuperscript{155} But the process also
worked in reverse: the vitality of federalism in those areas influ-
enced the pace of school desegregation as well. Not until Justice
Frankfurter’s last years on the Court and his replacement in 1962
by Arthur Goldberg did states’ rights barriers begin to erode.\textsuperscript{156} In
the 1950’s, it still took a governor’s blatant defiance to lower them.
Thus in school desegregation, *Cooper* dawned no new day. It stands
as that occasional constitutional case with a larger-than-life script
and a limited immediate impact.\textsuperscript{157}

IV. THE COURT BECOMES RESTIVE: PRINCE EDWARD

By the early 1960’s, the attitudes of lower federal courts toward
Southern evasion became perceptibly less indulgent. Blacks were
permitted to maintain more frequent class actions and were increas-
ingly relieved from jumping the administrative hurdles in the pupil
placement statutes. Even the placement acts themselves began to
be recognized for what they were: the barest tokenism superimposed
on still segregated school systems.\textsuperscript{158} And there were clues, albeit
faint ones, that the Supreme Court was beginning to bestir itself.

The Court’s first significant pronouncement of the decade, *Goss*


\textsuperscript{154} See, e.g., Baker v. Carr, 369 U.S. 186 (1962); Mapp v. Ohio, 367 U.S. 643 (1961), both
of which found Frankfurter in dissent.

\textsuperscript{157} See also Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952); Harbaugh,

A postscript exists to the crisis of Little Rock. Arkansas did not bow gracefully to the
Court’s decision. By order of Governor Faubus, all Little Rock high schools were closed during
the 1958-1959 school year, to be reopened in September 1959 after a federal court declared
(per curiam). And Faubus himself was handsomely reelected in 1958, 1960, 1962, and 1964,
due in great part to his “heroics” at Little Rock. Only on his retirement in 1966 did the
governorship change hands. See Yates, *supra* note 123, at 272-77. But the longer perspective
is the happier one. A visitor to Central High in 1972 found

one of the most successful ventures in school integration anywhere in America. One
looks at Central High, a decade and a half after 1957, and sees a still handsome school,
set in a wooded residential area, Negro and white children talking and playing sports
and associating freely together. . . . [S]tudent leaders of both races and the school
administration (now also thoroughly integrated, with a black principal at Central
High) have worked hard to correct [racial antagonisms].

try, finally met defeat.

\textsuperscript{158} See Green v. School Bd., 304 F.2d 118 (4th Cir. 1962) (discussed in Bickel, *supra* note
96, at 206-09).
v. Board of Education,159 concerned "minority to majority" transfer provisions in the desegregation plan of Knoxville, Tennessee. By the standards of 1963, Knoxville's plan was not a regressive one. It went well beyond the pupil placement stage and had won cautious approval both from the local district court and the Sixth Circuit Court of Appeals.160 Residential zoning, not race, was the basis for public school attendance. But to mollify those whites zoned into heavily black areas, the local school board permitted a pupil to transfer from a school where his race was in the minority back to a school where his race would be in the majority. Because this transfer provision turned explicitly on race and because it could only encourage significant resegregation, the Supreme Court, having taken the case, had no choice but to strike it down. Yet curiously the Court reentered school desegregation by disapproving a relatively "moderate" plan after years of sanctioning more obstructionist ones. Moreover, the Court's ruling doubtless discouraged other localities from adopting residential zoning by removing the "sweetener" for resisting whites.

In McNeese v. Board of Education,161 delivered the same day as Goss, the Court held that black plaintiffs challenging school segregation under the federal Civil Rights Act162 need not exhaust unpromising state administrative remedies before bringing suit in federal court. McNeese was significant because it came not from the South but from Illinois, because the black plaintiffs charged segregated treatment within the school walls, and because the no-exhaustion doctrine announced that day would later be wrenched far beyond its original school context.163 But why the Court waited until 1963 in a Northern setting to address the chief dilemma of Southern blacks challenging the pupil placement statutes remains unclear.164

Two years later, in Bradley v. School Board,165 the Court gingerly broached racial bias in teacher assignments. In some ways, teacher

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164 Indeed, only Justice Harlan's dissent in McNeese even mentions the pupil placement rulings. See 373 U.S. at 676-77.
165 382 U.S. 103 (1965) (per curiam).
assignments were the least visible and most flammable part of the entire school picture.\textsuperscript{144} Many white parents found it difficult enough to accept black classmates for their children, let alone a black teacher. Was a black to be permitted to discipline their offspring and teach them "nigra talk"? Many white teachers, moreover, did not relish teaching black schoolchildren. Some left teaching altogether at the onset of integration and others went to private schools. "Every one worries about the children," said one small-town Georgia teacher, "but I think desegregation is harder on us than anyone. . . . I almost had to pinch myself that first day when they came down the hall."\textsuperscript{147} And an Atlanta teacher expressed the struggle within her:

\begin{quote}
I just didn't believe it would work. I've known nigras all my life, and I didn't think they would adjust to our schools. I have nothing against them. I just thought their minds weren't like ours. And I still think many of them have a long way to go. . . . Yes, I'm ready now to let those who can do it come to our schools. That's where I have changed . . . .\textsuperscript{148}
\end{quote}

Black teachers, too, faced problems. For them, more than anyone, integration's blessings were most mixed. In the segregated system, noted Helen Nicholson of Hattiesburg, Mississippi, "Black teachers had to provide their own teaching supplies and, for the most part, knew nothing at all about departmental budgets . . . . There was a time when Black students who were either sisters or brothers or friends who lived near each other had to share one textbook."\textsuperscript{149} Integration might at least mean a schoolbook for each black schoolchild and better resources with which to teach. But it held many uncertainties. Black teachers sensed that in a desegregated school system, their job would be the least secure.\textsuperscript{170} And they wondered too, after years with all-black charges, how well they would teach in integrated schools and whether white students and parents would

\textsuperscript{144} Racial allocation of teachers has been doubly condemned as denying equal protection both to black teachers and to black schoolchildren whose educational experience is thereby impaired. See Lieberman, Teachers and the Fourteenth Amendment—The Role of Faculty in the Desegregation Process, 46 N.C.L. REV. 313, 320-40 (1968).

\textsuperscript{147} Coles, How Do The Teachers Feel?, SATURDAY REV., May 16, 1964, at 72, 72.

\textsuperscript{148} Id. at 73.


\textsuperscript{170} In 1972 alone in five Southern states, "4207 Black educators were dismissed, demoted, assigned out of field or unsatisfactorily placed . . . ." Watson, School Integration: It's Meaning, Costs and Future, 4 J.L. & EDUC. 15, 15 (1975).
accord them proper respect.

Faced with so delicate a problem, many school boards focused solely on student placements and left the teacher problem for later: much later. By 1965, for example, none of the 30,500 Negro teachers in Alabama, Louisiana, or Mississippi taught with any of the 65,400 whites.171 But in Bradley, the Court forbade further procrastination. District courts, the Court said, must not approve desegregation plans without addressing claims of racial bias in faculty assignments.172 In a related case, the Court warned that racial segregation of teachers would invalidate an otherwise constitutional pupil desegregation plan.173 But exactly how teachers must be assigned, the Court declined to say. That, in the grand tradition of Brown II, would be left to the lower federal courts.174

The Court doubtless recognized that faculty and student desegregation, to be effective, must occur simultaneously. White students would not attend schools with all-black faculties, and few white teachers cared to teach only black students. For a school to be identifiable black in any way—by the composition of its student body, faculty, or staff, even by its school name or traditions—was the surest way to stiffen white resistance to attending it. Yet the Court’s adoption of simultaneous faculty-student integration was of limited practical effect. So long as the Justices continued to indulge only token student integration, faculty integration would likewise be frustrated.

The Court’s most notable decision of the midsixties involved “rural, remote, and resolute” Prince Edward County, Virginia.175 on the upper tier of the state’s black belt, known as the Southside. The Southside is Virginia’s brush with the Deep South, “Dixie below the James,” one writer called it.176 In Southside, the eternities of the land—sunlit tobacco fields, forests of scrub pines, sleepy river rolls—lay side-by-side with such manmade eternities as segregated schools. Here in the Civil War were the South’s last strongholds at Petersburg and Appomattox. Here too, exactly one century later, lay the last stalwart hopes of segregation, in “America’s most stub-

172 382 U.S. at 105.
174 For an evaluation of various remedies for racial allocation of teachers, see Lieberman, supra note 166, at 350-59.
175 Goodman, Public Schools Died Here, SATURDAY EVENING POST, Apr. 29, 1961, at 32, 86.
176 P. ROUSE, BELOW THE JAMES LIES DIXIE (1968).
born county,” as one detractor called Prince Edward.177

Though Prince Edward was the defendant in one of the companion cases to Brown,178 the axe did not fall at once. But in May of 1959, the Fourth Circuit Court of Appeals ordered the county to desegregate immediately.179 Faced with such an order, Prince Edward chose to close its public schools competely. The county could not afford, its leaders contended, to maintain both a public and a private school system.180 For five long years—all after Virginia’s massive resistance had collapsed and statewide school closing laws had been declared unconstitutional—Prince Edward went its own way. The little county would set the course, show the South and the world how Brown might yet be thwarted. “The spotlight will be on you and your accomplishments,” residents were told. “If we have a successful year, the hopes of hundreds of thousands will be kindled.”181

For the nearly 1,400 white students of Prince Edward, the school closing crusade was no disaster. The leaders of the private school experiment were shrewd and determined. The churches, the Jaycees, and PTA’s all aided the effort, to the flattery and encouragement of the local press. “News of the Prince Edward experiment traveled far and swiftly. . . . Donations of all imaginable kinds turned up. A Silver Springs, Florida, man sent along 250 pounds of chalk . . . . Editor [James J.] Kilpatrick in Richmond donated some eighty books” to the private school’s library.182 White students met in churches and unrented stores under many of their former school teachers.183 And though few judged the private school effort an unqualified success, neither was it a sham. Within five months of opening, Prince Edward’s private schools had received state accreditation.184 Most important of all, private schools cost parents very little. After the first year, students attending them received public tuition grants: $125-$150 from the State of Virginia and an

179 Allen v. County School Bd., 266 F.2d 507 (4th Cir. 1959). The Fourth Circuit directed the school board to desegregate the white high school in the fall of 1959 and to make plans for elementary school desegregation. Id. at 511.
180 Goodman, supra note 175, at 87.
181 B. Smith, They Closed Their Schools 168 (1965). This book is the most comprehensive view of the Prince Edward school closings.
182 Id. at 166.
183 Id. at 167-88. See also Goodman, supra note 175, at 32.
184 Goodman, supra note 175, at 85.
additional $100 from the county. Finally, there was a property tax
credit of up to twenty-five percent for contributions made by Prince
Edward taxpayers to any “nonprofit, nonsectarian private school”
in the county.185

For Prince Edward’s 1,700 black children, it was a sorrier story.
Negroes rejected an offer of private schools, preferring to continue
their legal battle for public school desegregation.186 From 1959 to
1963, most Prince Edward blacks went without formal education. A
handful were educated across the border in North Carolina, a few
more sent north to integrated schools at the expense of the American
Friends Service Committee. An estimated two hundred received
“bootleg” education, living as “make-believe” members of families
outside Prince Edward so they might attend public schools without
paying nonresident charges. But the great mass of them—about
1,400—remained in Prince Edward. About one-third attended
makeshift training centers, set up “more for morale than for learn-
ing.” And eight hundred or so were lost, “completely and perhaps
permanently, to any known attempt at education.”187 One visitor,
Irv Goodman of the Saturday Evening Post, watched Negro children
“on the streets at noon, walking or sitting on the steps of the post
office or standing on a corner or throwing rocks in what was once a
public-school playground.” Goodman spotted “a Negro boy, eight
years old, sitting in his yard, scratching in the dirt with a stick—not
letters or numbers or lines of a pattern, but marks without meaning.
After a while, he scuffed out the marks with his shoe and scratched
again. The little boy had never been to school.”188

In time, the lonely vigil of Prince Edward became a national
outrage. The Kennedy administration felt something had to be
done.189 By the fall of 1963, federal, state, and local authorities coop-
erated with a private organization known as the Prince Edward Free
School Association to set up schools for Negroes in anticipation that
public schools might reopen the following year. But returning to
school after so many years would not be easy. Neil Sullivan, super-
intendent of schools for the Free School Association, found that
“[l]iving apart from an organized society, without a newspaper,

186 Id. at 223.
187 Goodman, supra note 175, at 86.
188 Id. at 33.
189 See C. Brauer, John F. Kennedy and the Second Reconstruction 95 (1977); Sullivan,
supra note 177, at 59.
magazine, or library (some with illiterate parents), the [Negro] children had learned to communicate by use of gestures and avoided using the spoken word." As part of the effort to educate them, these children "were present in the chambers of the Supreme Court [on March 30, 1964], when the Prince Edward case was heard for the third time."

Though there were no mobs and no National Guard, Prince Edward County affronted the Court as much as Little Rock. Here was a party to the original Brown decision, back in Court a decade later, with its private schools segregated and public schools shut down. Here was a county willing to forsake altogether democracy's noble experiment—universal public education—to defy the Brown decision. Here were Negro schoolchildren not better off after Brown but much worse. And there was the Supreme Court, indeed the entire federal judiciary, seemingly unable after ten long years to help.

Thus the Justices, as in Little Rock, had to end the obstruction as swiftly as possible. And in Griffin v. County School Board, the Court did just that. It curtly rejected four procedural grounds offered by Prince Edward to delay or dismiss the suit. On the merits, the Court was equally blunt. Black schoolchildren in Prince Edward, it held, had been denied equal protection of the law under either of two theories. The first was Virginia's permitting public schools to close in Prince Edward while those elsewhere across the state remained open. The second was the maintenance of private schools with public funds, at least where public schools were closed.

The Court was most emphatic as to remedy. Not only was the district court empowered to enjoin tuition grants and tax credits to supporters of private schools, but it was further authorized to order Prince Edward officials to reopen and fund a racially nondiscriminatory public school system. For Justices Clark and Harlan, this last proved too much, though the sensitivity of the occasion prevented them from pushing the point. One remedy only the Court did not allude to: integrating "private" schools. The South was

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190 Sullivan, supra note 177, at 60.
191 Id. at 71.
193 Id. at 230-32.
194 The injunction was appropriate, at least where public schools remained closed. Id. at 233.
195 Id. at 234.
196 That remedy, of course, would have led the Court to define what level of involvement
thus left the costly option of private academies, but not of closed public schools.

The object of Griffin, as it virtually had to be, was to get Prince Edward, never mind how. As in Cooper, impatience produced conclusoriness. "The case," wrote Professor Philip Kurland, "represents one of the many factual situations that compels the Court to resort to unbecoming and unfortunate methods for assuring that its will is done." On school segregation, so it seemed, decisions were to be judged more for moral outcome than for legal content. Cleansing the nation of disgrace did little to assure the orderly development of law.

Prince Edward, more than Little Rock, demonstrates how Southern obstruction and the Court's changing expectations shaped the course of school desegregation. Counties like Prince Edward caused the Court in desperation to vest district judges with sweeping remedial power. Determination to do whatever was necessary began, from deep frustration, to take hold of the Court. In Prince Edward, in 1964, that meant reopening public schools. In New Kent County, in 1968, it meant promptly converting, by whatever means, to substantially integrated schools. In Charlotte-Mecklenburg, in 1971, it meant, among other things, massive compulsory transportation of schoolchildren.

Justice Tom Clark, in an interview shortly before his death, recalled that federal remedial power grew in small individual steps, "like Topsy," with no grand design. The Court, Clark explained, had tried in Brown II to give localities a chance to change on their own. When confronted with case after case of obvious obstruction, the Court had no choice but to broaden federal judicial oversight over local schools, and finally to order student busing. Surely the Justice had in mind the story of Prince Edward.

In one sense, the cases bear Justice Clark out. The opinions of the midsixties—Goss (Knoxville), Bradley (the faculty assignment case), and Griffin (Prince Edward)—are, above all, expressions of exasperation. In Goss, the Court noted that "eight years after this decree [of all deliberate speed] was rendered and over nine years

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after the first Brown decision, the context in which we must interpret and apply this language to plans for desegregation has been significantly altered."\textsuperscript{201} One year later, in Griffin, the temperature rose. "[T]he issues here," said Justice Black, "imperatively call for decision now. The case has been delayed since 1951 by resistance at the state and county level, by legislation, and by lawsuits. The original plaintiffs have doubtless all passed high school age . . . . The time for mere 'deliberate speed' has run out . . . ."\textsuperscript{202} By 1965, in Bradley, the Court fumed that "more than a decade has passed since we directed desegregation of public school facilities 'with all deliberate speed.' . . . Delays in desegregating school systems are no longer tolerable."\textsuperscript{203}

But it is wrong to blame Southern foot-dragging alone for integration's slow pace. Rather, the Court itself must bear some measure of responsibility. Its decrees, even in the midsixties, were couched in the negative. Minority-to-majority transfer provisions, public school closings, public funding of private segregated schools, racially biased faculty assignments all were impermissible. What exactly was permissible, the Court never said. It simply policed the bare minimum, and that rather belatedly.

The school cases of the midsixties stand in contrast to Reynolds v. Sims\textsuperscript{204} and Miranda v. Arizona\textsuperscript{205} where more specific standards for constitutional compliance were promulgated. If school desegregation was a more complex and intractable problem than legislative apportionment or police interrogation, that was only more reason for assisting lower courts in resolving it. In failing to do so, the Court forfeited initiative and leadership on the most significant issue of its day. Like Presidents, Justices cannot rule effectively by veto alone.

\textsuperscript{201} 373 U.S. at 689.
\textsuperscript{202} 377 U.S. at 229, 234.
\textsuperscript{203} 382 U.S. at 105.
\textsuperscript{204} 377 U.S. 533 (1964). The standard of compliance that would satisfy the Constitution in Reynolds was equal population for state legislative districts, subsequently refined in Gaffney v. Cummings, 412 U.S. 735 (1973); Mahan v. Howell, 410 U.S. 315 (1973); Abate v. Mundt, 403 U.S. 182 (1971).
\textsuperscript{205} 384 U.S. 436 (1966). In Miranda, of course, giving the warnings specified by the Court constituted compliance. Despite the Court's specificity, numerous subsidiary questions inevitably arose. See, e.g., Michigan v. Mosley, 423 U.S. 96 (1975); Harris v. New York, 401 U.S. 222 (1971). The question is not whether the Court can anticipate all subsequent problems, but whether it will take the lead in resolving the major ones.
V. The 1964 Civil Rights Act and the HEW Guidelines

Brown's tenth anniversary was no time to celebrate racial equality. The Court had raised expectations that had gone unmet. Little Rock and Prince Edward had been more glamorous cases than anything else. The Court's intervention in those crises was, to be sure, welcome and symbolic. But those decisions did not so much advance the cause of desegregation as avert a fatal collapse. In fact, all the effort expended after Brown had resulted in a mere handful of Negroes in white Southern schools: 2.3%, to be exact.206 Some felt the courts had failed to push desegregation; certain local trial judges, complained Walter Gellhorn, "continue to be content with the pace of an extraordinarily arthritic snail."207 Others thought courts never could work wonders without political support. For whatever reason, faith in law and the legal process—the hallmark of the early days of the civil rights movement—had begun to ebb. Younger blacks in the South "departed the courtroom in favor of the sidewalk" and lunch counter.208 In the North, where the race problem had rarely been conceived in legal terms, violence prevailed and cities were set aflame.

Yet 1964—that year of failing faith in law—was also the year in which the power of the law was reasserted. "Indeed," wrote Harry Ashmore, "it is being argued in a nervous Congress that the need for civil rights legislation was not to advance the Negro cause, but to control and contain it."209 On July 2, Congress passed "the most comprehensive piece of civil rights legislation ever proposed":210 the Civil Rights Act of 1964.211 Title II forbade discrimination in all public accommodations.212 defined by the Act to include restaurants and lunch counters, motels and hotels, gas stations, theatres, and sports arenas.213 Public school integration also benefited from this provision. It was difficult, to say the least, for school integration to proceed smoothly in a community with segregated restaurants and restrooms. Conversely, integration in public accommodations would

206 See note 239 infra and accompanying text.
207 Gellhorn, supra note 114, at 6.
208 Ashmore, The Desegregation Decision: Ten Years After, SATURDAY REV., May 16, 1964, at 68, 68.
209 Id. at 69.
210 Civil Rights and the Negro American, supra note 70, at 524.
213 Id. § 201(b), 42 U.S.C. § 2000a(b).
make future school integration in the South seem a more natural step to take. After years of defiance or glacial progress, the Act presaged for Southern school desegregation not a great, but a modest leap forward.

To begin with, the Civil Rights Act of 1964 made school desegregation a joint enterprise. Courts no longer had to take the heat alone. With Congress and the Executive weighing in on behalf of desegregation, defiance no longer seemed so promising, the national verdict on Brown so much in doubt. A sense of inevitability began to descend on the South. Debate on integration progressed from "if ever" to "how much" and "how soon."

The Act permitted the Department of Justice to bring suit "for the orderly achievement of desegregation in public education . . . ."214 That in itself boosted and relieved the NAACP, whose lawyers had carried the legal battle since Brown almost alone. The NAACP had concentrated mainly on large urban school districts within the South, both because of the greater numbers of schoolchildren there and because of the supposed greater amenability of urban whites to desegregation. By 1966, largely as the result of the earlier efforts of the NAACP, Atlanta, Birmingham, Charleston, Jackson, Little Rock, Miami, Montgomery, Nashville, New Orleans, and Richmond, among others, were operating under court orders to desegregate.215 But the hope that rural districts might voluntarily desegregate in the wake of court orders in urban areas had not generally borne fruit. Now, with the Department of Justice on board, the resources existed to pursue recalcitrant rural districts also.

But the Department's entry into school desegregation meant much more than legal manpower. Its presence meant integration was not only something blacks were seeking but something the United States Government stood behind. Government attorneys helped fortify and strengthen the embattled district judge. Finally, Professor Owen Fiss notes:

[T]he Department's actions in court tended to deepen and solidify the Executive's commitment to equality. In some sense, high Executive officials were educated by and locked into the positions that the Department attorneys—the professionals—took for the United

215 Note, supra note 25, at 324.
States in civil rights litigation. Those positions could on occasion be abandoned or repudiated, but only with a good explanation.214

The Department of Justice was not the only federal agency drawn into school desegregation by the 1964 Civil Rights Act. The Office of Education of the Department of Health, Education, and Welfare drew up guidelines for desegregation in response to the Act. The first guidelines,217 issued in April 1965, were relatively mild. They devoted little attention to faculty desegregation and vaguely accepted both geographic zoning and freedom of choice plans as valid tools. The revised guidelines of March 1966,218 however, were considerably tougher and offered clearer criteria for integrating schools than most federal court decrees. "The [1966] guidelines call for school districts with 8 or 9 per cent of their Negro pupils in predominantly white schools to double this figure next fall," noted The New York Times. "Schools with few or no Negro pupils are expected to make a 'substantial' effort to catch up with the leaders. All school districts are expected to integrate their faculties."219 Though freedom of choice plans were still acceptable, the "single most substantial indication as to whether a free-choice plan is actually working to eliminate the dual school structure is the extent to which Negro or other minority group students have in fact transferred from segregated schools."220 The significance of that last sentence was enormous: racial progress in the South was to be judged not in theory but in fact, not by the paper plans and proclaimed intentions of school boards but by the numbers of whites and blacks together in schools.

The usual expressions of Southern outrage were trotted out against HEW and the guidelines, but with several added wrinkles. Federal bureaucrats, Southerners had discovered, were more fiendish than federal judges. "[M]y people," Senator Albert Gore had asserted, "would prefer to submit to a [f]ederal judge whom they know" their plans for desegregation, than be ruled by "some cru-

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220 1966 Guidelines, supra note 218, § 181.54, quoted in Dunn, supra note 217, at 62-63.
sader from afar."²²¹ Editor James J. Kilpatrick of the Richmond News Leader denounced the 1966 guidelines as an "arrogant edict" with a "harsh, preemptory, commanding" tone.²²² This time, local school officials led the assault on the guidelines, as opposed to defiant statewide officeholders of earlier years. "I am not going to be a party to assigning teachers and students to any schools—there are other ways to make a living," grumbled Superintendent E.R. Cone of Thomas County at a meeting of angry Georgia school officials.²²³

Within a few days, HEW Secretary John Gardner was forced, as the Supreme Court had been in Brown II, to reassure the South that nothing precipitous was about to occur. His department was not trying to impose a formula on anybody, insisted Gardner, or the "instantaneous desegregation" of every teaching staff.²²⁴ "A great many [Southern] communities last year accepted the notion of having a few Negro children in white schools," admitted David Seeley, assistant commissioner of education. "But the notion that the Negro and white schools will eventually disappear—that we'll just have public schools—is not yet accepted."²²⁵

The Southerners were not in the least pacified by the head of the office issuing those hated guidelines. United States Commissioner of Education Harold H. Howe, II, was a prophet of urgency for whom calmer human moods posed a noxious threat. "Our words," Howe said in 1966, "have urged the nation to desegregate its schools. But our reluctance to act has said even more loudly, 'not yet.' [T]he young Negro . . . must be convinced that the United States is his home, not his prison, and that it is a country worth fighting for, not a cage to be fought out of. It may already be too late to change his mind," though not, Howe reminded, "to provide his younger brothers and sisters with a healthier belief . . . ."²²⁶

The HEW guidelines promised a novel, more activist approach to segregated schools. Traditionally school desegregation had been sought through lawsuits. But after Brown II lawsuits had proved a protracted, piecemeal, expensive, idiosyncratic, and, for some plaintiffs in the Deep South, a very dangerous way of dismantling

²²³ Roberts, supra note 219, at 38, col. 2.
²²⁴ N.Y. Times, Apr. 12, 1966, § L, at 18, col. 3.
segregation. School boards cooled their heels and awaited litigation, and litigation, if ever completed, often meant little in the way of integration anyway. Though by the middle 1960's innovations such as statewide lawsuits and more specific court decrees saw occasional use, the courtroom, many felt, was not the final answer to the school problem. "A national effort," noted Judge John Minor Wisdom, "bringing together Congress, the executive, and the judiciary may be able to make meaningful the right of Negro children to equal educational opportunities. The courts acting alone have failed." 228

But what actual power did HEW have to punish school segregation? To the traditional court injunction, Congress in the 1964 Act added the federal fund cutoff. 229 In theory, this sanction was marvelously simple. Offending school districts (i.e., those violating HEW guidelines) would simply have their federal funds terminated. This new weapon, it was hoped, might finally force the progress Mr. Howe believed necessary. It would require school districts affirmatively to justify their behavior to federal officials. And it would strike school officials in the purse—where it hurt the most.

But the fund cutoff or "deferral" was far from foolproof. Like the injunction, it was a piecemeal remedy. Funds could be stopped only to the school system of the offending locality, 230 not to other local programs and certainly not to the state of which the locality was part. As with litigation, there was potential for delay. Funds could not be terminated until there had been a hearing, which included an express finding of noncompliance entered in the record and notice to the affected party of failure to comply, and until attempts at securing voluntary compliance had broken down. 231 As desegregation plans became more complex, facts more numerous and disputable, and intentions of school boards more obscure, bureaucratic haggles and backlogs would begin to mount.

But the real problem with fund cutoffs was more basic. As Professor Fiss has noted, termination was in many respects "like a hydrogen bomb—it is better suited to threats than to actual use." 232 It was


230 Id.

231 Id.

232 Fiss, supra note 216, at 758.
a clumsy sanction. Partial or gradual cutoffs, even if permissible, undercut the integrity of the antidiscrimination principle. You either discriminated or you did not: it was hard to admit degrees of prejudice or some other middle ground. In Southern communities where public and private schools competed for white allegiance, fund cuts only disadvantaged public ones, hardly a desired result. Worse still, terminating funds hurt the very persons the Civil Rights Act intended to benefit: the black and, in a broader sense, innocent public schoolchildren of both races.

Fund cutoffs suffered yet a final weakness in comparison with court injunctions. The injunction was backed by the power of contempt. No Southern official, after the “necessary” antics had been performed, chose to risk contempt of court and land in jail. But school districts faced with fund cutoffs had legitimate avenues of escape. They might snub HEW guidelines and dispense with federal aid, which amounted even after the Elementary and Secondary Education Act of 1965 to only eight percent of the average school district budget,233 much less than either the state or local share. Though the Justice Department as early as 1965 promised to bring to court those districts refusing federal aid, that effort was incomplete. “By August 15, 1967,” observed one commentator, “only twenty-five school districts originally subject to final termination proceedings had come back into compliance as a result of court orders obtained subsequent to HEW’s action. Fifty-five school districts remain ineligible for federal aid.”234

This is not to imply that HEW guidelines were exercises in futility. Far from it. Their greatest effect came in their incorporation in increasingly specific court decrees. By the late 1960’s, the Fifth Circuit insisted that “[c]ourts in this circuit should give great weight to future HEW Guidelines . . . .”235 The reasons for this deference were not difficult to fathom.236 To begin with, the Fifth Circuit contended, “the Guidelines were carefully formulated by educational authorities” while judges lacked “sufficient competence—they are not educators or school administrators—to know


234 Note, supra note 25, at 329-30.


236 See generally Note, supra note 25, at 356-65.
the right questions, [much] less the right answers."²³⁷ Undoubtedly, too, judges did not wish their own decrees to become avenues of escape from stricter administrative regulations.²³⁸ More fundamental, the lower courts looked, after many long years, to share responsibility for the nettlesome school problem, to be freer of the weary load, so complex and controversial, that Brown II had assigned them. Deference to HEW guidelines promised what Brown II had refused to deliver: a sense of order, uniformity, and specificity to Southern school desegregation.

After the Civil Rights Act of 1964, the South was squeezed in a tightening vice of new political and judicial determination. That Act represented, as much as anything, a gathering and coalescence of the national will on the whole question of Southern school segregation. Significant progress occurred in the years after 1964. In that year, only 2.3% of Southern Negroes attended desegregated schools; in 1965 the figure was 7.5%, in 1966 12.5%.²³⁹ Only the Supreme Court's continued inactivity kept the percentage from climbing higher. But in 1968 even that would change. The Court, which in the midsixties surrendered initiative to Congress and the Executive, stood ready to recover it. With Green v. County School Board,²⁴⁰ Southern school desegregation prepared to enter a new and climactic phase.

VI. THE RISE AND DEMISE OF FREEDOM OF CHOICE:

Green v. County School Board

Though the South never won the battle to keep its schools segregated, it did prove adept at orderly retreat. There were endless Southern fallback positions in the school controversy, from massive resistance to pupil placement to tokenism to freedom of choice and, lastly, to neighborhood schools. Sometimes judges accepted the fallback as an "interim" measure, as if grateful for ground thus far won and anxious to catch a breath before hostilities flared anew. Such was the case with freedom of choice plans in the middle 1960's. The Fifth Circuit remarked in 1966 that "[a]t this stage in the history

²³⁸ See Note, supra note 25, at 335-36.
²³⁹ Dunn, supra note 217, at 43 n.8. These are HEW's Office of Education figures. Other estimates are slightly lower. Most statistics did not count as "desegregated" a school where a handful of whites (less than five percent) attended predominantly black institutions.
of desegregation in the Deep South a 'freedom of choice plan['] is an acceptable method for a school board to use in fulfilling its duty to integrate the school system.' The Eighth Circuit noted that freedom of choice "is still only in the experimental stage and it has not yet been demonstrated that such a method will fully implement the decision of Brown and subsequent cases . . . ." While the Fourth Circuit embraced the concept less reservedly, two concurring judges urged waiting to see just how freedom of choice worked in practice. The 1966 HEW guidelines also warily approved freedom of choice, but only if tangible evidence of actual integration were forthcoming.

The South, however, clutched freedom of choice to its breast. It promised only limited integration, all the while winning federal court approval and avoiding loss of federal funds. What was unthinkable five or six years ago suddenly assumed, in light of more threatening alternatives, the status of holy prerogative. The opportunity for a child and his parents to select his own school, one would have thought, was what Thomas Jefferson had meant all along by "unalienable Rights." "[O]ne would find," mused an HEW official, "that freedom to choose one's own school was being talked about in the South in the same breath as the freedoms of speech and assembly under the first amendment."

The Supreme Court in 1925 recognized that a parent did have some constitutional interest in the choice of his child's education. In Pierce v. Society of Sisters, the Court held unconstitutional an Oregon law requiring children to attend only public schools. The law, said the Court, interfered "with the liberty of parents and guardians to direct the upbringing and education of children under their control." The State could not "standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him

241 Singleton v. Jackson Mun. Separate School Dist., 355 F.2d 865, 871 (5th Cir. 1966), after remand from 348 F.2d 729 (5th Cir. 1965). (The 1966 case is known as Singleton II, the 1965 case as Singleton I).
242 Kemp v. Beasley, 352 F.2d 14, 21 (8th Cir. 1965).
244 Id. at 323 (Sobeloff & Bell, JJ., concurring and dissenting).
246 Dunn, supra note 217, at 70.
247 268 U.S. 510 (1925).
and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."248

Pierce held, in effect, that if parents wished to purchase suitable private education for their children, the government could not stop them. That, however, was a very different matter from constitutionally guaranteeing parental control over an offspring's public education. For one thing, the guarantee would be impractical. In drafting attendance plans, school boards have always been free to deny parental preference for any one of a hundred reasons, overcrowding being the one most often given. And once a child is in public school, the parent cannot dictate what teacher he gets, what courses he takes, what grades he receives, or what discipline he meets. Parental views are often welcomed (or tolerated) by school authorities, but parental control over an offspring's education always has been circumscribed. This was nowhere truer than in the South. The irony was that the South, whose system of segregated public schools was once the very antithesis of free choice, was now arguing the fundamental status of that right.

The problem with freedom of choice was the variance between theory and practice. In theory, each child's choice of a school was free; in practice it was often anything but. For one thing, white children did not choose to go to black schools. And, doubtless due to ancient Southern mores, many Negroes did not select white schools either. "Most Negroes work for white people in the South—and almost everywhere else," Hodding Carter observed early in the sixties. "In a majority of instances a white employer need only mention to his Negro employe[e] that he is certain that both agree that school segregation is the wisest course for everyone concerned."249 In the event the employer failed to convey the message, school officials would. To lessen pressures for integration, periods of choice were often set few and far between; a child might be stuck throughout high school with his choice upon entering the ninth grade. Choosing a white school proved as troublesome as registering to vote. Sometimes birth and health certificates, personal appearances, and notarized forms were required of Negro pupils. Often Negroes were advised that white schools, regrettably, were

248 Id. at 534-35. See also Meyer v. Nebraska, 262 U.S. 390 (1923). The Court in Pierce upheld the parent's right against state interference. Advocates of freedom of choice asserted the parent's right against judicial interference. The principle, however, is the same in both cases.

249 Carter, supra note 119, at 72.
“overcrowded.” Or that school buses serving a particular school did not run through the “colored” parts of town. Or that blacks entering white schools would not wish to or be permitted to “engage in school activities, athletics, the band, clubs, [or] school plays.”\textsuperscript{250} Thus opportunity for pressure, covert and overt, was built into every pore of the “free” choice system. In those very communities where blacks were most disadvantaged and illiterate, freedom of choice would be least likely to work.

The carrot was out as well as the club. Every effort was made to seduce Negro children into remaining at Negro schools. Because “[p]ressure for integration usually speeds equalization,”\textsuperscript{251} the South hurried in the mid-sixties to upgrade Negro schools.\textsuperscript{252} The white hope was that Negroes would “prefer” a decent school of their own—with their own friends and familiar surroundings—to a white environment where they were socially unwanted, academically unprepared, and, in the case of many impoverished Negroes, even unsuitably clothed.\textsuperscript{253}

The wonder was that freedom of choice fared with the courts as well as it did. As a means of desegregation, it was transparently similar in concept to the pupil placement statutes of the late 1950’s. Both freedom of choice and pupil placement schemes were at best modest variations on old dual school systems. The rule was that pupils would go where they had in the past (i.e., to segregated schools). Interracial transfers were the exception. Like the pupil placement statutes, freedom of choice made integration depend on Negro initiative, stamina, and fortitude. School officials were absolved from acting affirmatively and permitted to react, in highly discretionary fashion, to Negro requests.\textsuperscript{254}


\textsuperscript{252} \textit{Id. See also} United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 891 (5th Cir. 1966), cert. denied, 389 U.S. 840 (1967).


\textsuperscript{254} For blacks, freedom of choice was just another bit of evidence of the lengths to which whites would go to avoid their presence in school. A report of the Student Nonviolent Coordinating Committee (SNCC), shortly before it turned to black separatism, denounced HEW for condoning free choice schemes:

\textit{In most counties where no Negroes have applied for transfer to white schools we know that fear of retaliation was the reason. . . . One of the easiest ways for school boards to comply [with HEW guidelines] . . . is to adopt a so-called “freedom of choice” plan. The method is simple[.] . . . get a few Negroes to sign up to attend white
Once again, the South was to pay dearly for its evasion. Judges distrusted freedom of choice primarily because it was so discretionary. And discretion, at this late hour after Brown, had to be curtailed and scrutinized. The result: another jump in judicial supervision over community schools.

The man most responsible for this development was Judge John Minor Wisdom of the Fifth Circuit Court of Appeals. It is a measure of the Supreme Court’s inconspicuousness that the most influential school opinions from Brown II to Green v. County School Board\(^{255}\) in 1968 were written by two lower federal judges: Judge Parker of the Fourth Circuit and Judge Wisdom of the Fifth. Judge Wisdom, appointed to the bench by President Eisenhower in July of 1957, had witnessed the long slow course of desegregation. He remembered how

in 1960, six years after Brown, the admission of three little Negro girls to one class in one white school in New Orleans was regarded as a great stride forward. I remember when transfers under the fraudulent pupil placement and grade-a-year plans were considered radical. When I see Tulane play the University of Mississippi in a football game with black players on each team, I think of the riots and violence that took place when James Meredith became the first black to attend the University of Mississippi. [Nevertheless, Wisdom had the] nagging feeling that it is not how far the blacks have come that is important, but how far they still have to go.\(^{254}\)

Frustrated in the middle 1960’s by lack of real progress, Judge Wisdom determined to make amends.

In three opinions, from 1965 to 1966 (Singleton v. Jackson Municipal Separate School District\(^{257}\) and II\(^{258}\) and United States v. Jefferson County Board of Education\(^{259}\)), Wisdom transformed the face of


\[^{255}\] 348 F.2d 729 (5th Cir. 1965).

\[^{256}\] 355 F.2d 865 (5th Cir. 1966).

\[^{257}\] 372 F.2d 836 (5th Cir. 1966), *cert. denied*, 389 U.S. 840 (1967). In a fourth opinion, United States v. Jefferson County Bd. of Educ. (Jefferson II), 380 F.2d 385 (5th Cir.) (per
school desegregation law. The foremost student of the Fifth Circuit’s history in this area, Professor Frank Read, contends: “Those cases mark the most important doctrinal change” in school integration law since Brown itself. “Their importance cannot be overemphasized.” Indeed Jefferson, Read believes, is “one of the four most important school desegregation cases yet decided.”260

The three Wisdom opinions are best considered as a body. Each is laced with phrases of urgency: “The time has come for footdragging public school boards to move with celerity toward desegregation.”261 “No army is stronger than an idea [school integration] whose time has come.”262 “The clock has ticked the last tick for tokenism and delay in the name of ‘deliberate speed.’”263 Henceforth, warned Wisdom, school plans must not be “longer on promises than performance”; the overriding question was how well they actually worked.264 And the crucial indicator of performance was, as we have seen, the HEW guidelines.265

Judge Wisdom’s critical premise was that school boards had a positive duty to integrate, not merely to stop segregating.266 A shift from racial to nonracial criteria in student assignment laws was not enough. Nor was the presence of a few blacks in formerly all-white schools. Wisdom saw school desegregation in far grander terms. Its purpose was nothing less than to redress the damage inflicted on the mass of Negroes down through the generations by segregated schools. What the state had done, it must now undo. A wrong had been done the entire race; the remedy must speak in similar terms. Pupil placement schemes and later freedom of choice plans might

Curiam) (en banc), cert. denied, 389 U.S. 840 (1967), the Fifth Circuit adopted Judge Wisdom’s basic approach in Jefferson I.


261 Singleton v. Jackson Mun. Separate School Dist. (Singleton I), 348 F.2d at 729 (footnote omitted).


263 Id. at 896.

264 See id. See also United States v. Jefferson County Bd. of Educ., 380 F.2d 385, 390 (5th Cir.) (per curiam) (en banc), cert. denied, 389 U.S. 840 (1967).

265 See notes 235-38 supra and accompanying text.

266 “The question to be resolved in each case is: How far have formerly de jure segregated schools progressed in performing their affirmative constitutional duty to furnish equal educational opportunities to all public school children?” United States v. Jefferson County Bd. of Educ., 372 F.2d at 896.
grant individual blacks equal educational opportunity. But, said Wisdom, "the only adequate redress for a previously overt system-wide policy of segregation directed against Negroes as a collective entity is a system-wide policy of integration." remedies now required "liquidation of the state's system of de jure school segregation and the organized undoing of the effects of past segregation."268

To speak thus is to thrust law to the forefront of social change, to adopt an admirable, if impossible, goal. Relief to the class, as opposed to the individual relief practiced heretofore, initiated the idea of compensatory justice, which later would influence the Supreme Court on such imposing issues as student busing and affirmative action programs. The problem with "undoing the effects of past segregation" is that it lacks a principled termination point; certainly full compensatory justice cannot end with the mere presence of blacks and whites together in schools. Full redress of the wrongs done the Negro is probably beyond the capacity of courts of this century to devise. Compensatory justice, the courts also would learn, was potentially a road of dashed black expectations and white resentments, and, on occasion, of counterproductive results. Judges in the coming decade would have to ask whether the nation's foremost ideal of racial justice was worth the awesome price necessary to achieve it or whether indeed it was achievable by the judiciary at all.

The full implications of Judge Wisdom's innovations were, in the midsixties, but dimly perceived. Wisdom's ambitious formulations, however, squarely contradicted Judge Parker's venerable dictum of restraint in Briggs v. Elliott.269 Parker held that states must simply cease segregating; Wisdom that they had, in effect, a duty to integrate. Parker believed Brown to involve only disputes between individual Negro children and the state;270 Wisdom argued that "Negroes collectively are harmed when the state, by law or custom, operates segregated schools . . . ."271 Parker's textual justification was the proscriptive phrasing of the equal protection clause ("nor [shall any state] deny to any person within its jurisdiction the equal protection of the laws"); Wisdom's the positive grant of citi-

267 Id. at 869 (emphasis in original).
268 Id. at 866.
270 See Carson v. Warlick, 238 F.2d 724, 729 (4th Cir. 1956).
zension in the first sentence of the fourteenth amendment272 and a belief that segregation laws constituted a "badge of slavery" whose effects, under the thirteenth amendment, had yet to be undone.273 It was a measure of the tenacity of the Briggs dictum that Judge Wisdom had to thrice attack it before being satisfied of its demise.274 If Judge Parker's personal prestige had influenced the Supreme Court to accept the dictum, perhaps it took someone of Judge Wisdom's standing to persuade the Supreme Court to bring it down.275 Wisdom's view, moreover, suited the evangelism of the midsixties as Parker's had the greater circumspection of the decade before.

But the most remarkable aspect of Jefferson was the remedial decree. Judge Wisdom, again relying largely on HEW guidelines, told local school officials when the free choice periods must be (March 1 to March 31 of each school year), how public notice of the choice procedure must be given (by newspaper, radio, and television), how the choice form and accompanying explanatory letter must be written, how the choice form might be returned ("by mail, in person, or by messenger to any school in the school system or to the office of the Superintendent"), how students must be assigned (by proximity to the school rather than prior attendance at it), how transportation must be routed ("so as to serve each student choosing any school in the system"), how entering Negro students must be treated ("may not be subject to any disqualification or waiting period for participation in activities and programs"), how school equalization efforts must proceed, where new schools should be constructed (with the object "of eradicating the vestiges of the dual system"), what remedial programs must be conducted (to permit Negroes formerly in segregated schools "to overcome past inadequacies in their education"), and how faculty and staff were to be hired, fired, and assigned.276

By any measure, the Jefferson decree was an extraordinary step. The local approach of Brown II was discarded in favor of a model

272 "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside." U.S. CONST. amend. XIV.
decree to apply throughout the circuit. A piecemeal approach to school desegregation was discarded in favor of a comprehensive view, addressing student and faculty assignment, transportation, and curriculum. And the Fifth Circuit introduced, more explicitly than ever before, race as a lodestar for educational decisionmaking. The decree, in fact, left only one major question: If freedom of choice had to be so circumscribed and supervised, why did Judge Wisdom not reject it altogether and require desegregation by other means?

The detail of Judge Wisdom's 1966 *Jefferson* decree finally dashed the Supreme Court's hope in *Brown II* that school authorities would assume "the primary responsibility for elucidating, assessing, and solving" the problems of desegregation. Though Wisdom had hoped reliance on HEW guidelines would help extricate courts from burdensome school controversies, *Jefferson* had precisely the opposite effect. After *Jefferson*, federal courts became bold architects of school desegregation policy. The *Jefferson* decree, in fact, was the forerunner of the broad equitable discretion exercised by district courts on student busing. Where a school board's busing plans were insufficient, district judges consulted experts in designing new ones. The lower courts disapproved awkward methods of financing school desegregation as well. And federal judges ordered, with increasing frequency after *Jefferson*, school authorities to offer remedial programs to recently integrated black pupils to train teachers to deal with integrated schools, and even to alter or suspend testing programs in school systems undergoing desegregation.*

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277 See 349 U.S. at 299.
278 See United States v. Jefferson County Bd. of Educ., 372 F.2d at 848.
282 See, e.g., Lemon v. Bossier Parish School Bd., 444 F.2d 1400, 1401 (5th Cir. 1971); Singleton v. Jackson Mun. Separate School Dist. (Singleton III), 419 F.2d 1211, 1219 (5th
short, foretold a level of judicial involvement in local education unimaginable at the time of *Brown*.

The final fate of freedom of choice, meanwhile, awaited the Supreme Court. In the spring of 1968, the Court considered challenges to freedom of choice in three Southern school systems.\(^{283}\) The experience of New Kent County, a small, rural locality in eastern Virginia where Negroes comprised fifty-seven percent of the school population, had been rather typical. In many ways New Kent's was a case of classic simplicity. The county had but two schools, New Kent on the east side and Watkins on the west side. New Kent was the white school, Watkins the black one. For a decade after *Brown*, schools in New Kent had remained totally segregated. But in August 1965, to remain eligible for federal funds, the county adopted freedom of choice. The plan bore modest results. Although no whites chose to attend all-Negro Watkins, black enrollment in formerly all-white New Kent advanced from 35 in 1965 to 111 in 1966 to 115 in 1967. Such progress notwithstanding, eighty-five percent of the Negro children in the county still attended the all-black school.\(^{284}\)

But the county had done all that could be expected, argued Frederick T. Gray to the Supreme Court. To do more would jeopardize public education. Besides, the Negroes wanted their own school to serve as a sort of community center. *Brown*, Gray stressed, had never required compulsory integration; it said only that states must "take down the fence" keeping students apart. Chief Justice Warren was skeptical:

Isn't the net result that while they took down the fence, they put booby traps in the place of it, so there won't be any white children go to a Negro school? . . . Isn't the experience of three years . . . some indication that it was designed for the purpose of having a booby trap there for them, that they didn't dare to go over? [Gray replied:] If the free choice of an American is a booby trap, then this plan has booby traps.\(^{285}\)

It was the lawyer for the Government, Louis Claiborne, who struck the fatal blow. Claiborne scoffed at the Southern contention

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\(^{284}\) See Green v. County School Bd., 391 U.S. 430, 441 (1968).

that free choice was the natural, sent-from-heaven way to run a school system. It was, said he, just the opposite: an artificial, inefficient, and uneconomical device. It made no sense to bus many Negroes all the way across the county to the black school and many whites all the way across the county to the white school when an "old-fashioned, traditional system of neighborhood schools" would do. And why would school officials want to trifle with all the forms they had "to send out, receive, tabulate, [and] count" each year under the free choice system? To Claiborne the answer was obvious. The only reason to endure all that trouble and expense was to preserve some semblance of the old segregation.

The Court saw it that way also. The New Kent case, Green v. County School Board,287 travelled far beyond the Court's previous pronouncements on school desegregation. Brown II, the Court said, as though it had been clear all along, had charged school boards "with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."288 But Brown II had always been ambiguous. It required only a "prompt and reasonable start"289 toward some ill-defined end. Many had believed, with Judge Parker in Briggs v. Elliott,290 that Brown II required only the cessation of segregation, not an affirmative duty to substantially integrate. Though the Court's decisions after Brown II tilted increasingly toward the affirmative duty concept, none had done so as explicitly as Green. Indeed, the Court might have voided freedom of choice as a continuation of segregation, so great were community pressures and inducements to choose one-race schools. But it went farther to remove, at long last, the onus of achieving integration from black children and to throw it squarely—affirmatively—onto the backs of local school boards.

The next question, of course, was what this affirmative duty might entail. "The burden on a school board today," the Court said in Green, "is to come forward with a plan that promises realistically to work, and promises realistically to work now."291 Gone forever was mere "deliberate speed." And while the Court refused to say that

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284 Id. at 392-93.
286 Id. at 437-38.
287 349 U.S. at 300.
289 391 U.S. at 439 (emphasis in original).
freedom of choice would never work, it made clear that New Kent's plan was not working so long as eighty-five percent of the black students remained totally segregated. Henceforth, the Court served notice, school plans would be judged not on paper or promise, but on performance.

This open use of a statistic to invalidate a school desegregation plan had limitless implications. Had the Court not condemned the statistical imbalance, integration might have become the prerogative only of those few Negroes whose parents had the tenacity and foresight to insist on it. But was this bare statistic of 85% significant only when combined with New Kent's history of enforced segregation at the time of Brown and its decade of defiance thereafter? Or was racial imbalance in public schooling to be frowned upon, wherever found and whatever the cause? How far beyond the special symbolism of public schools would the Court carry statistical reliance? Might an employer be in violation of the 1964 Civil Rights Act if his work force was 75% white? Or a criminal conviction be reversed if the jury was but 8% black? Or a zoning ordinance overturned if residents of the community were 95% white? Or legislative redistricting invalidated if few blacks were elected? Possibilities were endless. Green hardly foreshadowed an enslavement to statistics, a "numerical nightmare," but numbers were definitely encouraged as future evidence of racial discrimination. This thought struck some with especial horror. Statistics were doubtless invaluable in tracing progress toward racial equality. But might they not also chart a course of "reverse discrimination," where both public and private bodies openly favored blacks to win judicial (or executive) approval for their programs?292 The Constitution was indeed becoming color conscious as well as color blind.293

Green was novel in yet another sense. The Court actually tendered, albeit in a footnote, some positive suggestions for achieving school desegregation. The Court, for the moment, stopped saying what was not permissible and started suggesting what was. One suggestion was pairing: "[T]he Board could consolidate the two schools, one site (e.g., Watkins) serving grades 1-7 and the other (e.g., New Kent) serving grades 8-12 . . . ."294 A second suggestion was geographical zoning, which the board could achieve "simply by

292 See Fiss, supra note 216, at 763.
294 391 U.S. at 442 n.6.
assigning students living in the eastern half of the county to the New Kent School and those living in the western half of the county to the Watkins School." In this sense, Green stands as a traditional "neighborhood school" opinion. But the case must be seen in its setting—rural New Kent County where there was little residential segregation. But in urban areas, where residential segregation did prevail, were neighborhood schools constitutionally sufficient or was some far more drastic remedy required?

Green was a watershed case not because of what was said but because the Supreme Court said it. In its skepticism of freedom of choice, its reliance on statistical evidence, its insistence on results, and its imposition on school boards of an affirmative duty, Green mirrored to a great extent Judge Wisdom's landmark rulings for the Fifth Circuit and the approach of the 1966 HEW guidelines. One wonders, in fact, if the Court would have ruled as it did had not the Executive and the Fifth Circuit forced a heady pace. At a minimum, those institutions strengthened the Court's own perception that the time for renewed assault on school segregation in the South now had come.

VII. TOWARD A DESSEGREGATED SOUTH: THE POST-GREEN DECISIONS

After Green, the Supreme Court quickly warmed to its task. One year later, in United States v. Montgomery County Board of Education, the Court returned to the problem of faculty assignments. In an opinion by Justice Black, replete with compliments for his fellow Alabaman, District Judge Frank Johnson, the Court affirmed Johnson's order that Montgomery, Alabama, must work to achieve racial ratios of faculty at each school that reflect the racial ratio of teachers in the school district as a whole (three whites to two blacks). Green clearly had displaced Brown II as the governing standard. Judge Johnson's order, the Court emphasized, "was adopted in the spirit of this Court's opinion in Green v. County School Board in that his plan 'promises realistically to work, and promises realistically to work now.'"

Actually, Montgomery went well beyond Green. Green had used racial statistics merely to invalidate a school board's freedom of choice plan. But Judge Johnson, having found that previous plans

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295 Id.
297 Id. at 235 (citation omitted).
had not produced integrated faculties, imposed quantitative standards of his own that the school board was expected to meet. Thus, in Montgomery, for the first time, the Supreme Court sanctioned the inclusion of affirmative numerical goals in a school desegregation remedy.

Montgomery can be commended as an overdue attempt to give lower courts and school boards positive guidance as to what faculty desegregation required. The Court may also have been convinced that only numerical requirements could properly protect black teachers from being dismissed in a newly desegregated school. Yet Montgomery, by establishing racial ratios for teacher assignments, restricted the ability of school boards to adopt personnel policies based on competence not race and to assign teachers according to seniority, proximity, and personal preference. Curtailing school board discretion was, of course, the new order of the day. Yet the Justices in effect had sanctioned minimum racial quotas in the public workplace without any independent discussion of the merits of such a course.

Green influenced even more the Court's insistence in 1969 that Southern school systems proceed at once to desegregate. Green had alarmed many Southerners who sensed that massive rather than token integration was about to become a reality. By the summer of 1969, thirty last-ditch districts in Mississippi faced imminent desegregation. Help, however, arrived from the newly elected Nixon administration. Reportedly to accommodate Senator John Stennis, who was leading the administration's floor fight on deployment of the antiballistic missile system,298 HEW Secretary Robert Finch took the extraordinary step of writing Chief Judge John Brown of the Fifth Circuit, requesting that Mississippi districts be granted a delay in submitting school desegregation plans until at least December 1 to avoid "chaos, confusion, and a catastrophic educational setback . . . ."299 On August 25, the Justice Department appeared in court to support the delay,300 and on August 28 the Fifth Circuit approved it.301

The administration's "Southern strategy" provoked revolt and

298 See L. Panetta & P. Gall, Bring Us Together 251-57 (1971).
300 R. Murphy & H. Gulliver, supra note 299, at 58.
resignation within the ranks of the Justice Department. Lawyers refused to defend the Government's position and in some cases passed data to civil rights attorneys opposing it. Attorney General John Mitchell attacked his own staff, and the head of the Civil Rights Division, Jerris Leonard, had to lecture his lawyers on their proper responsibility.302 On September 3, the NAACP Legal Defense Fund ran a full page advertisement in The New York Times, featuring the picture of a young Negro school child. At the top of the page was written: "On August 25, 1969, the United States Government broke its promise to the children of Mississippi."303 For the first time since 1954, Justice Department spokesmen and civil rights lawyers sat across from one another in federal court. For the first time, also, NAACP Legal Defense Fund attorneys broke publicly with the Justice Department and appealed the delay to the Supreme Court.304

The Defense Fund prevailed. In Alexander v. Holmes County Board of Education,305 the Court abruptly reversed in a one paragraph per curiam opinion the Fifth Circuit's three month delay. "[T]he Court of Appeals should have denied all motions for additional time . . . .," the Supreme Court directed. "Under explicit holdings of this Court the obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools."306

Alexander was remanded in October 1969 to the Fifth Circuit judges who still "could not believe that the Supreme Court intended for them to issue orders that required the relocation of hundreds of thousands of school children in the middle of an on-going school year."307 Thus the judges decided, unanimously and en banc, upon a two-step process. Faculty and staff, transportation, athletics, and other school activities all had to be integrated no later than February 1, 1970. But the merger of student bodies was "difficult to arrange" in the middle of a school year. "Many students," noted the court, "must transfer. Buildings will be put to new use. In some instances it may be necessary to transfer equipment, supplies or libraries. School bus routes must be reconstituted." Massive stu

303 R. Murphy & H. Gulliver, supra note 299, at 58.
304 G. Orfield, supra note 302, at 327; Read, supra note 260, at 30-31 n.101.
306 Id. at 20.
307 Read, supra note 260, at 31.
dent integration, the Fifth Circuit held, could therefore be delayed until next September 1970.308

Again the Fifth Circuit was summarily reversed. In *Carter v. West Feliciana Parish School Board*,309 the Supreme Court scolded it for delaying student desegregation beyond February 1, 1970. Again immediate integration was ordered. Thus, wrote Professor Read, "the Fifth Circuit—which had been the most diligent court in America in desegregating public school facilities—was wrist-slapped for delaying massive student desegregation for a short four month period to avoid disruption in the midst of an on-going school year."310 This time, Chief Justice Burger and Justice Stewart dissented. The Fifth Circuit, they noted,

is far more familiar than we with the various situations of these several school districts, some large, some small, some rural and some metropolitan, and has exhibited responsibility and fidelity to the objectives of our holdings in school desegregation cases. [Reversal] without argument and without opportunity for exploration of the varying problems of individual school districts, seems unsound to us.311

The South now was forced to integrate at once and in earnest. After *Alexander* and *Carter*, immediate integration had to be ordered for all school districts involved in litigation within the Fifth Circuit. From December 2, 1969, to September 24, 1970, the Fifth Circuit issued no less than 166 opinion orders in school cases. Figures showing the actual amount of integration were the determining factors. "Perhaps no court in history," commented Read, "has responded with such alacrity and such monumental effort to a preemptory reversal."312 The judicial blitz had a stunning impact. By 1971, according to HEW estimates, 44% of Negro pupils attended majority white schools in the South as opposed to 28% who did so in the North and West.313 The South, seventeen years after *Brown* (and in the midst of President Nixon's "Southern strategy"), became America's most integrated region.

310 Read, supra note 260, at 31.
312 Read, supra note 260, at 32 n.108.
313 See 118 Cong. Rec. 564 (1972).
There was, however, a reaction to swift change of this magnitude. *Alexander* provides a singular opportunity to assess the social impact of a broad desegregation order on thirty school districts in the state with the highest percentage of blacks in the nation. What followed implementation of the order was white exodus from the public schools into segregated private academies on a mass scale. Total white public school enrollment of the *Alexander* counties dropped 25% between 1968 and 1970; in those counties with the largest black majorities in the general population, white flight from the public schools reached 90%, and even, in one case, 100%. The result: "[M]any black children [remained] in schools just as segregated as they had been before Brown." Although this extreme reaction was caused by the exceptionally large black populations in many counties, recurrent white flight to private academies etched a somber background to bright hopes for integration.

Against the backdrop of the post-*Brown* era, the Court's boldness in *Alexander* and *Carter* was remarkable. The Court manifested understandable impatience with unbecoming abruptness. Speed for two years (1968-1970) replaced the deliberateness of the previous thirteen. Summary reversal of a progressive federal tribunal replaced former deference, even to cautious ones. Administrative difficulties, which after *Brown II* excused the delays of a decade, now would not justify waiting for the next school year to begin. The Court that once badly needed executive support now moved in the face of executive opposition.

Thus the Court of the midfifties and that of the late sixties struck a perfect polarity save, perhaps, in one respect. Each Court was cryptic. Each made the pace of desegregation clearer than its content. After *Alexander* and *Carter*, desegregation must proceed at once, though exactly what was to proceed remained obscure. If freedom of choice was not favored, then what was? What if geographical zoning failed to produce the substantial integration *Green* seemed

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315 Id. at 12.
316 Munford's thesis is that the black percentage of the general population of a school district is the single greatest influence on white flight. His conclusion disagrees "with the two most common theories of white flight from school desegregation: the 'tipping' theory which says whites shun desegregated schools according to the percentage of blacks in the schools and the 'leadership' theory which places major responsibility for determining white resistance on the stance taken by community leaders." Id. at 12-13. See also H. Blalock, *Toward a Theory of Minority Group Relations* 145 (1967); V. Key, *supra* note 47, at 5.
to require? How much integration did Green require? How many all-black schools would be tolerated? How far-reaching an effort was required to desegregate them? Did the Court’s approval of racial ratios in teacher assignments in Montgomery impose a similar requirement for student bodies as well? For the moment, such questions remained to perplex lower federal judges.

In the end, desegregation came to the rural South suddenly but rather peacefully. The vivid exception involved the overturning of two buses bearing black schoolchildren in Lamar, South Carolina. Lamar was an obvious candidate for racial trouble. It was but one-third white. Its token freedom of choice plan had been rejected in favor of neighborhood zoning that sent 520 black students to schools where previously there had been but nineteen. One hundred and twenty whites also were scheduled to attend the Spaulding elementary and high schools where none had been before. Ordinary whites insisted the school zones were gerrymandered: “Not a single doctor, lawyer, school-board member or anybody prominent got put in the nigger schools,” protested one.317 And integration arrived abruptly. On January 19, 1970, five days after Carter, Chief Judge Clement Haynsworth announced for the Fourth Circuit that the Court’s decisions left him “no discretion” to postpone integration to the following fall. “[T]he disruption which will be occasioned by the immediate reassignment of teachers and pupils in mid-year”318 was now immaterial. “The proper functioning of our judicial system requires that subordinate courts and public officials faithfully execute the orders and directions of the Supreme Court. Any other course would be fraught with consequences, both disastrous and of great magnitude.”319

On the morning black students first arrived at Lamar High School, a mob of 150-200 white townspeople stood on the road in front of the school. The crowd forced each bus to halt, then surged forward in violent assault. “Ax handles slammed against windows, bricks and bottles hurled inside the bus, showering glass on the children.” Under cover of tear gas fired by patrolmen, the black children were able to escape “just as the mob turned over both buses.”320 Though luckily the black children escaped serious injury,

319 Id. at 198.
320 McIlwain, supra note 317, at 99, 162-63.
the social scars from the incident were more long-lasting. Lamar's schools were closed for a week, then opened under close guard. Five of every six whites at Lamar Elementary were missing, having left for private school, school in nearby counties, or no school at all. Of the 120 whites scheduled to attend formerly all-black Spaulding Elementary and High School, not one did.\textsuperscript{321}

Why had it happened? Many in Lamar blamed the Supreme Court, the distant authority that had tried for years to change "our way of life. If I push you up in that corner and keep pushing you, what're you going to do? You're going to push back. Well, we're pushing back." Midyear integration was what rankled Lamar, contended the Reverend Ed Duncan of Lake Swamp Baptist Church where the new private school now met. "If the government had waited until summer and done this the following fall, there wouldn't have been anything like as much trouble." One might suspect, however, that the timing of integration mattered less than the amount. "The public would permit token integration," said the Reverend Duncan, "but it's when a school isn't a white school anymore that you have a problem." To a person, Lamar's residents denied racist motives for the incident. "It definitely was never a race issue \ldots\)," swore one leader of the uprising. "It's simply the matter of education, quality of education. I'm not going to get my daughter drug down in her education.\textsuperscript{322}

What can the historian learn from such a tragedy? Perhaps, if the Court had intervened so aggressively fifteen years ago, Lamar would not have been an isolated whimper, but the war cry of the entire South. If so, then gradualism proved its worth. The South, in stages, became reconciled to the inevitable, exhausted from battling it, or well versed in escaping it (through private schools). But opposite interpretations are also possible: that Southern backwaters would have resisted in 1955, 1970, 1985, in the fall or at midyear: in short, whenever integration came. If so, what was ever gained by delay?

Lamar is actually an index of both continuity and change. The \textit{Louisville Courier-Journal} saw in the incident only "a montage of racial conflict of 10 years ago.\textsuperscript{323} The \textit{Cincinnati Enquirer}, however, found reason to hope. At Little Rock, the \textit{Enquirer} noted, "Gov. Orval Faubus winked at the resistance \ldots\). This week, Gov. Rob-

\textsuperscript{321} See \textit{id.} at 102, 162-63.
\textsuperscript{322} Id. at 102-03.
\textsuperscript{323} Louisville Courier-Journal, Mar. 6, 1970, \textsection A, at 8, col. 1.
ert E. McNair recognized his responsibility and sent state troopers to Lamar to restore order."324 This change seemed confirmed a year later, when an all-white jury in Darlington County, South Carolina (where Lamar is located), convicted three leaders of the rioting. Presiding Judge Wade Weatherford imposed strict sentences, and Governor John West hailed the sentencing, saying "justice is now color blind" in South Carolina.325

The Supreme Court's Southern and largely rural phase did not end, however, until 1972, four years after Green, in Wright v. City Council of Emporia.326 If the Southern phase began in Brown with a show of unanimity, it ended in Wright on a note of discord. The Justices split five to four, with all four Nixon appointees in dissent.

The issue was whether the city of Emporia could carve out a separate school district from surrounding Greensville County, Virginia. Emporia had been part of the county until 1967 when it became an independent city. Under Virginia law, cities normally provided for the education of their residents. Emporia, however, contracted with Greensville to administer its schools, with Emporia paying a specified part of the school system's total cost. In 1969, however, Emporia sought to form its own school system whether to better finance quality education, as the city claimed, or to evade a recent desegregation order, as the Supreme Court suspected.

The Court held, citing Green, that Emporia's formation of a separate school district would "impede the process of dismantling the existing dual system."327 Once again, after Green, numbers dominated discussion. The combined city-county school district was 66% Negro and 34% white. A separate Emporia district would have been substantially whiter (48%) but left the county system 72% black. The Court insisted that raw figures alone had not compelled its holding.328 Yet other grounds relied upon by the Court either were contradicted by the record329 or amounted to no more than a variation on the numbers argument.330 Chief Justice Burger, in dissent,

324 Cincinnati Enquirer, Mar. 6, 1970, at 6, col. 2.
327 Id. at 466. See also United States v. Scotland Neck Bd. of Educ., 407 U.S. 484 (1972).
328 407 U.S. at 464.
329 The Court's assumption of better facilities in Emporia's schools was contradicted by the record. See id. at 479-81 (Burger, C.J., dissenting).
330 See id. at 474-76 (Burger, C.J., dissenting) (criticizing Court's discussion of the relationship between racial imbalance and white enrollment at private academies). See also L. GRAGLIA, DISASTER BY DECRE E 148-49 (1976).
deplored the "[o]bsession with such minor statistical differences," noted that the separate county and city systems would each be nondiscriminatory, and urged the Court not to deny Emporia's demonstrated desire for local control of its schools and better education for its children. Only the majority's longer experience with Southern resistance and evasion kept him from prevailing.

After Wright, the Court's focus shifted north. Its next four major school opinions all involved Northern or Western cities: Denver; Detroit; Pasadena, California; and Dayton, Ohio. Yet it would be a mistake to view the rural South and the urban North as distinct and unrelated phases of the school desegregation struggle. There were differences, of course. Emporia's lost battle for a separate school district was won by the Detroit suburbs because, the Court held, they had never joined with the city in supporting segregation. And the South's segregation was always held to be presumptively unlawful, while that in the North had to be laboriously proven so. But generally the seeds of the Court's approach to urban school systems in the North were sown in the rural South.

Freedom of choice, for example, proved similar to open enrollment, student transfer, and optional attendance zone policies adopted by Northern school boards to minimize integration and found by federal courts to be violations of the fourteenth amendment. Another tactic, routine placement of black faculty in black schools, was judicially condemned both North and South, despite the claim of one Northern school board that "black teachers serve as adult role models and inspirational examples to black pupils." Green's insistence on statistical evidence that the duty to desegregate had been accomplished was to become characteristic of urban

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school litigation, both South and North. And the sweeping judicial decrees issued in the most impatient hours of the Southern struggle would characterize school remedies in Northern cities as well. Thus the schools of the rural South, at first isolated sites of a sectional skirmish, over time set the pattern for a larger national war. Indeed, the judicial transfer of rural Southern theories to the national urban school scene would become, if anything, too unthinking and complete.

Thus passed the first stage—the Southern stage—of school desegregation. School closings, tuition grants, blustering governors and National Guards, pupil placement laws, and freedom of choice schemes all were transparent Southern devices to evade the spirit, and quite often the letter, of Brown. The Court, in time, flushed them out and struck them down. In this respect, Green was, as Professor Brest has noted, “the Court’s last easy school desegregation case.” With Swann v. Charlotte-Mecklenburg Board of Education and student busing, the school issue became a national one, because busing was meant not to remedy a peculiarly Southern obstruction but to overcome the chief problem of the urban metropolis: racially separate patterns of housing.

The Southern stage of school desegregation had been the gradualist stage, where token results were humored and tolerated. Green marked the end of gradualism and the dawn of something quite new: an attempt at massive integration only dreamed of at the time of Brown. The gradualist stage was not without its successes. The principle of segregation had been broken and a national consensus rallied to the core principle of Brown. One by one, Southern tactics of resistance had been exposed and defeated. And though statistical progress in school desegregation was incremental for most of the period, still progress there had been.

Yet those fourteen long years between Brown and Green do not, in their totality, reflect well on the Supreme Court. “All deliberate speed” was a defensible starting point. Yet the Court neglected to monitor “deliberate speed,” to insist on more than token progress, or to have done with naked stratagems for evasion and delay. Thanks in part to the Supreme Court, Southern school desegregation ran a most uneven course. For a decade after Brown, the Court

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338 See pp. 519-20, 528-30, 547-54 supra.
did almost nothing; for two years after *Green*, it acted in unseemly haste. But the real damage ran deeper. By the time the Court awoke to its responsibilities, it already was too late. Blacks had lost hope and respect; many Americans sensed that law, after all, was less moral than manipulable. Much of the meaning of *Brown* had slowly trickled away.

Thus did the Supreme Court fail to provide leadership and direction to the Southern school controversy. The Court cannot set in motion so complex and multifaceted a process as school desegregation and fail to give it regular attention. Scores of questions and problems beg for answers. Troops in the field require the high Court’s authority and prestige. The Court cannot intervene just at times of crisis; it cannot say what is unconstitutional without suggesting what is; it cannot expect hollow outbursts of displeasure and impatience alone to get things done. The Court, like the rest of us, risks ineffectualness without follow-through. Aloofness, even for our most oracular and pristine institution, will not always do. Sadly, in its own mind, the Court became too much *le grand prononceur*. Particulars did not soil its hands; detail was left to other and lesser folk. Yet the failure of the post-*Brown* years is precisely the failure of the Court to sense its full place in a political partnership, not just with black litigants or with district judges but with all those Americans believing in the new day *Brown* foretold.