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### Why Alabama School Desegregation Succeeded (And Failed)

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# WHY ALABAMA SCHOOL DESEGREGATION SUCCEEDED (AND FAILED)

*Wendy Parker<sup>†</sup>*

## CONTENTS

INTRODUCTION .....	1091
I. A DREAM TEAM AIMS HIGH.....	1093
<i>A. The Place</i> .....	1094
<i>B. The People</i> .....	1096
<i>C. The Remedy</i> .....	1101
<i>D. Unitary Status Proceedings</i> .....	1105
II. MIXED RESULTS .....	1106
<i>A. Macon County</i> .....	1107
<i>B. Decline in African American Teachers</i> .....	1111
<i>C. Achievement Scores</i> .....	1114
III. THE VALUE OF <i>LEE V. MACON COUNTY</i> .....	1116
CONCLUSION .....	1119

## INTRODUCTION

Fred D. Gray was thirty-two years old when he filed *Lee v. Macon County Board of Education*.<sup>1</sup> The suit quickly grew in scope and set in motion sweeping remedial orders compelling the desegregation of school districts, high school athletic conferences, junior colleges, trade schools, and four-year colleges and universities.<sup>2</sup> Professor Owen M. Fiss gave

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<sup>†</sup> James A. Webster Professor of Law, Wake Forest University School of Law. I am deeply thankful for comments from my Wake Forest colleagues at a faculty workshop and from my co-participants at the Case Western University School of Law's symposium, *In Honor of Fred Grey: Making Civil Rights Law from Rosa Parks to the 21st Century*. Comments welcome via email at [parkerwm@wfu.edu](mailto:parkerwm@wfu.edu).

1. FRED D. GRAY, *BUS RIDE TO JUSTICE: CHANGING THE SYSTEM BY THE SYSTEM* 6, 204 (rev. ed. 2013).
2. *Lee v. Macon Cty. Bd. of Educ.*, 317 F. Supp. 103, 110–12 (M.D. Ala. 1970) (three-judge court) (per curiam) (requiring disestablishment of dual systems for trade schools and junior colleges); *Lee v. Macon Cty. Bd. of Educ.*, 283 F. Supp. 194, 198–99 (M.D. Ala. 1968) (three-judge court) (per curiam) (mandating integration of athletic conferences and associations for high schools and junior colleges and recognizing voluntary integration of collegiate conferences); *Lee v. Macon Cty. Bd. of Educ.*, 267 F. Supp. 458, 478 (M.D. Ala. 1967) (three-judge court) (per curiam) (ordering desegregation of trade

CASE WESTERN RESERVE LAW REVIEW · VOLUME 67 · ISSUE 4 · 2017  
*Why Alabama School Desegregation Succeeded (And Failed)*

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the remedy gushing praise, calling it “as ingenious, as path-breaking, as innovative as something like *Marbury v. Madison*.”<sup>3</sup>

This Symposium rightly celebrates Mr. Gray, one of Case Western Reserve University School of Law’s most famous graduates.<sup>4</sup> When he finished law school and returned home to Alabama in 1954, he vowed to “destroy everything segregated [he] could find.”<sup>5</sup> The time and place were ripe for change. The Supreme Court had just decided *Brown v. Board of Education*,<sup>6</sup> and Alabama offered a plethora of places to battle segregation. As one of Alabama’s few African American lawyers, Mr. Gray quickly began filing suits to challenge Alabama’s racial hierarchy.<sup>7</sup>

While *Lee v. Macon County* may not be Mr. Gray’s most well-known case (that honor properly belongs to his representation of Rosa Parks in her criminal case for refusing to give up her bus seat),<sup>8</sup> *Lee v. Macon County* presents a unique vehicle for examining the role of the law in dismantling *de jure* school segregation. The case offered perhaps the *best* opportunity for litigation to promote racial equality in American schools. The success (and failure) of this school desegregation case,

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schools, vocational schools, and state colleges), *aff’d sub nom.* Wallace v. United States, 389 U.S. 215 (1967); *Lee v. Macon Cty. Bd. of Educ.*, 231 F. Supp. 743, 758 (M.D. Ala. 1964) (three-judge court) (per curiam) (school districts and State defendants added to the suit). The University of Alabama, Auburn, and other Alabama colleges not governed by the Alabama State Board of Education, were exempt, as were other school districts already sued for *de jure* segregation. *See Lee*, 267 F. Supp. at 484 n.29; JACK BASS, TAMING THE STORM: THE LIFE AND TIMES OF JUDGE FRANK M. JOHNSON, JR., AND THE SOUTH’S FIGHT OVER CIVIL RIGHTS 228 (1993); GRAY, *supra* note 1, at 209–10. The K–12 portion of the lawsuit was eventually divided into separate suits for each school district. *Lee v. Lee Cty. Bd. of Educ.*, 963 F. Supp. 1122, 1127 (M.D. Ala. 1997).

3. BASS, *supra* note 2, at 235 (quoting Professor Fiss from an interview conducted on June 17, 1989).
4. At the time, the school was called Western Reserve University School of Law. Mr. Gray would have preferred attending the law school in his home state, University of Alabama School of Law, but the school was for whites only. He was entitled to tuition reimbursement for the extra cost of attending out of state (a part of separate but equal), but only after successfully completing his first semester. Finding the money upfront for out of state law school tuition was not easy for Mr. Gray. GRAY, *supra* note 1, at 14–19.
5. *Id.* at xi.
6. 347 U.S. 483 (1954).
7. GRAY, *supra* note 1, at 37, 43.
8. *Id.* at 55–62. Mr. Gray also represented four African American women in their suit seeking to have the state statutes and city ordinances mandating segregated buses be held unconstitutional. *See Browder v. Gayle*, 142 F. Supp. 707 (1956) (three-judge court), *aff’d* 352 U.S. 903 (1956) (per curiam).

thus, affords a unique chance to discover the true potential of litigation as a means to dismantling *de jure* segregation.

Alabama is not an obvious location for successful school desegregation. The state is not generally known for being at the forefront of creating racial equality, particularly when the suit started in 1963. More likely to come to mind is Governor George Wallace standing in the schoolhouse door to prevent integration.<sup>9</sup> Yet Alabama, through *Lee v. Macon County*, is where K–12 school desegregation litigation had one of its best chances for success.<sup>10</sup> I make this argument, which is largely based on the people involved in the case, in Part I of this Article. Part I also includes an overview of the litigation, from its beginning in 1963 to the present day (remarkably, aspects of the suit are still ongoing in 2017).

Part II examines the mixed results of the K–12 portion of *Lee v. Macon County*—inequalities are vastly improved since 1963, but persistent patterns of segregation and inequities remain. Here I focus on persistent segregation by school buildings, but also on the loss of African American teachers and the persistence of a racial achievement gap.

Part III addresses a continuing debate in the academic literature (and movies like *Selma*): the role of the litigation in creating change, as compared to social mobilization.<sup>11</sup> One could easily criticize the usefulness of *Lee v. Macon County* given the continuing segregation and inequality found in Alabama. In the end, however, I believe the lawsuit helped move Alabama closer to educational equity. Alabama would be worse off if Mr. Gray had not had the courage to file *Lee v. Macon County*.

## I. A DREAM TEAM AIMS HIGH

*Lee v. Macon County* started with relatively minor goals. Mr. Gray filed the suit in January 1963, seeking admission of a select group of African American students to the all-white Tuskegee Public High School, a small rural school.<sup>12</sup> At the time, nine years after *Brown I*,

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9. BASS, *supra* note 2, at 207 (noting Wallace’s efforts to prevent integration at the University of Alabama).

10. I am excluding here voluntary school integration, which is an entirely different approach than school desegregation litigation.

11. See, e.g., GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2d ed. 2008) (discussing social change through litigation in civil rights); see *infra* notes 135–138 and accompanying text (discussing Rosenberg’s book).

12. *Lee v. Macon Cty. Bd. of Educ.*, 231 F. Supp. 743, 744–45 (M.D. Ala. 1964) (three-judge court) (per curiam). This was not the first time African Americans in Tuskegee sought admission to the white schools. See Brian K. Landsberg, *Enforcing Desegregation: A Case Study of Federal District Court Power and Social Change in Macon County Alabama*, 48 L. & SOC’Y REV.

Alabama public schools were entirely segregated; not a single African American student attended a white school, and no white student attended an African American school.<sup>13</sup> On August 13, 1963, U.S. District Court Judge Frank M. Johnson, Jr. ordered nonracial school assignments in the upcoming school year, set to start the next month, and a more comprehensive desegregation plan for the following year.<sup>14</sup> The school board complied and assigned thirteen African American students to Tuskegee Public High School.<sup>15</sup>

The beginning of *Lee v. Macon County* was fairly typical of school desegregation at the time. The goal then was the integration of white schools with the admission of a handful of African American students, typically selected as the best and brightest of the African American community and with parents willing to put their children onto the front lines of actualizing racial mixing in schools.<sup>16</sup> Within a year, however, the case took on its unique, comprehensive shape. At times in its long life of fifty-three years and counting, it represented true opportunities for social change through litigation. To learn more about that promise, the next sections examine Macon County, the Dream Team of players, and the resulting remedial orders.

#### A. The Place

Tuskegee Public High School is located in Macon County, Alabama, a county notable for two reasons. First, it is and was a predominately black county.<sup>17</sup> Yet in 1963, whites “controlled all the political offices,

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867, 871–72 (2014) (detailing requests in 1955 and 1962); *see also infra* note 39 (noting earlier requests by named plaintiffs in *Lee v. Macon County*). As early as 1950, the Tuskegee Civil Association published a report demonstrating school funding inequality. Landsberg, *supra*, at 871; *see also* Erwing W. Wadsworth, A Historical Perspective of Education in Macon County, Alabama: 1836–1967, at 334 (Apr. 8, 1969) (Unpublished Ed.D. dissertation, Auburn University) (on file with author) (recounting a request in 1951 for equality in facilities).

13. Landsberg, *supra* note 12, at 873.
14. *Lee v. Macon Cty. Bd. of Educ.*, 221 F. Supp. 297, 300 (M.D. Ala. 1963).
15. Forty-eight African American students applied for admission to Tuskegee High School, but the school board only approved thirteen. Landsberg, *supra* note 12, at 875. The board gave the students both personality and intelligence tests to select students for admission, and made choices in consultation with the U.S. Department of Justice. ROBERT J. NORRELL, REAPING THE WHIRLWIND: THE CIVIL RIGHTS MOVEMENT IN TUSKEGEE 139 (2d ed. 1998).
16. J. HARVIE WILKINSON III, FROM *BROWN* TO *BAKKE*: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954–1978, at 78–87 (1979).
17. NORRELL, *supra* note 15, at x (“Macon County, for which Tuskegee is the seat of government, had a higher percentage of black population—about eighty-four percent—than any other county in the United States in the

including the Board of Education.”<sup>18</sup> For whites, their numerical minority status meant affording rights to African Americans could cause the loss of their power—and the possibility that African Americans would in turn oppress them as much as they had oppressed African Americans. That made affording any rights to African Americans frightening to many white citizens of Macon County. From an African American perspective, their numbers were the opposite of frightening. Their numerical strength gave them a real opportunity for political power and a large community of moral support to pursue equality throughout the county.

A second feature of Macon County increased the chances of African Americans gaining political power and economic support. Its county seat, Tuskegee, was home to two segregated entities that empowered its African American citizenry. In 1881, Booker T. Washington founded the Tuskegee Institute for educating African Americans.<sup>19</sup> The city also housed the Tuskegee Veterans Hospital.<sup>20</sup> The hospital was founded solely for African American veterans and was staffed by African American doctors and nurses. Critically, employment at the Tuskegee Institute or Tuskegee Veterans Hospital gave their workers “economic independence.”<sup>21</sup> That independence had been reflected as early as 1941, when future voting rights plaintiff Dr. Charles G. Gomillion formed the Tuskegee Civil Association (TCA) to promote racial equality.<sup>22</sup>

In sum, Macon County was well positioned as a place to litigate the need to integrate schools. It housed a number of educated, economically independent African American citizens committed to advancing the cause of racial equality, including school desegregation.<sup>23</sup> Detroit Lee, the lead plaintiff in *Lee v. Macon County*, for example, worked for

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1960s.”); *see also infra* note 99 (discussing the demographics of Macon County in the twenty-first century).

18. Frank M. Johnson, Jr., *School Desegregation Problems in the South: An Historical Perspective*, 54 MINN. L. REV. 1157, 1167 (1970). That changed in the late 1960s, when African Americans were elected to critical offices, including sheriff and mayor. NORRELL, *supra* note 15, at 188–90, 200–02. By 1972, eighty percent of elected local officials were African American, the most of any place in the United States. *Id.* at 202.
19. The school was originally named the Normal School for Colored Teachers. It later became the training site for the Tuskegee Airmen. It is now named Tuskegee University. *See* GRAY, *supra* note 1, at 109.
20. *Id.* at 109–10.
21. NORRELL, *supra* note 15, at 27–30. From the beginning, TCA had a large role in *Lee v. Macon*. *Id.* at 137.
22. *Id.* at 41.
23. *See* Wadsworth, *supra* note 12, at 324 (noting that a “large core of intelligent, educated Negroes” lived in Tuskegee).



CASE WESTERN RESERVE LAW REVIEW · VOLUME 67 · ISSUE 4 · 2017  
*Why Alabama School Desegregation Succeeded (And Failed)*

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Tuskegee Veterans Hospital.<sup>24</sup> Macon County had the makings of a community committed to integration.

*B. The People*

The story of *Lee v. Macon County* would be fundamentally different without Governor George Wallace, who took office a mere week before Mr. Gray filed *Lee v. Macon County*. At his inauguration for governor, he had declared his opposition to Mr. Gray's cause of integration: "segregation now . . . segregation tomorrow . . . segregation forever."<sup>25</sup> Learning that the Macon County school board intended to follow Judge Johnson's 1963 order and allow African American students into Tuskegee Public High School, Governor Wallace employed the Alabama State Troopers and National Guard to close and keep closed Tuskegee Public High School.<sup>26</sup> He also spent state monies to open the all-white, ostensibly private Macon Academy, so white students and teachers would have a place for education.<sup>27</sup>

Governor Wallace paid a high price for his intervention. His actions demonstrated his and the State's complicity in establishing and maintaining *de jure* segregation at the local level, making them appropriate parties and potentially legally responsible in cases like *Lee v. Macon County*. Mr. Gray successfully moved to add Governor Wallace and other state officials as defendants in 1964.<sup>28</sup>

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24. See NORRELL, *supra* note 15, at 137.

25. George C. Wallace, Governor, Ala., Inaugural Address 2 (Jan. 14, 1963), (transcript available at <http://digital.archives.alabama.gov/cdm/singleitem/collection/voices/id/2952/rec/5> [<https://perma.cc/4LQB-JJAR>]).

26. See Wendy Parker, *The Future of School Desegregation*, 94 NW. U. L. REV. 1157, 1203 (2000) (noting that the lawsuit quickly captured the governor's attention). Other Alabama school districts also initially indicated their intention to integrate schools, only to be ordered otherwise by the State of Alabama. See BASS, *supra* note 2, at 208–10 (noting the intention of Huntsville to begin integration without court order and the plans of Birmingham and Mobile to comply with integration orders); Johnson, *supra* note 18, at 1169 (noting that school districts with small African American populations indicated a willingness to integrate as early as 1965 but changed their course of action after state involvement).

27. *Lee v. Macon Cty. Bd. of Educ.*, 231 F. Supp. 743, 747 (M.D. Ala. 1964) (three-judge court) (per curiam). His efforts were also directed toward other school districts newly under court order to desegregate—Birmingham, Huntsville, and Mobile. Landsberg, *supra* note 12, at 876. Interestingly, Jim Clark, sheriff of Selma, was on hand with his "mounted posse" to offer their support. NORRELL, *supra* note 15, at 147.

28. *Lee*, 231 F. Supp. at 745, 750–51. The state defendants included the Alabama State Board of Education, the State Superintendent of Education, and Governor Wallace as President of the State Board of Education. Governor Wallace was not sued in his capacity as Governor of Alabama. For a detailed review of the State of Alabama's actions to prevent school integration, see *Lee*

CASE WESTERN RESERVE LAW REVIEW · VOLUME 67 · ISSUE 4 · 2017  
*Why Alabama School Desegregation Succeeded (And Failed)*

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Forcing Governor Wallace's inclusion in *Lee v. Macon County* set the stage for far-reaching litigation. Including state officials as defendants created an exceptionally strong opportunity to desegregate Alabama schools. Now, rather than filing individual school desegregation suits in each of Alabama's over one hundred school districts with their own sets of plaintiffs, lawyers, and courtrooms, plaintiffs would litigate the validity of and remedy for Alabama's *de jure* segregation in one courtroom, with one set of lawyers.<sup>29</sup> In addition, the state by definition had statewide power, and having both the state and individual school districts subject to court order created the opportunity for more expansive and thorough remedies.

Just as critically, the state defendants faced U.S. District Court Judge Frank M. Johnson, Jr. A son of Alabama and former college and law school classmate of Governor Wallace, Judge Johnson had already proven more than willing to side with civil rights plaintiffs.<sup>30</sup> The U.S. Department of Justice often sought to litigate civil rights cases in his courtroom, and Dr. Martin Luther King, Jr. called him "a man who gave true meaning to the word 'justice.'"<sup>31</sup> Having Judge Johnson presiding over a statewide suit to desegregate Alabama schools presented a wealth of opportunities to the plaintiffs. The state defendants, fully aware of Judge Johnson's willingness to side with civil rights plaintiffs, fought their joinder in the lawsuit, but without success.<sup>32</sup>

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v. Macon Cty. Bd. of Educ., 267 F. Supp. 458, 462–72 (M.D. Ala. 1967) (three-judge court) (per curiam), *aff'd sub nom.* Wallace v. United States, 389 U.S. 215 (1967).

29. Johnson, *supra* note 18, at 1168–69 ("The massive intervention by the Governor and other State officials provided the means to shortcut in Alabama the slow district-by-district litigation which was taking so much time and effort all over the South.").

30. *See, e.g.*, Browder v. Gayle, 142 F. Supp. 707, 717 (M.D. Ala. 1956) (three-judge court) (holding state statutes and city ordinances requiring segregated city buses unconstitutional), *aff'd per curiam*, 352 U.S. 903 (1956); United States v. U.S. Klans, Knights of Klu Klux Klan, Inc., 194 F. Supp. 897, 907 (M.D. Ala. 1961) (ordering protections for Freedom Riders). *But see* Gomillion v. Lightfoot, 167 F. Supp. 405, 410 (M.D. Ala. 1958) (ruling that the court lacked jurisdiction), *aff'd*, 270 F.2d 594, 601 (5th Cir. 1959), *rev'd*, 364 U.S. 339, 348 (1960) (holding the district court had jurisdiction to consider the plaintiff's claims of racial gerrymandering). *See generally* David J. Garrow, *Visionaries of the Law: John Minor Wisdom and Frank M. Johnson, Jr.*, 109 YALE L.J. 1219, 1230–34 (2000) (discussing Judge Johnson's many court decisions in support of civil rights issues).

31. BASS, *supra* note 2, at 3.

32. Joseph M. Bagley, School Desegregation, Law and Order, and Litigating Social Justice in Alabama, 1954–1973, at 301–03 (Jan. 5, 2014) (unpublished dissertation, Georgia State University), [http://scholarworks.gsu.edu/cgi/viewcontent.cgi?article=1036&context=history\\_diss](http://scholarworks.gsu.edu/cgi/viewcontent.cgi?article=1036&context=history_diss) [https://perma.cc/87BN-YD3D].



CASE WESTERN RESERVE LAW REVIEW · VOLUME 67 · ISSUE 4 · 2017  
*Why Alabama School Desegregation Succeeded (And Failed)*

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While Judge Johnson was the judge most intimately involved in *Lee v. Macon County*, he operated with the support of his fellow federal judges. His task would have been impossible if the Fifth Circuit had not affirmed his orders and had not already demonstrated its commitment to effective school desegregation.<sup>33</sup> The Fifth Circuit, particularly Judge John Minor Wisdom, was a strong supporter of plaintiffs in civil rights litigation.<sup>34</sup> At the time, many civil rights matters necessitated a three-judge district court, and Judge Johnson had support there as well.<sup>35</sup>

Appearing before Judge Johnson was, to borrow a phrase from another noteworthy Twentieth Century case, a “Dream Team” of plaintiffs’ lawyers. The private plaintiffs had knowledgeable and committed representation. A native son, Mr. Gray was well connected to Alabama’s African American community.<sup>36</sup> He had already successfully argued *Gomillion v. Lightfoot*<sup>37</sup> before the Supreme Court.<sup>38</sup> His named plaintiffs (Detroit and Hattie, on behalf of their sons Anthony and Henry Lee) had waited until Mr. Gray had the time to file a suit on their behalf and were fully committed to desegregating Alabama schools.<sup>39</sup> The NAACP and NAACP-LDF sent their experienced civil

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33. Most important was Judge Wisdom’s opinion in *United States v. Jefferson County*, the school desegregation suit for Birmingham, Alabama. *United States v. Jefferson Cty. Bd. of Educ.*, 372 F.2d 836 (5th Cir. 1966), *aff’d on reh’g en banc*, 380 F.2d 385, 390 (5th Cir. 1967). For more detail about the importance of this decision, see Garrow, *supra* note 30, at 1224–25.
  34. WILKINSON, *supra* note 16, at 111; Wendy Parker, *Connecting the Dots: Grutter, School Desegregation, and Federalism*, 45 WM. & MARY L. REV. 1691, 1718 n.136 (2004).
  35. The three-judge panel hearing much of *Lee v. Macon County* was composed of District Court Judges Harlan Hobart Grooms and Judge Johnson and Fifth Circuit Judge Richard T. Rives. Judge Rives was as notable for his commitment to civil rights as Judge Wisdom. *Lee v. Macon Cty. Bd. of Educ.*, 231 F. Supp. 743, 744 (M.D. Ala. 1964) (three-judge court) (per curiam); see Parker, *supra* note 26, at 1187–88 n.210 (“Judge Ben F. Cameron dubbed Judge John R. Brown of Texas, Judge Elbert Parr Tuttle of Georgia, Judge Richard T. Rives of Alabama, and Judge John Minor Wisdom of Louisiana “The Four,” and the name came to symbolize the Fifth Circuit’s strong commitment to civil rights.”).
  36. See GRAY, *supra* note 1, at 28–29 (discussing some of the connections Mr. Gray had in Montgomery).
  37. 364 U.S. 339, 341 (1960) (concluding that plaintiffs stated a cause of action under the U.S. Constitution to challenge the state’s changing “Tuskegee’s boundaries . . . to remove from the city all save four or five of its 400 Negro voters while not removing a single white voter or resident”).
  38. The case had been argued October 18–19, 1960. *Id.* at 339.
  39. As Mr. Gray explains, “Detroit Lee had wanted me to file such a lawsuit several years earlier, at a time when I was busy with some prior litigation.” GRAY, *supra* note 1, at 204; see also NORRELL, *supra* note 15, at 137 (noting

CASE WESTERN RESERVE LAW REVIEW · VOLUME 67 · ISSUE 4 · 2017  
*Why Alabama School Desegregation Succeeded (And Failed)*

---

rights lawyers to Alabama to offer Gray assistance, which he readily accepted.<sup>40</sup>

The private plaintiffs also received active support from the United States. One of Judge Johnson's very first actions was joining the United States to the case.<sup>41</sup> The Department of Justice (DOJ) represented the United States in *Lee v. Macon County*. Having the United States as a party meant the federal government could officially support private plaintiffs and their quest for school integration. Moreover, the federal government could use its enforcement powers to prevent the State of Alabama and local school districts from interfering with desegregation orders. Thus, any resulting court orders would be backed not only by private groups represented by the private plaintiffs, but by the federal Executive Branch as well.<sup>42</sup>

The Kennedy and Johnson Administrations actively supported the cause of school desegregation in Alabama. President John F. Kennedy federalized the National Guard to ensure that Tuskegee Public High School opened in fall 1963.<sup>43</sup> The Executive Branch also gave its support in smaller ways. For example, future Assistant Attorney General for Civil Rights John Doar demonstrated personal interest in the students originally admitted by the school board.<sup>44</sup> He wrote that his involvement "[took] the burden of policing the school board off the back of the Negroes' attorney."<sup>45</sup> While the United States and private

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that Lee first asked in 1956 to pursue school desegregation, but was told to wait until voting rights were resolved).

40. Bagley, *supra* note 32, at 187, 318 (noting the specific involvement of Director Counsel Jack Greenberg and future Chief Judge of the Southern District of New York Constance Baker Motley); *see also* GRAY, *supra* note 1, at 199 (noting that, conversely, the NCAAP-LDF was interested in Mr. Gray's help because of his connections to the Middle District of Alabama).
41. *See Lee v. Macon Cty. Bd. of Educ.*, 231 F. Supp. 743, 744–45 (M.D. Ala. 1964) (three-judge court) (per curiam) (noting that the appearance of the United States as a party was "appropriate and necessary"). At the time, the United States lacked authority to file its own civil rights suits. Landsberg, *supra* note 12, at 872.
42. Johnson, *supra* note 18, at 1171 (concluding that as of 1970 the Department of Justice had taken the lead because "[t]he volume of litigation [had] become so great").
43. Governor Wallace had ordered the National Guard to keep Tuskegee Public High School closed. President Kennedy federalized the National Guard and sent them home, "leaving only local authorities to keep the peace." *See* NORRELL, *supra* note 15, at 148.
44. Landsberg, *supra* note 12, at 875.
45. *Id.* (quoting 1963 memo by Doar).

CASE WESTERN RESERVE LAW REVIEW · VOLUME 67 · ISSUE 4 · 2017  
*Why Alabama School Desegregation Succeeded (And Failed)*

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plaintiffs sometimes had serious strategic disagreements, they were very often united in goal.<sup>46</sup>

After passage of the Civil Rights Act of 1964 and the Elementary and Secondary Schools Act of 1965 (ESEA), the Department of Health, Education, and Welfare (HEW) also became involved in desegregating Alabama school districts.<sup>47</sup> Derrick Bell, as Acting Director of HEW's Office of Civil Rights, worked on behalf of HEW in Alabama.<sup>48</sup> HEW negotiated plans with Alabama school districts not subject to court school desegregation orders, with the threat of withholding federal funds to school districts that failed to reach agreement with HEW. Although Judge Johnson at times opposed the involvement of HEW in *Lee v. Macon County* school districts, the role of HEW proved to be critical in actualizing school integration.<sup>49</sup>

Other groups joined the lawsuit. To protect the rights of African American teachers, the Alabama State Teachers Association (ASTA) intervened as a plaintiff.<sup>50</sup> Even Macon Academy was joined as a defendant.<sup>51</sup>

Although not an official party to the suit, the support of moderate whites also deserves mention. In the face of Judge Johnson's first order to admit thirteen African Americans into the white high school, the white teachers "pledge[d] to honor [their] contracts."<sup>52</sup> The president of the Tuskegee High Parent Teachers Association, the high school football coach, and the superintendent of schools worked in favor of desegregation in 1963.<sup>53</sup> Many white parents protested Governor Wallace's closing of Tuskegee Public High School.<sup>54</sup>

In sum, *Lee v. Macon County* held great promise in actualizing the ideals of *Brown v. Board of Education*. African Americans pledged

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46. *Id.* at 880 (describing differences in 1964).

47. *See generally* Parker, *supra* note 34, at 1720–21 (discussing the role of HEW and DOJ in school desegregation during this time period).

48. While DOJ initially resisted the role of HEW in overseeing the school districts subject to remedial orders in *Lee v. Macon County*, DOJ eventually welcomed the role of HEW in managing the large project of overseeing the desegregation efforts of ninety-nine individual school districts. *See* BASS, *supra* note 2, at 225, 231; Bagley, *supra* note 32, at 495, 524.

49. *See* BASS, *supra* note 2, at 231; Parker, *supra* note 34, at 1720–21.

50. GRAY, *supra* note 1, at 210–11. NEA replaced ASTA as the intervenor after the ASTA merged with the white teacher's union in Alabama. Johnson, *supra* note 18, at 1171.

51. *Lee v. Macon Cty. Bd. of Educ.*, 231 F. Supp. 743, 757–58 (M.D. Ala. 1964) (three-judge court) (per curiam).

52. Wadsworth, *supra* note 12, at 355.

53. NORRELL, *supra* note 15, at 138–140; Wadsworth, *supra* note 12, at 351.

54. NORRELL, *supra* note 15, at 145.

strong support to the case, and willingly sent their children to formerly all-white schools. Some whites even initially supported integration, and local school districts (including Macon County) indicated their intention to comply with integration orders. The remedial orders of Judge Johnson, the litigation strategy of the DOJ, and the administrative enforcement of HEW all supported the community's quest for integrated schools.

The only missing piece was the support of the State of Alabama.

### *C. The Remedy*

In *Lee v. Macon County*, the African American community, high-powered lawyers, cabinet-level departments, and noted federal judges all converged to integrate Alabama schools.<sup>55</sup> No other school desegregation case presented such a wide range of capable forces to achieve integration. The first remedial stage of the litigation lasted from 1963 to 1970, and remedial orders were more limited than one might predict. Judge Johnson certainly did not shy away from supporting integration in his orders, but he was still operating in a State that aggressively opposed school integration. Perhaps for that reason more than any other, Judge Johnson's remedial orders were more modest than one might envision.

Judge Johnson's first remedial order in 1963 was the most expansive type of school desegregation order at the time. Yet it still only required the *nonracial* application of Alabama's Pupil Placement Law, a race neutral statute explicitly enacted to maintain segregation.<sup>56</sup> Only thirteen African American students, out of forty-eight who applied, were to be admitted to the *de jure* white school.<sup>57</sup> As discussed in more detail *infra*, white parents quickly fled the school, leaving the thirteen African American students once again in a segregated school.<sup>58</sup>

Judge Johnson's second remedial order in 1964 broke new ground in school desegregation. At this time, the State of Alabama became the first state to be legally responsible for *de jure* segregation in its school districts. In all other respects, however, the 1964 order was modest. Judge Johnson, despite a request from Mr. Gray, declined to issue any

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55. The effectiveness of the orders as they relate specifically to Macon County is discussed in more detail *infra* Part II.A.

56. *Lee v. Macon Cty. Bd. of Educ.*, 221 F. Supp. 297, 300 (M.D. Ala. 1963). For the discriminatory nature of pupil placement laws, see Johnson, *supra* note 18, at 1160–61; Parker, *supra* note 34, at 1709–13.

57. *Lee v. Macon Cty. Bd. of Educ.*, 267 F. Supp. 458, 462 (M.D. Ala.) (three-judge court) (per curiam), *aff'd sub nom. Wallace v. United States*, 389 U.S. 215 (1967).

58. See *infra* note 91 and accompanying text.

CASE WESTERN RESERVE LAW REVIEW · VOLUME 67 · ISSUE 4 · 2017  
*Why Alabama School Desegregation Succeeded (And Failed)*

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statewide desegregation order.<sup>59</sup> The court also left intact most of the state laws designed to maintain segregated schools.<sup>60</sup>

The order did, however, break a racial barrier previously enforced in Alabama. In 1965 in Macon County, thirty-two African Americans were attending formerly all-white schools, and eight whites were attending formerly all-African American schools.<sup>61</sup> Eleven years after *Brown v. Board of Education*, African Americans and whites were finally enrolled in the same school. Judge Johnson must be credited with creating integration, even if it only affected a fraction of the African American and white students.<sup>62</sup>

In 1965, HEW became active in mandating school desegregation in Alabama. Apart from Judge Johnson's remedial orders, HEW was threatening to cut off federal funding (significant for the first time after the passage of ESEA) if Alabama school districts refused to reach agreement to desegregate.<sup>63</sup> By fall 1965, Alabama increased its integration. Over 1,000 African American students were enrolled in formerly all-white schools in about half of the Alabama school districts.<sup>64</sup> Yet this still represented less than one percent of the total African American enrollment.<sup>65</sup>

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59. *Lee v. Macon Cty. Bd. of Educ.*, 231 F. Supp. 743, 756 (M.D. Ala. 1964) (three-judge court) (per curiam) (“[A]t this particular time, this Court will not order desegregation in all the public schools of the State of Alabama.”). The court also held the tuition grant statute unconstitutional as applied to Macon Academy, but not unconstitutional otherwise. *Id.* at 754, 757–58. Most significantly, the court did not enter a specific desegregation order or compel the state to desegregate *any* schools. *Id.* at 756. Instead the court ordered the state not to intervene. *Id.* at 755.

60. A tuition grant statute used to establish and fund segregation academies was only struck down to the extent that it was used to establish white schools in the face of integrated public schools. *Id.* at 754. Even more notably, Judge Johnson struck down the Alabama School Placement Law, which was designed to maintain segregated attendance with its rules for student assignment, only when used to give African American students tests when they sought admission to white schools under court order to desegregate. *Id.* at 757; *see also supra* note 56 (citations to scholarship on the discriminatory nature of pupil assignment laws).

61. *See* Lansberg, *supra* note 12, at 882.

62. Professor Lansberg properly gives Judge Johnson substantial credit for breaking this color barrier. *See id.* at 883–85.

63. Parker, *supra* note 34, at 1720–21.

64. *See* Lansberg, *supra* note 12, at 882. By 1965, eighty-four Alabama school districts had school desegregation plans approved by HEW. Sixteen school districts did not. Bagley, *supra* note 32, at 363.

65. Bagley, *supra* note 32, at 363.



Judge Johnson's 1967 order is the one that Professor Fiss gave such high praise and landed Judge Johnson on the cover of Time magazine.<sup>66</sup> It created a situation in Alabama mandating integration everywhere; Judge Johnson finally granted the plaintiffs' requests for statewide relief. Whites would have no place to move in Alabama to avoid integration. The order was detailed, comprehensive in scope, and intended to address every possible aspect of unequal schooling in Alabama.

The 1967 order mandated desegregation of what would later be known as the six *Green* factors—student assignment, faculty and staff assignment, facilities, transportation, and extra-curricular activities.<sup>67</sup> Judge Johnson detailed how the state defendants were to oversee school construction and consolidation; teacher recruitment, placement, certification, and training; and school transportation.<sup>68</sup> The State also had to file detailed reports to facilitate oversight of its efforts.<sup>69</sup>

The order was also immediate. School districts (ninety-nine in all) only had twenty days to adopt desegregation plans, and Judge Johnson was quite specific in what those plans should require.<sup>70</sup> Following Supreme Court precedent, the district court retained jurisdiction until the schools had been desegregated to the extent practical, or had transitioned to being a “unitary,” rather than “dual,” school system.<sup>71</sup> In sum, the order was comprehensive in scope, immediate in timing, and detailed in its requirements. One can understand the high praise Professor Fiss gave the order.

Yet the remedy was also fundamentally limited: it allowed school districts to adopt freedom-of-choice plans.<sup>72</sup> Such plans created integration only to the extent parents choose to send their child to a school not identified with their race. They were notorious for their ineffectiveness in creating desegregation.<sup>73</sup> Judge Johnson allowed freedom-of-choice plans to continue until 1970, despite the objections of the private

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66. See BASS, *supra* note 2, at 235; see also *Lee v. Macon Cty. Bd. of Educ.*, 267 F. Supp. 458, 480–82, 484–85 (M.D. Ala. 1967) (three-judge court) (per curiam) (detailing the 1967 order at length), *aff'd sub nom. Wallace v. United States*, 389 U.S. 215 (1967).

67. *Lee*, 267 F. Supp. at 480–91; *Green v. Cty. Sch. Bd.*, 391 U.S. 430, 435 (1968).

68. *Lee*, 267 F. Supp. at 480–82, 484, 488–90.

69. *Id.* at 480–82, 484–85. The 1965–66 Tuition Grant Statute was also declared unconstitutional. *Id.* at 485.

70. *Id.* at 486–91.

71. *Bd. of Educ. v. Dowell*, 498 U.S. 237, 248, 250 (1991) (holding that federal court jurisdiction ends once school districts are declared “unitary”); *Lee*, 267 F. Supp. at 486.

72. *Lee*, 267 F. Supp. at 478–83.

73. *Johnson*, *supra* note 18, at 1171.



CASE WESTERN RESERVE LAW REVIEW · VOLUME 67 · ISSUE 4 · 2017  
*Why Alabama School Desegregation Succeeded (And Failed)*

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plaintiffs and the United States and despite the Supreme Court's sharp criticism of such plans in 1968 in *Green v. County School Board*.<sup>74</sup> Nor were the freedom-of-choice plans particularly effective. Under the first year of the plans, HEW reported that only 5.4% of African American students were attending *de jure* white schools, a rate lower than any other state save Mississippi.<sup>75</sup>

In early 1970, Judge Johnson stated that freedom-of-choice plans would be judged by their effectiveness.<sup>76</sup> For school districts still segregated, he required compulsory assignment to start in the fall of 1970.<sup>77</sup> As a result, the number of African Americans in formerly all-white schools quadrupled between 1968 and 1970.<sup>78</sup>

That order concluded, however, most aspects of the statewide nature of *Lee v. Macon County*. A three-judge court in 1970 ordered that the ninety-nine school districts be transferred to the federal district court encompassing that school district and be given their own docket number.<sup>79</sup> The decision to break the statewide K–12 school desegregation suit into individual suits was fundamentally practical. Judge Johnson had been personally supervising the desegregation of ninety-nine school districts, along with the other educational institutions subject to *Lee v. Macon County* and other civil rights cases on his docket.<sup>80</sup> The creation of individual suits changed, however, the nature of the K–

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74. *Lee v. Macon Cty. Bd. of Educ.*, 292 F. Supp. 363, 367 (M.D. Ala. 1968) (three-judge court) (per curiam) (“There simply are no other or more effective means reasonably available *at this time* that promise a speedier conversion to a unitary system.”). The order required additional desegregation of faculty according to a specified ratio and the closure of underutilized African American schools. *Id.* at 367–68. The Department of Justice and private plaintiffs had argued that seventy-six of the ninety-nine school districts necessitated additional relief to comply with *Green*. *Id.* at 364–65; *see also* *Green v. Cty. Sch. Bd.*, 391 U.S. 430, 441–42 (1968) (sharply questioning freedom-of-choice plans because they “burden children and their parents with a responsibility which *Brown II* placed squarely on the School Board”).

75. Bagley, *supra* note 32, at 561. In the seventy-six school systems with new motions, over ninety percent of African American students would attend all-black black schools. *Id.*

76. *See* Johnson, *supra* note 18, at 1172.

77. *Id.* at 1171–72.

78. Bagley, *supra* note 32, at 644.

79. *See* *Lee v. Lee Cty. Bd. of Educ.*, 963 F. Supp. 1122, 1126–27 (M.D. Ala. 1997).

80. *See* BASS, *supra* note 2, at 230–31 (recounting Judge Johnson's Saturday meetings with school districts to review their proposed desegregation plans); Johnson, *supra* note 18, at 1164–65 (detailing the amount of time the author spent on school desegregation cases); *supra* note 2 and accompanying text (describing the scope of the *Lee v. Macon County* lawsuit).

12 remedial approach from a statewide approach to one by school district. Judge Johnson retained jurisdiction over the school districts within the jurisdictional boundaries of the Middle District of Alabama, including Macon County.

After massive amounts of litigation from 1963 to 1970, *Lee v. Macon County* had succeeded in outlawing state laws designed to thwart school integration and had imposed compulsory assignment plans on all Alabama school districts.

#### *D. Unitary Status Proceedings*

The next major stage of *Lee v. Macon County* started in 1995. At that time, most of the school desegregation cases in Alabama were still subject to federal court jurisdiction. By 1995 most of the cases, however, had had little or no recent activity, a pattern far from unique to Alabama.<sup>81</sup>

Two judges in the Middle District of Alabama—U.S. District Court Judges W. Harold Albritton III and Myron H. Thompson (who replaced Judge Johnson)—took the novel step of not letting the existing school desegregation orders languish on their dockets. They instead issued orders in their pending school desegregation cases requiring the parties to investigate whether the school districts should be declared unitary and the cases dismissed.<sup>82</sup> In other words, the plaintiffs would be forced to identify ways in which the school districts were not desegregated to the extent practicable. Further, the defendants would be required to redress those continuing vestiges of segregation or prove why they could not redress any existing disparities in their school system.

In many respects, these orders were just as powerful as Judge Johnson's 1967 order. By 1995, most federal district court judges had almost no involvement in their pending school desegregation cases.<sup>83</sup> Judges Albritton and Thompson instead were requiring the parties to look anew at ways to use existing school desegregation litigation—now over thirty years old—to create more equality in Alabama schools. These orders again make Alabama uniquely situated to achieve meaningful reform through school desegregation litigation. It gave the plaintiffs a second chance to achieve equity in Alabama school desegregation.

As was true in the 1960s, skilled lawyers represented the private plaintiffs, including lawyers from the NAACP-LDF. Experienced school desegregation lawyers from the Department of Justice represented the United States. Judge Thompson held that the state defendants were

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81. See Parker, *supra* note 26, at 1200–03 (finding a similar pattern in Georgia and Mississippi).

82. See *id.* at 1205.

83. See *id.* at 1211–13 (discussing reasons that school district litigation tends to sit idle on dockets).

still liable parties to the suit, specifically on the issue of facilities and special education.<sup>84</sup> Thus, for a second time, private plaintiffs, state government, and the federal government were all litigating school desegregation issues. The unitary status proceedings gave the parties a chance to improve upon past attempts and to create more equitable schooling under the supervision of engaged judges.

The scope of the unitary status proceedings was as comprehensive as the 1967 order, if not more. The parties focused not only on the *Green* factors but also on quality of education issues. Discipline, graduation rates, gifted and talented placement, resource allocation, teacher salaries and demographics, curriculum, drop-out prevention, and special education placement all received special attention.<sup>85</sup> Judge Thompson eventually issued statewide orders regarding the equitable distribution of facilities and the nondiscriminatory placement in special education.<sup>86</sup> All school districts save two have been declared fully unitary.<sup>87</sup> The next Part examines some of the results of the efforts to desegregate Alabama schools.

## II. MIXED RESULTS

Fifty-three years after Mr. Gray filed *Lee v. Macon County*—after all the time, resources, and energy put into desegregating Alabama schools—no one would argue that *Lee v. Macon County* has achieved all that the plaintiffs sought or even all that the judicial remedies mandated. Perhaps that is to be expected. As early as 1971, Chief Justice

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84. *Lee v. Lee Cty. Bd. of Educ.*, 963 F. Supp. 1122, 1122–23, 1128–30 (M.D. Ala. 1997); *see infra* note 86 (noting the impact on special education).

85. *See* Wendy Parker, *The Decline of Judicial Decisionmaking: School Desegregation and District Court Judges*, 81 N.C. L. REV. 1623, 1653–55 (2003).

86. *Lee v. Lee Cty. Bd. of Educ.*, No. 3:70CV845, 2009 WL 1231497 (M.D. Ala. Apr. 28, 2009) (facilities order); *Lee v. Lee Cty. Bd. of Educ.*, 476 F. Supp. 2d 1356, 1360, 1362–64 (M.D. Ala. 2007) (requiring implementation of strategies to reduce the overrepresentation of African American students in the categories of mental retardation and emotional disturbance and underrepresentation in the categories of specific learning disability and gifted).

87. The two are Chambers County and Randolph County. Chambers County last filed a status report on October 22, 2013, but apparently has never sought unitary status. *See* Docket, *Lee v. Chambers Cty. Bd. of Educ.*, No. 3:70-cv-844 (M.D. Ala. June 5, 1990) (showing last entry on Feb. 7, 2017). Randolph County, in a 2013 consent decree, has undertaken additional efforts to achieve unitary status in personnel issues; the school district has achieved unitary status in all other respects. Docket, *Lee v. Randolph Bd. of Educ.*, No. 3:70-cv-847 (M.D. Ala. May 17, 1994) (showing last entry on Jan. 17, 2017); Consent Order, *Lee v. Randolph Cty. Bd. of Educ.*, No. 3:70-cv-847 (April 16, 2013).

Warren E. Burger recognized the limits of school desegregation litigation.<sup>88</sup> Yet demonstrating the limits of school desegregation litigation in Alabama would be particularly notable given the promise of the suit.

This Part studies the current situation in Alabama schools to evaluate how the schools measure up to the ultimate goals of school desegregation litigation—desegregating schools and promoting educational equity. The Section focuses on three indicators: the particular situation of Macon County, the site of the beginning of this lawsuit, and statewide data on teachers and achievement scores. Of course, the causal connection between litigation and the present situation is complex and far beyond the scope of this Article. Yet the numbers presented below offer some indication of the success and limits of *Lee v. Macon County*.

#### *A. Macon County*

Despite the efforts of a Dream Team of lawyers and a progressive, engaged district court judge backed by a supportive court of appeals, *Lee v. Macon County* has not brought either integration or educational excellence to Macon County. African Americans in Macon County quickly learned the limits of judicial orders.<sup>89</sup>

That limit became obvious as early as 1965. The first remedial order in 1963 compelled the integration of Tuskegee Public High School by thirteen carefully selected African American students.<sup>90</sup> By 1968, however, that school transitioned to one-hundred percent African American.<sup>91</sup> While the Lees and other families wanted their children to attend the better-financed Tuskegee Public High School, they never sought to have the school all to themselves. They had already experienced segregation at Tuskegee Institute High School and found it lacking. Despite the efforts of Judge Johnson, the United States, and private plaintiffs,

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88. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 22 (1971) (“One vehicle can carry only a limited amount of baggage.”).

89. One of Tuskegee’s most famous African American citizens, Dr. Charles G. Gomillion, noted his disappointment as early as 1973. NORRELL, *supra* note 15, at 207.

90. *See supra* notes 14–15, 56–58 and accompanying text.

91. Within three days of opening in September 1963, all of the white students had left the high school, and the state ordered the school closed for the year. *See Johnson, supra* note 18, at 1168 (“[In 1963,] only 35 of the 250 white students appeared for classes. Within three days public pressure forced all of them to withdraw.”). The African American students finished that school year at Shorter and Natasulga High Schools. *Id.* Tuskegee Public High School reopened for the 1964–65 school year. The school was initially integrated, albeit with a fraction of its previous enrollment. NORRELL, *supra* note 15, at 168. That integration was not sustainable. By the end of the 1968 school year, all the white students had left for other public high schools or Macon Academy. *See id.* at 194–95; Landsberg, *supra* note 12, at 879.

CASE WESTERN RESERVE LAW REVIEW · VOLUME 67 · ISSUE 4 · 2017  
*Why Alabama School Desegregation Succeeded (And Failed)*

---

African American students in Tuskegee found themselves once again in a separate school. White flight, supported by the State of Alabama, thwarted the first goal of *Lee v. Macon County* to integrate Tuskegee Public High School.<sup>92</sup>

The litigation, however, did not end in 1965. The federal courts maintained jurisdiction over the Macon County Board of Education for forty-one more years. During that long time, judicial involvement in Macon County was minimal, with one notable exception.<sup>93</sup>

That exception concerned Notasulga High School, the only Macon County school with any appreciable white enrollment. From 1973 to 1991, the school enrollment ranged from forty-two to fifty percent white.<sup>94</sup> In 1991, facing declining enrollment in the county, the school district sought judicial permission to close that school and reassign the students to a consolidated high school, where whites would be around six percent of the student population.<sup>95</sup> Those protesting the plan were allowed to intervene as plaintiffs in the case.<sup>96</sup> After two years of active litigation, that request was eventually denied by an equally divided, en banc Eleventh Circuit decision, thereby affirming a district court order protecting the continued operation of the one integrated school.<sup>97</sup>

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92. The story at Notasulga High School in Macon County ended better at first. See *infra* notes 94–97 and accompanying text.

93. See Docket, *Lee v. Macon Cty. Bd. of Educ.*, No. 3:70-CV-846 (M.D. Ala. June 24, 1970), ECF No. 1 (showing relatively little action over the course of thirty-five years). For example, the only judicial involvement in Macon County in 1970 and 1972 was the receipt of school district reports. *Id.* In 1971, 1973, and 1974 the school district sought to change school district lines, apparently with little dispute and court involvement. *Id.* From 1977 to 1991, the case had no action, not even the filing of reports. *Id.* In 1997, the plaintiffs requested an investigation into the school district, but the request was denied. *Id.* In 2005, the school district sought judicial permission to close two schools, which was granted. Order, *Lee v. Macon Cty. Bd. of Educ.*, No. 3:70-CV-846-T (M.D. Ala. Aug. 19, 2005), ECF No. 101.

94. The school initially was the site of significant white flight. In 1964, six African American students enrolled at the high school, and all the whites left. *Lee v. Macon Cty. Bd. of Educ.*, 970 F.2d 767, 768 (11th Cir. 1992), *aff'd en banc*, 995 F.2d 184 (11th Cir. 1993). Arsonists then burned the building. *Id.* From 1965 to 1970, the school was all-white, until a 1970 plan was adopted to create integration. *Id.* While called a high school, it is a K–12 school. *Id.* By 1973, the school opened with a student body almost evenly divided between African Americans and whites. *Id.* at 769. In 1991, the white population had dropped, but was still significant at forty-three percent. *Id.*

95. *Id.* at 770. While Macon County was facing declining enrollment, Notasulga High School at the time was increasing its enrollment. *Id.*

96. *Id.*

97. *Lee v. Macon Cty. Bd. of Educ.*, 995 F.2d 184, 185 (11th Cir. 1993) (en banc) (per curiam).



CASE WESTERN RESERVE LAW REVIEW · VOLUME 67 · ISSUE 4 · 2017  
*Why Alabama School Desegregation Succeeded (And Failed)*

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Yet even using school desegregation litigation to protect *white* students and their preference to keep open the only integrated school eventually proved futile. That school is now over ninety-nine percent African American, and only a handful of white students attend any public school in Macon County.<sup>98</sup> In 2006, when the suit ended, the school district had an African American superintendent, an all-African American school board, and a faculty and staff over ninety-five percent African American.<sup>99</sup> Governor Wallace's promise of "segregation tomorrow" has come true for the public schools in Macon County.<sup>100</sup> Ironically, the former segregation academy, Macon Academy, now renamed Macon East Academy, is integrated.<sup>101</sup>

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98. *Enrollment by Ethnicity and Gender (School Level), Macon County 2014–2015*, ALA. STATE DEP'T OF EDUC., <http://web.alsde.edu/PublicDataReports/Default.aspx> [<https://perma.cc/6UHK-BXY3>] (reporting eleven white male students enrolled at Notasulga High School). In 2011–12, the school had reported twenty-eight white students. *Enrollment by Ethnicity and Gender (School Level), Macon County 2011–2012*, ALA. STATE DEP'T OF EDUC., <http://web.alsde.edu/PublicDataReports/Default.aspx> [<https://perma.cc/6UHK-BXY3>]. It is impossible to know the exact number of white students because categories with fewer than ten students are listed with a "\*" rather than an exact number. *Id.* In 2005, when Macon County was declared unitary, Notasulga High School was fourteen percent white. *Lee v. Macon Cty. Bd. of Educ.*, No. 3:70-CV-846-MHT, 2006 WL 1381873, at \*2 (M.D. Ala. May 22, 2006).
  99. *See Lee*, 2006 WL 1381873, at \*2. The county's population remains predominately African American. *Id.* (finding that the county's population was 84.6% African American in 2000). The public only identified one concern with the grant of unitary status—the protection of and support for Notasulga High School. *Id.* at \*4. A former high school principal expressed concern with irregular student transfers, but a follow-up investigation did not substantiate the concern. *Id.* at \*4–5.
  100. *Enrollment by Ethnicity and Gender (System Level), Macon County 2012–2013*, ALA. STATE DEP'T OF EDUC., <http://web.alsde.edu/PublicDataReports/Default.aspx> [<https://perma.cc/6UHK-BXY3>] (showing twelve white female students and thirteen white male students for the district). In 2013, the number of white female and male students had dropped below the individualized reporting threshold of ten. *Enrollment by Ethnicity and Gender (System Level), Macon County 2013–2014*, ALA. STATE DEP'T OF EDUC., <http://web.alsde.edu/PublicDataReports/Default.aspx> [<https://perma.cc/6UHK-BXY3>].
  101. Wendy Parker, Brown's 60th Anniversary: A Story of Judicial Isolation, in *THE PURSUIT OF RACIAL AND ETHNIC EQUALITY IN AMERICAN PUBLIC SCHOOLS*, 108 (Kristi L. Bowman ed., 2015); *see also* Bagley, *supra* note 32, at 689 (reporting that, when segregationist academies were forced to accept black students in the 1990s to improve their finances, they were able to replicate the limited impact of freedom-of-choice plans in the 1960s and 1970s).



Nor is the public school system particularly strong in its educational outcomes. On the statewide test for reading, less than eleven percent of third graders met or exceeded academic standards for reading, but the number increased to 35.38% for eighth graders and 37.15% for tenth graders.<sup>102</sup> Math scores are weaker and unfortunately declined the longer the student was in the system. Third graders demonstrated academic proficiency at a rate of 28.76%, but that rate dropped to below 5.62% for eighth graders and 3.82% for tenth graders.<sup>103</sup> Yet the school district has strong graduation rates. About eighty-nine percent of students graduate, which is the same as the state average.<sup>104</sup>

The ability of *Lee v. Macon County* to achieve desegregated school buildings should not be judged solely by the results in Macon County. A statewide perspective of school building desegregation is entirely warranted given the scope of the lawsuit. A National Assessment of Educational Progress (NAEP) report quantified the degree of racial segregation in schools on a statewide basis by comparing the percentage of African American students in a school attended by a white student with the percentage of African American students in a school attended by an African American student.<sup>105</sup> Any difference in the average is one indication of school segregation on a state level.

In 2011, the average white student in Alabama attended a school that was nineteen percent African American, while the percent for the average African American student was sixty-three percent African American, resulting in a difference of forty-four percentage points.<sup>106</sup> The gap in Alabama is slightly worse than for the United States as a whole, where the gap is thirty-nine percentage points.<sup>107</sup> The difference in Alabama is also higher than most of its comparable states. Georgia, Louisiana, North Carolina, Mississippi, South Carolina, and Virginia all

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102. These numbers are found in the 2014 ACT Aspire and ACT Plan reports for Macon County. *Assessment Reporting System*, ALA. STATE DEP'T OF EDUC., <https://www03.alsde.edu/accountability/accountability.asp> [<https://perma.cc/SPQ7-HAPQ>].

103. *Id.*

104. *Graduation Rate, 2014–2015 Cohort Graduation Rate*, ALA. STATE DEP'T OF EDUC., <https://www.alsde.edu/dept/data/Pages/graduationrate-all.aspx> [<https://perma.cc/6FLA-7MLU>].

105. NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., *SCHOOL COMPOSITION AND THE BLACK–WHITE ACHIEVEMENT GAP 23* (2015), [https://nces.ed.gov/nationsreportcard/subject/studies/pdf/school\\_composition\\_and\\_the\\_bw\\_achievement\\_gap\\_2015.pdf](https://nces.ed.gov/nationsreportcard/subject/studies/pdf/school_composition_and_the_bw_achievement_gap_2015.pdf) [<https://perma.cc/DF2S-GBDZ>].

106. *Id.* at 24 fig.12.

107. *Id.*

had a smaller gap.<sup>108</sup> This study indicates that segregation continues to be at issue in Alabama, as it is for all of the United States. Segregated school buildings may be of particular concern in Alabama given that its surrounding states have so far had higher success in achieving integrated school buildings.<sup>109</sup>

### *B. Decline in African American Teachers*

This Section shifts from students to teachers. From its early stages, the transition from “‘white’ school or ‘Negro’ school[s] [to] just schools”<sup>110</sup> included the desegregation of faculties.<sup>111</sup> A school’s staff and faculty was part of a school’s racial identity.

At least initially, some African American teachers and principals had serious concerns with the quest to end *de jure* segregation.<sup>112</sup> Although underpaid as compared to their white counterparts and lacking the financial resources found in white schools, African American teachers and principals fared better than most African American workers did under *de jure* segregation.<sup>113</sup> They were generally well respected in their communities and comparably well paid.

The end of *de jure* segregation often meant the closing of underfunded and under-maintained African American schools. Sometimes

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108. *Id.* Specifically, the gap in Georgia was thirty-seven; Louisiana, thirty-three; Mississippi, forty-three; North Carolina, twenty-seven; South Carolina, twenty-three; and Virginia, twenty-seven. *Id.* Notably, Georgia, Mississippi, and South Carolina also had statewide suits. See David L. Norman, *The Strange Career of the Civil Rights Division’s Commitment to Brown*, 93 YALE L.J. 983, 987 n.17 (1984).

109. In 1980, Alabama had made greater strides in enrollment of African American students in predominately white schools than other Southern states. GARY ORFIELD, PUBLIC SCHOOL DESEGREGATION IN THE UNITED STATES, 1968–1980, at 6 tbl.3 (1983), [http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/public-school-desegregation-in-the-united-states-1968-1980/orfield\\_american-desegregation-1983.pdf](http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/public-school-desegregation-in-the-united-states-1968-1980/orfield_american-desegregation-1983.pdf) [https://perma.cc/M6DS-PGWP] (noting that 44.3% of black students were enrolled in predominately white schools in 1980, an increase of thirty-six points since 1968, ahead of all Southern and Border states but Delaware, Kentucky, and Florida); see also *id.* at 50, app. A (reflecting that 31.9% of African American students in Alabama attended schools at least ninety percent African American).

110. *Green v. Cty. Sch. Bd.*, 391 U.S. 430, 442 (1968).

111. For a description of this history, see Wendy Parker, *Desegregating Teachers*, 86 WASH. U. L. REV. 1, 8–15 (2008).

112. JACK GREENBERG, CRUSADERS IN THE COURTS 391 (1994) (“We had not anticipated how seriously black teachers would be at risk during desegregation.”).

113. RICHARD KLUGER, SIMPLE JUSTICE 391–92 (Vintage Books 1977) (1975); GREENBERG, *supra* note 112, at 391; Adam Fairclough, *The Costs of Brown: Black Teachers and School Integration*, 91 J. AM. HIST. 43, 49 (2004).

CASE WESTERN RESERVE LAW REVIEW · VOLUME 67 · ISSUE 4 · 2017  
*Why Alabama School Desegregation Succeeded (And Failed)*

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African American teachers were re-assigned to the formerly all-white schools, but that re-assignment was often coupled with a demotion. Fairly frequent was the outright loss of jobs. One estimate is that almost 40,000 African American teachers lost their jobs between 1954 and 1972.<sup>114</sup> An estimated 150 plus African American men in Alabama lost their principalships.<sup>115</sup> A study in 1970 estimated that over “[o]ne-third of the estimated 10,500 black teachers in [Alabama] have been dismissed, demoted or pressured into resigning.”<sup>116</sup>

Even if the teachers kept their jobs and their status, they faced extreme parental (and school district) resistance.<sup>117</sup> Judge Wisdom lamented that integration of faculty was “[t]he most difficult problem in the desegregation process.”<sup>118</sup> Putting an African American teacher in charge of a white child, or an African American principal over a white teacher, represented a tangible shift in power. African American families as well often mourned the loss of African American teachers for their children.<sup>119</sup>

Sixty years after *Brown*, the percentage of African American teachers in Alabama is lower than it was under *de jure* segregation. In 1939, 1949, and 1959, the percentage of African American teachers was around thirty percent.<sup>120</sup> Today, the percentage has dropped a third, to

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114. JACQUELINE JORDAN IRVINE, BLACK STUDENTS AND SCHOOL FAILURE 34–35 (1990) (reporting that 39,386 black teachers lost their teaching jobs in the South between 1954 and 1972).

115. Fairclough, *supra* note 113, at 54 (“The main casualties of integration were the black schools and the men who had run them. . . . In Alabama, the number of black principals declined from 210 to 57, in Virginia from 170 to 16.”); Russell W. Irvine & Jacqueline Jordan Irvine, *The Impact of the Desegregation Process on the Education of Black Students: Key Variables*, 52 J. NEGRO EDUC. 410, 417 (1983) (reporting that “there was a ninety percent reduction in the number of black principals in the South between the years 1964 and 1973, dropping from over 2000 to less than 200”).

116. ROBERT W. HOOKER, DISPLACEMENT OF BLACK TEACHERS IN THE ELEVEN SOUTHERN STATES 18 (1970), <http://files.eric.ed.gov/fulltext/ED047036.pdf> [<https://perma.cc/3UG5-ZUEY>].

117. Parker, *supra* note 111, at 12–13.

118. *United States v. Jefferson Cty. Bd. of Educ.*, 372 F.2d 836, 892 (5th Cir. 1966), *aff’d per curiam*, 380 F.2d 385 (5th Cir. 1967) (en banc).

119. For details of the situation faced by African American teachers and staff in Alabama, see Bagley, *supra* note 32, at 517–18, 588–89.

120. In 1939, the figure was 28.96% African American teachers; in 1949, 33.24%. See TRUMAN M. PIERCE, ET AL., WHITE AND NEGRO SCHOOLS IN THE SOUTH 184 tbl.46 (1955). The figure was 32.2% in 1959. See S. EDUC. REPORTING SERV., STATISTICAL SUMMARY OF SCHOOL SEGREGATION-DESEGREGATION IN THE SOUTHERN AND BORDER STATES 5 (Jim Leeson ed., May 1961) [hereinafter STATISTICAL SUMMARY], <https://babel>.

around twenty percent.<sup>121</sup> By way of comparison, the percentage of African American students in Alabama has stayed fairly constant from 1939 to the present, around thirty-three percent.<sup>122</sup>

While the initial decline in African American teachers was certainly directly tied to the closing of *de jure* African American schools, the current numbers are certainly caused by a myriad of factors. The reason for the decline is obviously beyond the scope of this Article, and may be caused mainly by the opening of more career opportunities for educated African Americans than Jim Crow allowed. I mention the decline, however, because most people view the loss of African American teachers as a loss to the African American community. That loss is often overlooked in examinations of school desegregation outcomes and is worthy of any evaluation of the results of school desegregation litigation.

In *Lee v. Macon County*, Judge Johnson first ordered the integration of faculties in 1966.<sup>123</sup> During the unitary status proceedings that began in 2005, the issue of the lack of hiring of African American teachers would sometimes arise, and some school districts were required to take additional steps to increase their number of African American teachers.<sup>124</sup> At this stage, many considered school desegregation litigation as a successful way to promote the hiring of African American teachers.<sup>125</sup>

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[hathitrust.org/cgi/pt?id=mdp.39015016912365;view=1up;seq=3](https://hathitrust.org/cgi/pt?id=mdp.39015016912365;view=1up;seq=3) [<https://perma.cc/SQ7P-3FJQ>].

121. By 1999, Alabama's teaching population was seventeen percent African American; the percentage increased to twenty percent by 2009. ALA. STATE DEP'T OF EDUC., 1998 ALABAMA EDUCATION STATISTICS: A SUMMARY (on file with author). For the 2015–16 school year, the percentage was 19.5%. *Quick Facts 2015–2016*, ALA. STATE DEP'T OF EDUC., <https://www.alsde.edu/sec/comm/Quick%20Facts/QF-2016-ONLINE.pdf> [<https://perma.cc/J88K-WMQC>] (last updated Aug. 3, 2016).
122. In 1939 and 1949 the percentage of African American students in Alabama was the same: 34.7%. *See* PIERCE, *supra* note 120, at 110 tbl.20. In 1959, the number had dropped slightly, to 34.5%. *See* STATISTICAL SUMMARY, *supra* note 120, at 5. In 1999, the percentage of African American students in Alabama was thirty-six percent; in 2009, thirty-five percent. 1998 ALABAMA EDUCATION STATISTICS, *supra* note 121. For the 2015–16 school year, the percentage was 33.2%. *Quick Facts 2015–2016*, *supra* note 121.
123. *Lee v. Macon Cty. Bd. of Educ.*, 267 F. Supp. 458, 472–73 (M.D. Ala.) (three-judge court) (per curiam), *aff'd sub nom.* *Wallace v. United States*, 389 U.S. 215 (1967); *Lee v. Macon Cty. Bd. of Educ.*, 253 F. Supp. 727, 729 (M.D. Ala. 1966) (three-judge court) (per curiam).
124. *See* Parker, *supra* note 101, at 108 (noting significant improvements in the area of minority teacher employment).
125. *Id.*; *see also* Bagley, *supra* note 32, at 751 (quoting interview with *Lee* plaintiff attorney Solomon Seay as reporting that unitary status proceedings

*C. Achievement Scores*

One of the outcomes of *de jure* segregation and its attending inequality of resources was a racial difference in achievement scores, with white students typically outperforming African American students. Nationally, that gap decreased rapidly throughout the 1970s, increased a little in the 1980s and 1990s, and is now on the decline again.<sup>126</sup>

Given that *Lee v. Macon County* was a statewide suit, it seems fair to evaluate the progress Alabama has had in reducing its racial achievement gap. In Alabama, African American students continue to underperform as compared to their white counterparts. For example, according to the 2015 ACT Aspire tests in reading, African American sixth graders were deemed proficient at a rate of twenty-four percent, compared to white students at fifty-four percent, a gap of thirty points.<sup>127</sup> In math, the African American sixth graders were proficient thirty-two percent of the time, compared to sixty-percent of whites, a gap of twenty-eight points.<sup>128</sup> The difference was a little lower for eighth graders. White students in eighth grade were proficient in reading fifty-three percent of the time, as compared to twenty-nine percent African

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in the 2000s were often concerned with protecting the rights of African American staff and teachers).

126. Stanford University's Center for Education Policy Analysis has established a comprehensive Educational Opportunity Monitoring Project, which tracks national trends. *Racial and Ethnic Achievement Gaps*, STAN. CTR. FOR EDUC. POL'Y ANALYSIS, <http://cepa.stanford.edu/educational-opportunity-monitoring-project/achievement-gaps/race/#second> [https://perma.cc/YR8C-G39Z] (last visited Mar. 13, 2017). Nationally, the racial achievement gap has declined about fifteen to twenty percent between the 1970s and 2012. *Id.*; see also ALAN VANNEMAN, ET AL., NAEP EDUC. STATISTICS SERVS. INST., *ACHIEVEMENT GAPS: HOW BLACK AND WHITE STUDENTS IN PUBLIC SCHOOLS PERFORM IN MATHEMATICS AND READING* 6, 28 (July 2009) [hereinafter NAEP REPORT], <http://nces.ed.gov/nationsreportcard/pdf/studies/2009455.pdf> [https://perma.cc/U7RJ-TM7S] (providing similar tables). The numbers in Alabama have declined since 1990. For example, the difference in math achievement scores for eighth graders declined from 1.1 standard deviation in 1990 to 0.9 standard deviation. See *Racial and Ethnic Achievement Gaps*, *supra*. For reading, the standard deviation for eighth graders in Alabama declined from 0.89 to 0.77. *Id.*
127. *Percentage Proficient by Grade and Race in Reading on 2015 ACT Aspire*, ALA. STATE DEP'T OF EDUC., <https://www.alsde.edu/dept/data/Assessment%20Data/Aspire%20Reading%20Results%20by%20Race%20Graph.pdf> [https://perma.cc/9SBB-QB5Z].
128. *Percentage Proficient by Grade and Race in Mathematics on 2015 ACT Aspire*, ALA. STATE DEP'T OF EDUC., <https://www.alsde.edu/dept/data/Assessment%20Data/Aspire%20Math%20Results%20by%20Race%20Graph.pdf> [https://perma.cc/2G2J-FZQN].



CASE WESTERN RESERVE LAW REVIEW · VOLUME 67 · ISSUE 4 · 2017  
*Why Alabama School Desegregation Succeeded (And Failed)*

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American students, a difference of twenty-four points.<sup>129</sup> For math the scores for eighth grade white students was thirty-seven percent; African American, eleven percent, a difference of twenty-six points.<sup>130</sup>

One obvious question is how Alabama compares to other states. If Alabama is doing a better job than most states in reducing the achievement gap, that would indicate a notable success for the State that perhaps could be linked to *Lee v. Macon County*. One recent study found that at least four Alabama school districts are not doing a better job than most school districts in erasing the racial achievement gap. The study identified twenty school districts with the largest achievement gaps between 2009 and 2011, and the twenty with the smallest. Four Alabama school districts were on the list of the districts with the largest gaps, and no Alabama school district made it to the list of the districts with the smallest gaps.<sup>131</sup>

Likewise, a NCES study of the entire state did not indicate Alabama outperforming the rest of the country or its fellow Southern states in erasing the achievement gap.<sup>132</sup> Using 2007 data for eighth graders

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129. *Percentage Proficient by Grade and Race in Reading on 2015 ACT Aspire*, *supra* note 127.

130. *Percentage Proficient by Grade and Race in Mathematics on 2015 ACT Aspire*, *supra* note 128.

131. See Sean F. Reardon, et al., *The Geography of Racial/Ethnic Test Score Gaps*, 50 fig.4 (Stanford Ctr. for Educ. Policy Analysis, Working Paper No. 16-10, 2016), <https://cepa.stanford.edu/sites/default/files/wp16-10-v201604.pdf> [<https://perma.cc/2VW3-D4XE>]. The four school districts are (in the order listed) Auburn City, Vestavia Hills, Tuscaloosa City, and Homewood City. *Id.* The school districts range in the number of students qualifying for free or reduced meals from less than ten percent for Vestavia Hills to forty-eight percent in Tuscaloosa City. 2015–2016 Free Lunch for System and School Reports, <https://web.alsde.edu/PublicDataReports/Default.aspx> [<https://perma.cc/ED2C-CUYC>] (select Free Lunch By System and School from drop down menu, then select 2015–2016 from year drop down menu, then select Vestavia Hills or Tuscaloosa under System Name drop down menu and select View Report). The percentage of African American students for the four school districts ranged from a low of less than seven percent for Vestavia Hills to seventy-one percent for Tuscaloosa City. 2015–2016 Enrollment by Ethnicity and Gender (System Level), <https://web.alsde.edu/PublicDataReports/Default.aspx> [<https://perma.cc/ED2C-CUYC>] (select Enrollment By Ethnicity and Gender (System Level) from the drop down menu, then select 2015–2016 from the year drop down menu, then Vestavia Hills or Tuscaloosa under System Name drop down menu and select View Report). Interestingly, Homewood and Vestavia are school districts located near Birmingham that were created after the school district for sued in 1965 for desegregation. See Bagley, *supra* note 32, at 737. Both were initially over ninety percent white, although they were included in the school desegregation order for the county included their school districts and Birmingham. See *Stout v. Jefferson Cty. Bd. of Educ.*, 448 F.2d 403 (5th Cir. 1971).

132. NAT'L CTR. FOR EDUC. STATISTICS, *supra* note 105, at 15 fig.10.



in math, the study found the racial achievement gap in Alabama to be thirty-one percentage points. That gap is the same for the nation as a whole and for South Carolina.<sup>133</sup> In five states comparable to Alabama, however, the achievement gap is smaller.<sup>134</sup> This data suggests that Alabama is doing worse than its surrounding states, which also had *de jure* school segregation.

### III. THE VALUE OF *LEE V. MACON COUNTY*

Given the early promise of *Lee v. Macon County*, this Part examines why the schools of Alabama remain so segregated and unequal. Academics have long debated the wisdom of relying on the judiciary, instead of grassroots movements, to effectuate social change in schools. Most prominently perhaps, Professor Gerald Rosenberg in *The Hollow Hope* contends that schools became integrated only after Congress and the Executive Branch gave their institutional support.<sup>135</sup> He affords the judiciary little independent value in desegregating schools.<sup>136</sup> He endorses direct action over litigation and would likely argue that *Lee v. Macon County* is another example of the limits of judicial action.<sup>137</sup>

Professor Rosenberg's thesis is fairly consistent with *Lee v. Macon County* from 1963 to 1970. School integration in Alabama was almost non-existent until Congress passed the ESEA and HEW began its enforcement efforts.<sup>138</sup> Even the Alabama judges recognized the importance of the other federal branches. In the 1967 remedial order, the three-judge panel specifically mentions the Civil Rights Act of 1964 and HEW's support of school integration.<sup>139</sup> The judges also acknowledge

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133. *Id.* at 25 fig.13.

134. *Id.* In Georgia, the gap is twenty-nine points; Louisiana, twenty-three; Mississippi, twenty-seven; North Carolina, twenty-nine; and Virginia, twenty-nine. *Id.*

135. ROSENBERG, *supra* note 11, at 42–156.

136. *Id.* at 106 (“Courts can matter, but only sometimes, and only under limited conditions.”).

137. *See id.* at 431 (“[T]here is no substitute for political action.”).

138. For example, the actual integration achieved under Judge Johnson's 1963–65 orders affected less than half of one percent of Alabama African American students. *Id.* at 433 (showing the percentage to be 0.43% in 1965). Once HEW became involved in Alabama (and Judge Johnson's orders expanded substantially), that number increased to just under five percent in 1966 and a remarkable eighty percent by 1970. *Id.*; *see also supra* notes 64–65, 78 and accompanying text (discussing this massive jump).

139. *Lee v. Macon Cty. Bd. of Educ.*, 267 F. Supp. 458, 464–66 (M.D. Ala. 1967) (three-judge court) (per curiam), *aff'd sub nom. Wallace v. United States*, 389 U.S. 215 (1967).

their own delay in ordering statewide relief.<sup>140</sup> I therefore agree with Rosenberg that all three branches of government, working together, produced substantial integration in Alabama.

Yet that consistency does not mean that *Lee v. Macon County* was of minor importance. First, while the judicial delay in *Lee v. Macon County* was wrong—Judge Johnson should have granted Mr. Gray’s motion for statewide relief in 1964 instead of 1967—the delay is more excusable than Professor Rosenberg would likely allow.<sup>141</sup> Judge Johnson and the lawyers appearing before him faced an extreme situation in Alabama, especially from 1963 to 1965. To name perhaps the two most notable: four young African American girls died in a bombing of Sixteenth Street Baptist Church in Birmingham just days after Governor Wallace ordered Tuskegee High School closed; and African Americans were savagely beaten as they first tried to cross the Edmund Pettis Bridge from Selma to Montgomery on March 7, 1965.<sup>142</sup> Judge Johnson and the lawyers appearing in *Lee v. Macon County* were intimately involved in these matters as well. Their work in Alabama was directed not just at schooling, but to other important civil rights issues as well.<sup>143</sup> In Alabama, from 1963 to 1965 particularly, the judicial delay was due in part to depth of the many civil rights issues facing the federal courts and litigants. The urgency of those other civil rights issues makes immediacy in creating integrated schools via court order less likely, but does not indicate the unimportance of courts.

Relatedly, the suit also failed in many respects because of the difficulty of the educational problems it identified and exposed. How could a single lawsuit—even one with all the promise of *Lee v. Macon County*—create “just” schools where the vestiges of discrimination are eliminated to the “extent practicable?”<sup>144</sup> That failure, however, does not indicate the inadequacy of judicial efforts; instead, it indicates the depth of the issues facing the judiciary.

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140. *Id.* at 465 (“[I]t is now evident that the reasons for this Court’s reluctance to grant the relief to which these plaintiffs were clearly entitled over two years ago are no longer valid.”).

141. *See supra* note 59 and accompanying text (pointing out the ground-breaking nature of Judge Johnson’s second remedial order).

142. DAVID J. GARROW, *BEARING THE CROSS* 291, 394–99 (2004).

143. *See generally* TOMIKO BROWN-NAGIN, *COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT* (2011) (exploring how the role of civil rights leaders helped craft the meaning of constitutional doctrine).

144. *Green v. Cty. Sch. Bd.*, 391 U.S. 430, 435, 442 (1968) (requiring the transition from “dual” schools to “just schools”); *Bd. of Educ. v. Dowell*, 498 U.S. 237, 248, 250 (1991) (mandating the end of school desegregation litigation once the school district had eliminated the vestiges of discrimination “to the extent practicable”).

Moreover, the ideal situation of all three branches of the federal government supporting integration was incredibly short-lived. Since 1970, the federal branches of government have not converged in the cause of school integration. Nor is that likely to change in the near future. Congress rarely lends any support to integration of school buildings; other education initiatives like choice, accountability, and testing top Congressional agendas instead.<sup>145</sup> Today even the ESEA is of limited utility; amendments in 2016 have substantially limited federal involvement in local schools.<sup>146</sup>

Today's activists do not face the situation in the late 1960s that Professor Rosenberg details. Today the federal courts are the only federal entity where activists are at the very least guaranteed the opportunity to expose educational inequalities. The federal judiciary has no choice but to hear such plaintiffs once its jurisdiction is properly evoked. Lawsuits, in other words, are a method of publically exposing the reality of segregated and unequal schooling.<sup>147</sup>

In other words, the federal judiciary today offers activists a *place* for their activism. No one expects students to boycott their schools or sit-in at the better schools. A place matters today, and the mandatory nature of federal district court jurisdiction gives the plaintiffs a platform to take their complaints.

*Lee v. Macon County* demonstrates that importance. In 1995, Judges Albritton and Thompson gave plaintiffs a forum when they ordered the parties to look anew at the pending *Lee v. Macon County* suits for ways to eliminate vestiges of discrimination.<sup>148</sup> These remarkable orders required plaintiffs to investigate current inequalities in the school districts—and the access to relevant information through discovery. I can think of no other way that plaintiffs could get the detailed information they received through discovery. The orders also directed the school districts to answer publically, to a federal judge, as to why

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145. See generally JAMES E. RYAN, FIVE MILES AWAY, A WORLD APART: ONE CITY, TWO SCHOOLS, AND THE STORY OF EDUCATIONAL OPPORTUNITY IN MODERN AMERICA 241–67 (2010) (criticizing recent choice, testing, and accountability legislation for their failure to create meaningful reform).

146. Derek W. Black, *Abandoning the Federal Role in Education: The Every Student Succeeds Act*, 105 CALIF. L. REV. (forthcoming 2017) (manuscript at 3) (“The [2016 amendments to ESEA] reverse[] the federal role in education and return[] nearly full discretion to states.”).

147. This argument is consistent with one advocated about the Montgomery bus boycott—that both the bus boycott and the Supreme Court’s eventual prohibition of segregated bus seats were necessary to effectuate change. Christopher Coleman, Laurence D. Nee & Leonard S. Rubinowitz, *Social Movements and Social-Change Litigation: Synergy in the Montgomery Bus Protest*, 30 L. & SOC. INQUIRY 663, 666 (2005) (arguing that the “synergy between social movements and litigation” produced integrated buses).

148. See *supra* Part I.D.

they could not create more equality in their school buildings. The judges forced the parties to come together to explore ways to further educational equality. Most remarkably, the orders gave the plaintiffs a place at the school district's table of setting its policy and practices.

### CONCLUSION

*Brown I* broke new ground by declaring that “in the field of public education, the doctrine of ‘separate but equal’ has no place.”<sup>149</sup> Nine years later, so did Mr. Gray when he filed *Lee v. Macon County*. Until then, Alabama had completely avoided any implementation of *Brown I*. Not one African American student attended school with a white student.<sup>150</sup> While Alabama schools today still struggle with segregation and educational inequalities, that reality indicates the difficulty and scope of the task more than the weakness of litigation. After all, litigation is just one vehicle on the road to racial justice. Thankfully, Mr. Gray moved us closer to that goal when he filed *Lee v. Macon County*.

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149. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954). *See generally* Justin Driver, *Rethinking the Interest-Convergence Thesis*, 105 NW. U. L. REV. 149 (2011) (arguing that *Brown* was not an example of interest-convergence between black and white interests, but an instance of true leadership by the Supreme Court).

150. *See supra* note 13 and accompanying text.