

**THE IMPACT AND LIMITS OF IMPLEMENTING *BROWN*:  
REFLECTIONS FROM SIXTY-FIVE YEARS OF SCHOOL SEGREGATION AND  
DESEGREGATION IN ALABAMA’S LARGEST SCHOOL DISTRICT**

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### ABSTRACT

This article considers the legacy of the *Brown* decision through the lens of Alabama's largest school district, Mobile County. One of the first to desegregate in the state nine years after the *Brown* decision, the district and the district court judge resisted widespread desegregation efforts, eventually culminating in a U.S. Supreme Court decision in 1971 (paired with *Swann*) that required more extensive desegregation. Even then, the district did not enter a final consent decree until 1989 that established a series of magnet schools serving a small fraction of the county's enrollment. By that time, law and politics had shifted, constraining the scope of remedial efforts to address discrimination as it adapted. The district was declared unitary eight years later on the thirty-fourth anniversary of the filing of the desegregation case. With twenty years of data post-unitary status, I analyze the resegregation that has occurred. Further, political and demographic trends in Mobile County's schools since 1997 illustrate the challenges of addressing school segregation in our contemporary era despite increasing social science evidence of the benefits of integration for students and our society. Mobile County schools illustrate both the necessity of *Brown* in moving desegregation ahead as well as the limits as it has been implemented to date. I conclude with recommendations for how we might achieve the promise of *Brown* in the twenty-first century.

### INTRODUCTION

In May 1954, the U.S. Supreme Court issued one of its most significant decisions declaring that school segregation of children by race was inherently unequal and therefore violated the Fourteenth Amendment of the U.S. Constitution.<sup>1</sup> Combined in that decision were four cases from different parts of the South and Border region.<sup>2</sup> Despite this sweeping declaration, the Court was unclear how to remedy school segregation, which was just one facet of almost complete separation of black and white people in the South. A year later, after re-argument about an appropriate remedy, the Court issued a second opinion (*Brown II*) that returned the cases to the district courts which they felt were best situated to fashion a remedy cognizant of the

1. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

2. *Id.* at 486.

local circumstances and “with all deliberate speed.”<sup>3</sup> Despite Thurgood Marshall’s prediction after the 1954 decision that schools would quickly be desegregated, a decade later a small percentage of black students attended majority-white schools in the South.<sup>4</sup>

In Alabama, no black child would attend a desegregated school until more than nine years after *Brown*.<sup>5</sup> Alabama’s largest district, Mobile County, is an ideal context to study the legacy of *Brown*. Unlike other major metropolitan areas in the state, until recently, Mobile County had one school district encompassing the county’s 1,644 square miles.<sup>6</sup> Social science research has found that district fragmentation is associated with higher segregation,<sup>7</sup> and thus, only one district in the county for both white students and students of color (largely black during this time period) could enable integration.<sup>8</sup> Despite this demographic advantage, however, the district resisted meaningful integration for decades, and like hundreds of districts across the region, has been declared unitary. The district largely decided to end its desegregation efforts when no longer required to do so. At the time of unitary status, considerable segregation existed in the district, and in the two decades since the end of court oversight, the district has experienced a number of changes that have unraveled the incomplete gains of desegregation. These policy decisions illustrate the challenges of pursuing the goals of *Brown* in a post-unitary system. Some of these decisions made by the Mobile County district itself—and some made by other entities—may not be made intentionally to further segregation, but without continuing court oversight or political will to assess the potential impact of race-neutral policies progress is unlikely to occur. Understanding these shifts, and the

3. *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 301 (1955).

4. See GARY ORFIELD, *THE RECONSTRUCTION OF SOUTHERN EDUCATION: THE SCHOOLS AND THE 1964 CIVIL RIGHTS ACT* 340–41 (1969).

5. See *Lee v. Macon Cty. Bd. of Educ.*, 221 F. Supp. 297 (M.D. Ala. 1963).

6. Herbert J. Lewis, *Mobile County*, *ENCYCLOPEDIA ALA.* (Aug. 30, 2007), <http://www.encyclopediaofalabama.org/article/h-1332>.

7. See Kendra Bischoff, *School District Fragmentation and Racial Residential Segregation: How Do Boundaries Matter?*, 44 *URBAN AFF. REV.* 182 (2008).

8. Gary Orfield, *Metropolitan School Desegregation: Impacts on Metropolitan Society*, 80 *MINN. L. REV.* 825 (1996); *IN PURSUIT OF A DREAM DEFERRED: LINKING HOUSING AND EDUCATION POLICY* 121 (JOHN A. POWELL ET AL. EDS., 1995). See GENEVIEVE SIEGEL-HAWLEY, *WHEN THE FENCES COME DOWN: TWENTY-FIRST-CENTURY LESSONS FROM METROPOLITAN SCHOOL DESEGREGATION* (2016).

forces resisting desegregation, allow for an understanding of the importance of *Brown* in bringing about change that is unlikely to otherwise have occurred—the limitations in its implementation in cases of political resistance and federal judges who were hesitant to require far-reaching efforts as the nature of discrimination changed, and a study of the dimensions of growing segregation in the last two decades in Mobile County after the case brought to comply with *Brown* ended. I argue that despite the challenges and setbacks in fully achieving the goals of *Brown* in places like Mobile County, it is an important goal to continue to strive for by learning lessons from previous efforts and committing to more robust, comprehensive integration in the twenty-first century.

### I. PRIOR TO SCHOOL DESEGREGATION BEGINNING (1963)

Like every state constitution,<sup>9</sup> the Alabama constitution has an education clause. It states, “The legislature shall establish, organize, and maintain a liberal system of public schools throughout the state for the benefit of the children thereof between the ages of seven and twenty-one years.”<sup>10</sup> It further states, “Separate schools shall be provided for white and colored children, and no child of either race shall be permitted to attend a school of the other race.”<sup>11</sup> The constitution, adopted in 1901,<sup>12</sup> reflects the extent to which the constitution reinforced Jim Crow provisions of that era—and the extent to which Alabama voters have been unwilling to remove such language despite the fact that separate schools have been outlawed by federal courts thereby rendering this language unenforceable. In 1956, as part of Alabama’s massive resistance to *Brown*, Section 256 of the Alabama constitution was amended by Amendment 111 that declared “nothing in this Constitution shall be construed as creating or recognizing any right to education or training at public expense, nor as limiting the authority and duty of the legislature, in furthering or providing for education, to require or impose conditions or procedures deemed necessary to the preservation of

9. Molly A. Hunter, *State Constitution Education Clause Language*, EDUCATION LAW CENTER, <https://edlawcenter.org/assets/files/pdfs/State%20Constitution%20Education%20Clause%20Language.pdf> (last visited May 20, 2020).

10. ALA. CONST. art. XIV, § 256.

11. *Id.*

12. ALA. CONST.

peace and order.”<sup>13</sup> Efforts to remove the segregation language here and elsewhere in the constitution failed in recent years.<sup>14</sup>

Alabama had restricted the rights of African-American residents not only with respect to school desegregation but in a range of other ways as well. Repeatedly, after courts struck down laws as unconstitutional, the state legislature would pass new laws or amend the constitution to provide new hurdles to racial equality. When, for example, the courts declared Alabama’s white primary system to be unconstitutional,<sup>15</sup> the legislature passed the Boswell Amendment to institute new voting requirements to help to preserve white supremacy in voting.<sup>16</sup> This meant that black citizens lacked formal power to influence policies, and segregation existed beyond schools as well.

Further, the NAACP was outlawed from operating in the state in 1956,<sup>17</sup> and there was a lengthy court battle (eight years) before it was allowed to form again.<sup>18</sup> In Mobile, civil rights leader John LeFlore—who had partnered with white political leader Joseph Langan to make slow progress in some aspects of civil rights issues<sup>19</sup>—formed the Non-Partisan Voter League, which worked on many fronts, not just school desegregation.<sup>20</sup> This partnership between LeFlore and Langan was credited by many for

13. ALA. CONST. amend. CXI. The amendment also says, “To avoid confusion and disorder and to promote effective and economical planning for education, the legislature may authorize the parents or guardians of minors, who desire that such minors shall attend schools provided for their own race, to make election to that end, such election to be effective for such period and to such extent as the legislature may provide.”

14. See *Alabama Separation of Schools, Amendment 2 (2004)*, BALLOTPEDIA [https://ballotpedia.org/Alabama\\_Separation\\_of\\_Schools,\\_Amendment\\_2\\_\(2004\)](https://ballotpedia.org/Alabama_Separation_of_Schools,_Amendment_2_(2004)); Debbie Elliott, *Ala. Racist Language Measure Draws Unexpected Foes*, NPR (Nov. 1, 2012, 12:38 PM), <http://www.npr.org/2012/11/02/164107184/ala-racist-language-measure-draws-unexpected-foes>.

15. See *Smith v. Allwright*, 321 U.S. 649, 666 (1944).

16. Scotty E. Kirkland, *Boswell Amendment*, ENCYCLOPEDIA ALA. (June 2, 2011), <http://www.encyclopediaofalabama.org/article/h-3085>. It was invalidated when challenged by black plaintiffs from Mobile. See *Davis v. Schnell*, 81 F. Supp. 872 (S.D. Ala. 1949) (three-judge court), *aff’d per curiam* 336 U.S. 933 (1949).

17. *NAACP v. Alabama*, 377 U.S. 288, 289 (1964).

18. *Id.* at 310.

19. Keith Nicholls, *Politics and Civil Rights in Post-World War Two Mobile*, in *MOBILE: THE NEW HISTORY OF ALABAMA’S FIRST CITY* 254 (Michael V.R. Thomason ed., 2001).

20. *Id.* at 257-9.



creating a more peaceful racial climate during the civil rights era in Mobile, which was in contrast to other areas of the state.<sup>21</sup> For example, in 1947 and in 1949, Langan used his position to leverage an agreement with the Mobile school board to address the gap between pay of black and white teachers.<sup>22</sup> Ultimately the district reneged on its agreements, but it was a sign of his willingness to take a stand to try to at least make separate equal.<sup>23</sup> Throughout the 1950s and early 1960s, Langan was repeatedly seen as a white political leader supporting incremental efforts to further civil rights of black citizens in Mobile and working closely with LeFlore.<sup>24</sup>

After the 1954 *Brown* decision, resistance to any efforts to comply with the decision took many shapes, although resistance was stronger in the Deep South, and signs of progress were present in the Border region and Middle South.<sup>25</sup> Alabama's governor announced that it would be the state's policy to have massive resistance to *Brown*<sup>26</sup>—even before *Brown II* was issued describing how the Court saw implementation as being remanded to district courts with “all deliberate speed.”<sup>27</sup> Likewise, more than one-hundred members of the U.S. Congress endorsed the Southern Manifesto in 1956.<sup>28</sup> As desegregation scholar Gary Orfield noted, by endorsing this manifesto,

21. FRYE GAILLARD, *THE DREAM LONG DEFERRED: THE LANDMARK STRUGGLE FOR DESEGREGATION IN CHARLOTTE, NORTH CAROLINA* 82 (1982).

22. Nicholls, *supra* note 21, at 277–314.

23. *Id.* Langan was the focus of personal attacks (e.g., by Klan) and ultimately was defeated, in part due to his views on racial integration.

24. *Id.* A statue to commemorate their partnership now stands in Mobile. Matt Irvin, *City to Unveil New Downtown Park Dedicated to Racial Unity*, AL.COM (Aug. 22, 2009), [http://blog.al.com/live/2009/08/city\\_to\\_unveil\\_new\\_downtown\\_pa.html](http://blog.al.com/live/2009/08/city_to_unveil_new_downtown_pa.html).

25. ORFIELD, *supra* note 6, at 17.

26. Joseph M. Bagley, *School Desegregation, Law and Order, and Litigating Social Justice in Alabama, 1954–1973*, at 39–45 (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].

27. *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955).

28. Ken Rudin, *On This Day in 1956: 'Southern Manifesto' On Race Signed by 100*, NPR (Mar. 12, 2009, 11:15 AM), [https://www.npr.org/sections/politicaljunkie/2009/03/on\\_this\\_day\\_in\\_1956\\_southern\\_m.html](https://www.npr.org/sections/politicaljunkie/2009/03/on_this_day_in_1956_southern_m.html).

southern politicians gave “their blessing to a systematic campaign to use every resource of state and local government to defy the law of the land.”<sup>29</sup>

In keeping with the response across the South, Alabama passed a pupil placement law in August 1955.<sup>30</sup> It established seventeen criteria for evaluating a student’s request to transfer from the school to which they were assigned.<sup>31</sup> It was challenged but ultimately upheld by the Fifth Circuit (which the U.S. Supreme Court sustained in 1958) as constitutional.<sup>32</sup> Such laws, passed in states and cities across the South after *Brown*, included a range of criteria for approving a student’s transfer request all of which were non-racial but were subjective and imprecise.<sup>33</sup> In Alabama’s case, some criteria were controlled by the district, such as available space and transportation, and others were judgments about the student’s “home environment.”<sup>34</sup> Moreover, a number of criteria are clearly related to concerns about how integration would affect other students (e.g., white students) such as the “possibility or threat of friction or disorder among pupils or others.”<sup>35</sup> The laws required administrative appeals before moving to the federal court system, and the administrative appeals could take many months to exhaust.<sup>36</sup> Moreover, the final decision about placement was to be determined by the local school boards, not the state,<sup>37</sup> making it harder to legally challenge the law.

The following year, additional laws complicated desegregation efforts further. Alabama adopted a freedom of choice law that would permit the freedom to choose schools.<sup>38</sup> Freedom of choice alongside the pupil

29. ORFIELD, *supra* note 6, at 17.

30. *Shuttlesworth v. Birmingham Bd. of Educ.*, 162 F. Supp. 372, 373 n.1 (N.D. Ala. 1958).

31. 1955 Ala. Laws 493–94.

32. *Shuttlesworth v. Birmingham Bd. of Educ.*, 358 U.S. 101 (1958) (*per curiam*).

33. Wendy Parker, *Connecting the Dots: Grutter, School Desegregation, and Federalism*, 45 WM. & MARY L. REV. 1691, 1708–14 (2004).

34. 1955 Ala. Laws 494.

35. *Id.* Importantly, this implicitly elevates concerns about perceived disruption for white students over consideration of the constitutional rights of black students who continued to be segregated.

36. *Id.*

37. *Id.*

38. Albert S. Foley, *Mobile Alabama: The Demise of State Sanctioned Resistance*, in COMMUNITY POLITICS AND EDUCATIONAL CHANGE: TEN SCHOOL



placement law meant, in application, that black students' requests to attend white schools were denied;<sup>39</sup> such laws were eventually declared not sufficient to meet a district's requirements under *Brown*.<sup>40</sup> The fact that the intent of such laws was to further segregation was not in doubt. As described by the *Birmingham News*, the freedom of choice law was "the second of two major legislative pieces [the first being the Pupil Placement Law] calculated to assure racial segregation in schools."<sup>41</sup> Alabama had made some efforts during this time to improve schools serving black students but disparities remained, such as student-teacher ratios, and fewer than half of all-black high schools prior to desegregation were accredited by professional organizations or the state.<sup>42</sup> Additionally, state law in 1956 permitted the creation and funding of private academies to resist desegregation of public schools.<sup>43</sup>

The Mobile school board and white parents reflected state actions. In 1955, the Mobile school board adopted a policy of resistance saying, "It must be recognized that integration is not acceptable to the major portion of our people. This is a factor that cannot be ignored, as was recognized by the Supreme Court" in *Brown II*.<sup>44</sup> Attitudes of white parents, seen in letters to the Mobile County school board and to the newspaper during the 1960s, illustrated their antagonism towards desegregation. In early 1963, after an unsuccessful integration attempt by black students, a parent wrote condemning the consideration they received (and presumably would have been required under the pupil placement law).<sup>45</sup> Another parent, who did not want to "encourage" interracial marriage, urged the school board to begin integrating students as old as possible because "intimate and close

SYSTEMS UNDER COURT ORDER 174, 176 (Charles V. Willie & Susan L. Greenblatt eds., 1980).

39. *Id.* at 178. White students could have chosen to attend all-black schools but rarely did so as a practical matter.

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

41. Joseph M. Bagley, *School Desegregation, Law and Order, and Litigating Social Justice in Alabama, 1954-1973* (Jan. 5, 2014) (unpublished Ph.D. dissertation, Georgia State University) (on file with Department of History, Georgia State University).

42. 1963 U.S. COMMISSION ON C.R. STAFF REP.: PUB. EDUC. 10.

43. RICHARD A. PRIDE, *THE POLITICAL USE OF RACIAL NARRATIVES: SCHOOL DESEGREGATION IN MOBILE, ALABAMA, 1954-97* 26 (2002).

44. *Id.* at 29.

45. Letter from Lloyd J. Skoda to Burns (Jan. 1963) (on file with the University of South Alabama Library).

association through childhood . . . may destroy the natural pride of race.”<sup>46</sup> Likewise, the daily Mobile newspaper also supported the district court judge resisting more widespread desegregation efforts.<sup>47</sup>

John LeFlore had been trying to desegregate the schools in Mobile since the mid-1950s.<sup>48</sup> The board again turned down a similar petition in 1962, saying in January 1963, “We feel, in light of the obligations which the Board has, including the tremendous building program, that it would be ill-advised and not to the best interests of your people for us to attempt to present a formula for integration of the public schools.”<sup>49</sup> They also noted integration would be “detrimental to 99%” of black children, teachers, and parents.<sup>50</sup> Internally, the Board and superintendent wrestled with how to prevent or limit desegregation, questioning whether the pupil placement law would be the best way to limit integration. In February 1963, the superintendent wrote to the Board his conclusion that Alabama’s placement law “cannot be used successfully to prevent the integration of our schools” and proposed an alternate plan which he believed was “our best hope for keeping integration to a minimum.”<sup>51</sup> He closed saying, “Over the years it has been the purpose of our entire staff to give the Board every possible support in achieving the objective of maintaining segregated schools.”<sup>52</sup>

After this denial, LeFlore helped identify more than twenty plaintiffs who subsequently filed the *Birdie Mae Davis* lawsuit;<sup>53</sup> the lead plaintiff requested to transfer from all-black Williamson High School to all-white Murphy High School, less than one mile away. The complaint also cited other

46. Letter from Thomas G. Greaves, Sr. to Bd. of Sch. Comm’rs, Mobile Cty. (June 4, 1963) (on file with the University of South Alabama Library).

47. PRIDE, *supra* note 45, at 36.

48. *Id.* at 34. A prominent white Mobilian had also tried to enroll her foster child who was African-American in a white school in 1956 and was turned down. ANDREW S. MOORE, THE SOUTH’S TOLERABLE ALIEN: ROMAN CATHOLICS IN ALABAMA AND GEORGIA, 1945-1970 74 (2007).

49. Proposed Reply to Petition from Bd. of Sch. Commr’s 1 (Jan. 11, 1963) (on file with the University of South Alabama Library).

50. *Id.* at 2.

51. Letter from Cranford H. Burns, Superintendent, Bd. of Sch. Comm’rs, Mobile Cty. to Bd. of Sch. Comm’rs, Mobile Cty. 1 (Feb. 27, 1963) (on file with the University of South Alabama Library).

52. *Id.* at 2.

53. Foley, *supra* note 40, at 178-79.

children were bused seventeen miles each way to maintain segregation.<sup>54</sup> In January 1963, the United State Department of Justice also filed a desegregation complaint on behalf of students living in impacted areas in Mobile, e.g., the Brookley Air Force base.<sup>55</sup> The Alabama attorney general offered to support the district with “every legal means possible”<sup>56</sup> to respond to the case and preserve segregation. At the time, Alabama was resisting desegregation efforts in all public schools, k–12 or higher education, among students and faculty. Indeed, the protests in Birmingham in May 1963 and Governor Wallace’s attempt to block two black students from enrolling in the University of Alabama in June spurred President Kennedy to send a civil rights bill to Congress<sup>57</sup> that included authorizing the federal government to bring or join desegregation efforts,<sup>58</sup> which provided a significant boost to those challenging segregation, often against local and state actors with more financial resources.<sup>59</sup> This bill would ultimately be signed into law as the Civil Rights Act of 1964.

To be clear, Mobile County Public School System (MCPSS) and white Mobilians were not alone or even particularly unique in their resistance to desegregation,<sup>60</sup> although resistance to any desegregation efforts after *Brown* went on longer in Alabama than almost any state in the country.<sup>61</sup> Even now, there are contemporary but race-neutral ways that districts and white families thwart integration.<sup>62</sup> This historical context is useful, however,

54. PRIDE, *supra* note 45, at 35.

55. *Parents Join Government in Desegregation Suits*, SOUTHERN SCHOOL NEWS, April 1963, at 1, 8.

56. JOHN HAYMAN, BITTER HARVEST: RICHMOND FLOWERS AND THE CIVIL RIGHTS REVOLUTION 183-91 (1996).

57. Erica Frankenberg & Kendra Taylor, *ESEA and the Civil Rights Act: An Interbranch Approach to Furthering Desegregation*, 1 RSF 32, 32–49 (2015).

58. *Id.*

59. *See id.*

60. *See, e.g.*, EQUAL JUSTICE INITIATIVE, SEGREGATION IN AMERICA 28–30 (2018).

61. *See Southern Education Reporting Service*, A Statistical Summary, State by State, of Segregation-Desegregation Activity Affecting Southern Schools from 1954 to Present, Together with Pertinent Data on Enrollment, Teachers, Colleges, Litigation, and Legislation; 1963 U.S. COMMISSION ON C.R. STAFF REP.: PUB. EDUC. 8.

62. *See, e.g.*, Noah Berlatsky, *White Parents Are Enabling School Segregation – if It Doesn’t Hurt Their Own Kids*, NBC NEWS (Mar. 11, 2019),

for understanding the need for a federal role to help desegregation occur given the lengthy state and local resistance to complying with the Supreme Court's ruling almost a decade earlier.<sup>63</sup>

## II. WHAT DOES *BROWN* REQUIRE? DESEGREGATION BEGINS, AND SLOWLY EXPANDS (1963 – 1971)

As described above, the *Birdie Mae Davis* litigation was filed in March 1963. Federal district court judge Daniel Thomas oversaw what was to be at the time of its dismissal the most voluminous litigation ever filed in the Southern District of Alabama. A later analysis of school desegregation litigation across the South noted the *Davis* case was “a complex desegregation case featuring almost every form of resistance to integration.”<sup>64</sup>

*Brown II* returned desegregation to local federal courts to oversee desegregation, believing that they were best able to craft a remedy to account for local context.<sup>65</sup> However, this left district court judges—themselves products of segregation—responsible for overturning a system of segregation that had governed every facet of life in the South with no clear direction from the Supreme Court.<sup>66</sup> With the white political leaders fiercely against desegregation, Judge Thomas was perhaps emblematic of how slow progress would be, given the Supreme Court's decision to return implementation to the local district courts. He was reversed nine straight times by the Fifth Circuit Court—and yet persisted in believing that more time was necessary.

<https://www.nbcnews.com/think/opinion/white-parents-are-enabling-school-segregation-if-it-doesn-t-ncna978446/>.

63. Likewise, in considering voting rights litigation in Alabama that enabled minority representation, authors concluded that it “could have been achieved in no other way” than via lawsuits as a result of the history of racial discrimination in the state. Peyton McCrary, et al, *Alabama, in* QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT 1965-1990 56 (Chandler Davidson and Bernard Grofman, eds, 1994).

64. FRANK T. READ & LUCY S. MCGOUGH, LET THEM BE JUDGED: THE JUDICIAL INTEGRATION OF THE DEEP SOUTH 406 (1978).

65. *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955).

66. Mobile was also the seat of the Catholic diocese, and it was not until 1964 that the Bishop agreed to integrate Catholic schools in the area. Even then, it was gradual and left to the discretion of educators to evaluate on a case-by-case basis. MOORE, *supra* note 52, at 122.

An evaluation of judicial efforts in the South described him and another judge in the South as “deeply concerned about *Brown II*, anxious to delay whenever possible to avoid local upheaval, but nevertheless ready to enforce direct appellate court orders. Not obstructionists, they were also not overly enthusiastic about enforcing civil rights at the expense of antagonizing powerful local opposition.”<sup>67</sup>

The case also featured a school board determined to resist desegregation by any means possible, leading to a lack of elected and judicial leadership in the case. The school board presented an array of evidence in fall 1963 that black students’ scores were below whites as justification for maintaining separate schools and even argued that it was preferable policy for black families to have separate schools.<sup>68</sup> The school board’s attorney also noted that as a result of changes to Alabama’s state constitution in 1956, public education was voluntary and therefore they had more freedom as to how to assign students because it was not required by the state.<sup>69</sup> In other words, the district’s arguments a decade after the *Brown* oral argument make clear they were still contesting the validity of that decision. The school board adopted the plan to start with twelfth grade—the plan most likely to be less successful because of more conflict.<sup>70</sup> A Mobile educator noted that the school board would “prove to the federal bureaucrats that integration won’t work.”<sup>71</sup> The board was supported by a range of local and state leaders in its stance.<sup>72</sup>

67. READ & MCGOUGH, *supra* note 64, at 407.

68. PRIDE, *supra* note 23, at 51–53.

69. *Id.* at 48; ALA. CONST. amend. CXI.

70. Joseph Newman & Betty Brandon, *Integration in the Mobile Public Schools*, in THE FUTURE OF PUBLIC EDUCATION IN MOBILE (Howard Mahan and Joseph Newman eds., 1982). These plans were likely to produce more conflict because students were older and attached to their schools. In fact, some districts’ plans would allow twelfth graders to remain in their schools to graduate while reassigning younger high school students. In the 1988 consent decree in this case, for example, the parties agreed that if a twelfth grader was reassigned due to a magnet school opening after completion of eleventh grade, the student could get a diploma of the school he or she attended in grade eleven.

71. Robert E. Anderson, Jr., *Mobile, Alabama: The Essence of Survival*, in THE SOUTH AND HER CHILDREN: SCHOOL DESEGREGATION 1970-1971 38, 40 (Robert E. Anderson, Jr. ed., 1971).

72. As described *infra* including the governor, state attorney general, state legislature, and local officials.



A. *Litigation Commences*

A July 1963 *Wall Street Journal* article talked about the “racial peace” in Mobile in contrast to other cities and featured a civic group, Alabamans Behind Local Education (ABLE), that was working to facilitate “orderly desegregation” of schools.<sup>73</sup> The district court judge denied the plaintiffs’ request to integrate or grant a preliminary injunction to prevent the school board from operating segregated schools on June 24, citing other aspects of Mobile that had voluntarily been integrated without court intervention.<sup>74</sup> This motion itself came after an initial appeal to the Fifth Circuit by plaintiffs who were frustrated at the length of time it took the judge to act on their initial filing.<sup>75</sup> Though the circuit court denied the appeal, and commended *Brown II*’s discretion, it also noted that integration had to be balanced by the length of time segregation had persisted in districts. They wrote, “[T]he amount of time available for the transition from segregated to desegregated schools becomes more sharply limited with the passage of the years since the first and second *Brown* decisions. Thus it is that this court must require prompt and reasonable starts, even displacing the District Court discretion, where local control is not desired, or is abdicated by failure to promptly act.”<sup>76</sup> The Fifth Circuit would spend considerable effort overturning the district court because of its failure to act promptly.

Judge Thomas scheduled a trial for November to devise a plan for desegregation beginning in 1964–65.<sup>77</sup> Moreover, citing *Brown II*’s determination that district court judges were best situated to oversee remedies

73. Burt Schorr, *Harmony in Mobile: An Alabama City Builds Racial Peace as Strife Increases Elsewhere*, WALL ST. J., July 18, 1963, at 1. This perception was shared at least to some extent by African-American leaders. In a 1960 article in the *Pittsburgh Courier*, Rev. Fred Shuttlesworth complained about other cities in Alabama but lauded the good coming from Mobile where police and fire companies had been integrated and praised Joe Langan as fair. *A Southerner Speaks*, THE PITTSBURGH COURIER, Apr. 9, 1960, at 14. A 1965 article in the *Pittsburgh Courier* believed LeFlore’s civil rights record was one of the most envious in the South despite violence he faced, including from the local White Citizen’s Council. *Racists Shoot Homes of Mayor, Civil Rights Leader in Mobile*, THE PITTSBURGH COURIER, Mar. 13, 1965, at 3.

74. *Davis v. Bd. of Sch. Comm’rs*, 219 F. Supp. 542, 545 (S.D. Ala. 1963).

75. *See Davis v. Bd. of Sch. Comm’rs*, 318 F.2d 63 (5th Cir. 1963).

76. *Id.* at 64.

77. *Davis*, 219 F. Supp. at 546.



that would meet constitutional requirements and be cognizant of local conditions, Judge Thomas proactively argued that jurisdiction of the case not be taken by the circuit court.<sup>78</sup> He was overruled, however, by the Fifth Circuit in less than twenty-four hours after hearing the case.<sup>79</sup> Instead, they required the district court to order the school board to submit a plan for desegregation for September 1963 and to prohibit the school district from segregating students.<sup>80</sup> The Fifth Circuit also disagreed with his premise that if more time was allowed, the schools would be duly integrated as other aspects of Mobile life had been without court intervention.<sup>81</sup> After all, as the Circuit court decision noted “the Defendant school authorities have not to this day ever acknowledged that (a) the present system is constitutionally invalid or (b) that there is any obligation on their part to make any changes at any time.”<sup>82</sup> Justice Hugo Black likewise rejected the defendant’s request for a stay of the Fifth Circuit decision in order to prohibit desegregation noting that the “record fails to show that the Mobile Board has made a single move of any kind looking towards a constitutional public school system.”<sup>83</sup>

Mobile County then proposed admitting twelfth grade students via non-racial application of the Pupil Placement Law.<sup>84</sup> The court approved this plan, extending the deadline for potential transfer students.<sup>85</sup> The board approved two transfers, and in early September, two African-American students were poised to enter Murphy High School with nearly three thousand white students.<sup>86</sup> Integration was originally supposed to occur the first week of September, but the school board delayed their enrollment for a week.<sup>87</sup> Alongside similar proclamations to block the state’s first integration efforts in a few other schools across Alabama, Governor George Wallace issued an executive order to prevent desegregation of the Mobile County district and of Murphy High School particularly.<sup>88</sup> State troopers prevented the two students from enrolling on September 9 even though, pursuant to

78. *Id.* at 545.

79. *Davis v. Bd. of Sch. Comm’rs*, 322 F.2d 356 (5th Cir.1963).

80. *Id.* at 359.

81. *Id.* at 358.

82. *Id.*

83. *Bd. of Sch. Comm’rs v. Davis*, 84 S. Ct. 10, 11 (1963).

84. 1964 U.S. COMMISSION ON C.R. STAFF REP.: PUB. EDUC. 28.

85. *Id.*

86. *Id.* at 28–29.

87. *Id.*

88. *See United States v. Wallace*, 222 F. Supp. 485, 487 (M.D. Ala. 1963).

federal court order, they had registered for Murphy the preceding week.<sup>89</sup> Contemporary media accounts described hundreds of deputies, police, and Alabama state troopers on Murphy's campus.<sup>90</sup> President Kennedy intervened to federalize the Alabama state guard and a federal court order forbid the Governor from interfering with the integration of Murphy High School,<sup>91</sup> which allowed the students to enroll the following day. At Murphy, there were several hundred students absent and a few hundred protesting, but things calmed down relatively quickly.<sup>92</sup>

After the November 1963 trial, the district court had not ruled on plaintiffs' request for an injunction against the school board's operation of segregated schools. The court of appeals finally vacated the district court's 1963 order in summer 1964, which it deemed would take too long to fully integrate.<sup>93</sup> It noted that in other cases that were controlling precedent for Mobile, such as the Birmingham case, where desegregation had also commenced the preceding year, it had required swifter action given the decade that had elapsed since *Brown*.<sup>94</sup> The school district continued to promise it would resist through all possible legal means.<sup>95</sup> It proposed a plan to begin desegregating a grade per year in 1964.<sup>96</sup> The board also argued that county schools (outside the city limits and overwhelmingly white) were not able to take additional students.<sup>97</sup> Instead, the courts ordered that grades ten through twelve had to be desegregated in 1964,<sup>98</sup> but in implementation only modest desegregation occurred.<sup>99</sup> Moreover, faculty and staff desegregation

89. STAFF REP.: PUB. EDUC., *supra* note 95, at 29.

90. See Claude Sitton, *Wallace Orders Guard Units out for School Duty*, N.Y. TIMES, Sep. 10, 1963, at 1.

91. See STAFF REP.: PUB. EDUC., *supra* note 95, at 29.

92. Foley, *supra* note 40, at 190.

93. Davis v. Bd. of Sch. Comm'rs, 333 F.2d 53, 54–55 (5th Cir. 1964).

94. *Id.* This short opinion was still appealed twice by the district. See *cert denied*, Bd. of Sch. Comm'rs v. Davis, 379 U.S. 844 (1964).

95. STAFF REP.: PUB. EDUC., *supra* note 95, at 30.

96. *Id.*

97. STAFF REP.: PUB. EDUC., *supra* note 95, at 30.

98. *Education: Public Schools-Alabama*, 9.2 RACE REL. L. REP. 620-626 (1964).

99. Davis v. Bd. of Sch. Cmm'rs, 364 F.2d 896 (5th Cir. 1966) (describing that thirty-nine of 31,000 black students attended schools in 1964-65 with white students in the Mobile County schools).

was delayed at the district's request.<sup>100</sup> The district also indicated it would resist desegregation in summer 1964 using available legal mechanisms.<sup>101</sup>

The case once again came before the Fifth Circuit in 1966, to review the district court's latest order.<sup>102</sup> The court noted the number of times the case had come before them, as well as changed circumstances—subsequent circuit decisions<sup>103</sup> and the new, more robust Office of Education guidelines issued in March 1966<sup>104</sup>—since the district court's last decision as evidence of the folly of trying to oversee desegregation in such a manner.<sup>105</sup> The Fifth Circuit panel concluded the plan the district court had approved “falls far short of the requirements of the law in several respects”: all faculty being assigned in a segregated manner; white schools having better course offerings than black schools; and the way in which the plan largely made *Brown's* promise of desegregation a mirage.<sup>106</sup> Only thirty-nine black students had gone to formerly all-white schools (out of 31,000 black students),<sup>107</sup> in part because of the plan's reliance on student transfers to achieve integration and the fact that many schools were near capacity<sup>108</sup> and therefore unable to accept transfers that would desegregate the schools.<sup>109</sup> Further, in language foreshadowing subsequent Supreme Court desegregation decisions, the Fifth Circuit was especially critical of race-neutral justifications to maintain segregated student assignments such as safety considerations and especially relying on the concept of “neighborhood schools.” They noted:

100. PRIDE, *supra* 45, at 52.

101. STAFF REP.: PUB. EDUC., *supra* note 95, at 30.

102. Davis, 364 F.2d at 896.

103. *Id.* at 901. *E.g.*, Singleton v. Jackson Mun. Separate Sch. Dist., 335 F.2d 865 (5th Cir. 1966).

104. Davis, 364 F.2d at 902.

105. The circuit court panel, perhaps influenced also by a myriad of other cases under consideration by the Fifth Circuit, stated at the beginning of its opinion, “[T]he utter impracticability of a continued exercise by the courts of the responsibility for supervising the manner in which segregated school systems break out of the policy of complete segregation into gradual steps of compliance and towards complete compliance with [*Brown*].” *Id.* at 898.

106. *Id.* at 901.

107. *Id.* at 900.

108. *Id.* at 899.

109. To be clear, the transfers refer to black student transfers. *Id.* at 901. There is no indication at this stage any white students had transferred to formerly all-black schools.

[T]here are neighborhoods in the South and in every city of the South which contain both Negro and white people. So far as has come to the attention of this court, no Board of Education has yet suggested that *every* child be required to attend his “neighborhood school” if the neighborhood school is a Negro school. Every board of education has claimed the right to assign every white child to a school other than the neighborhood school under such circumstances. And yet, when it is suggested that Negro children in Negro neighborhoods be permitted to break out of the segregated pattern of their own race in order to avoid the “inherently unequal” education of “separate educational facilities,” the answer too often is that the children should attend their “neighborhood school.”<sup>110</sup>

The circuit court panel ultimately overturned Judge Thomas’s more lenient plan, ordering desegregation of all grades to be accomplished by 1967.<sup>111</sup> They also permitted black students to choose whether to enroll in their existing school or the closest white school to where they lived.<sup>112</sup>

The Department of Justice lawyers who intervened in the case in 1967 uncovered evidence that the school board had deliberately perpetuated segregation by allowing white students to transfer if they lived near (and had been zoned to) a formerly white school that had been integrated.<sup>113</sup> Such actions could quickly turn a school to being racially identifiably black. This flexibility further belied the rigidity of “neighborhoods” as had been used by the district for student assignment as a race-neutral pretext for maintaining segregation when white students could opt out if needed to avoid desegregation.

In 1967, in response to subsequent circuit court decisions like *Jefferson* and Health, Education and Welfare (HEW) Guidelines requiring teacher desegregation alongside student desegregation efforts, Alabama passed the teacher choice law.<sup>114</sup> It read, “No child shall be required to have

110. *Id.* (emphasis added).

111. *Id.* at 904.

112. *Id.*

113. Foley, *supra* note 40, at 174–207.

114. JOSEPH BAGLEY, THE POLITICS OF WHITE RIGHTS: RACE, JUSTICE, AND INTEGRATING ALABAMA’S SCHOOLS 130 (2018).

a teacher of a race different from the one preferred by his or her parent or guardian except where the preference made does not reflect the majority will of parents or guardians similarly situated.”<sup>115</sup> The law also gave the state the authority to withhold district funding if not complied with.<sup>116</sup> By fall 1967, just eight black teachers taught in identifiably white schools and one white teacher taught at a black school.<sup>117</sup> The state continued as late as 1967, as well, to pass laws offering tuition assistance to avoid desegregated schools.<sup>118</sup> Both laws were invalidated by federal courts,<sup>119</sup> but these laws and the small numbers of students or teachers crossing, attending, or working in schools that were even nominally “desegregated” illustrate the continued obstruction to implementing desegregation at the state level.

In 1968, the Fifth Circuit again weighed in with specific instructions about constructing attendance zones to further desegregation and remedy existing segregation; it declared the district’s freedom of choice plan unacceptable because it had not done more to eliminate racially identifiable schools.<sup>120</sup> However, the case returned to the Fifth Circuit a year later on appeal regarding the plan the district court adopted and with questions about two proposed school buildings.<sup>121</sup> The circuit court this time showed frustration that the district court “gave literal interpretation to the directive” and “ignored the unequivocal directive” to draw attendance zones that would be desegregative.<sup>122</sup> Referring to statistics, they concluded that the plan that had been adopted was “insufficient” at the grades one through eight and ruled it was improper to permit freedom of choice for high school students or in rural areas of the district.<sup>123</sup> The court also faulted the minority-to-majority transfers permitted under the plan.<sup>124</sup> Noting that the case did not present legal or constitutional questions so much as questions of educational administration, the Fifth Circuit ordered the district court to have HEW collaborate on designing a plan, using their expertise to develop a plan that

115. *Id.*

116. *Id.*

117. *Davis v. Bd. of Sch. Comm’rs*, 414 F.2d 609, 610-11 (5th Cir. 1969).

118. *BAGLEY*, *supra* note 116, at 130.

119. *Id.* at 130–31.

120. *Davis v. Bd. of Sch. Comm’rs*, 393 F.2d. 690, 692–95 (5th Cir. 1968). The decision also required more faculty and staff desegregation efforts. *Id.* at 695–96.

121. *Davis v. Bd. of Sch. Comm’rs*, 414 F.2d 609 (5th Cir. 1969).

122. *Id.* at 610.

123. *Id.*

124. *Id.*

would “fully and affirmatively desegregate all public schools” in the county.<sup>125</sup>

Additionally, school faculties were increasingly a focus of desegregation efforts, which, as implemented, often meant that black teachers or administrators were demoted or lost jobs despite their expertise.<sup>126</sup> In 1969, HEW officials submitted a desegregation plan for Mobile schools, including potential non-contiguous zones.<sup>127</sup> The school board said this violated the rights to neighborhood schools and for parents to choose the teacher’s race.<sup>128</sup> White elite in the community also resisted the plan.<sup>129</sup> Yet, the school board refused to develop its own plan, instead relying on freedom of choice.<sup>130</sup> It also didn’t even provide data for the court to use to devise a plan. Even after *Green & Alexander* had been issued by the Supreme Court, Mobile County wrote in its brief to the Supreme Court: “We respectfully urge this Court to approve as a general principle the constitutional validity of the neighborhood school concept, and the constitutional invalidity of the arbitrary assignment of public school students and teachers on the basis of a racial ratio or quota, or in pursuit of racial balance.”<sup>131</sup> Judge Thomas then required the implementation of the plan west

125. *Id.* at 610–11. The court enjoined building any new schools, including schools that would have been in predominantly black areas, until an appropriate desegregation plan was adopted. *Id.* at 611.

126. *E.g., HEW Guidelines for School Desegregation* (1966) at 3.

127. Foley, *supra* note 40, at 188.

128. Anderson, *supra* note 73, at 39.

129. PRIDE, *supra* note 45, at 83. Since 1963, when groups like the White Citizen’s Council demanded the district not desegregate schools, there were groups that were active and vocal in opposition to any desegregation, even token amounts. These protests were aimed at officials, civil rights leaders, and protesting the harm to white students subjected to any desegregation. *E.g., PRIDE, supra* note 45, at 88, 91; Foley, *supra* note 40, at 189-90. Such efforts, in addition to the state political context, likely made it easier for the elected school board to resist court desegregation orders.

130. PRIDE, *supra* note 45, at 90. Such plans had already been deemed by the Supreme Court earlier to not necessarily meet what is required to remedy prior segregation. *See Green v. Cty. Sch. Bd.*, 391 U.S. 430, 434 (1968).

131. Brief for the Board of School Commissioners of Mobile County at 99, *Davis v. Bd. of Sch. Comm’rs*, 402 U.S. 33 (1971) (No. 70-436). In a resolution adopted in November 1969, the school board noted that only in the South had students been denied the right to choose their school and that educational quality had declined where students were forced to attend desegregated schools. This resolution was



of the interstate,<sup>132</sup> and asked for new plans east of the interstate,<sup>133</sup> where most students,<sup>134</sup> especially black students, lived (see map 1). The Supreme Court reversed this in January 14, 1970,<sup>135</sup> and the Fifth Circuit required compliance by February 1.<sup>136</sup> Yet the school board continued to refuse to submit a desegregation plan.<sup>137</sup> After the state passed a Freedom of Choice Act in March 1970, the school board announced it would not follow the desegregation plan Judge Thomas had ordered on January 31.<sup>138</sup>

similar to a state resolution by the School Boards Association. PRIDE, *supra* note 45, at 89–90.

132. PRIDE, *supra* note 45, at 84 (citing Aug. 1, 1969 order).

133. *Id.*

134. *Id.*

135. *Id.* at 90 (reversing the Fifth Circuit decision from Dec 1, 1969).

136. Bruce Galphin, *Integration Deadline Defied in Mobile, Ala.*, THE WASHINGTON POST (Feb. 3, 1970), at A-4; PRIDE, *supra* note 47, at 90.

137. Galphin, *supra* note 138, at A-4.

138. PRIDE, *supra* note 47, at 95.

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Map 1: Percentage of black residents in central Mobile County by tract, 1970



Source: 1970 U.S. Census data; mapping software provided by Social Explorer

In fact, in a 1970 decision in which the Fifth Circuit evaluated the plan the district court had implemented after considering several HEW plans and a Department of Justice plan (alongside a school board plan),<sup>139</sup> the court was critical of the obstinance of the district. Noting an objection the district had

139. Davis v. Bd. of Sch. Comm'rs, 430 F.2d 883, 885 (5th Cir. 1970).

raised to the plan that was being ordered, the Court wrote, “[T]he defendants, the only parties in possession of current and accurate information, have offered no help. This lack of cooperation and generally unsatisfactory condition, created by defendants, should be terminated at once by the district court.”<sup>140</sup> Likewise, the court ordered the immediate implementation of a modified Department of Justice plan<sup>141</sup> but noted that a plan depending on the discretionary drawing of zone lines could be subject to abuse when implemented. They concluded, “The proper administration of zone lines depends upon good faith in establishing and maintaining the lines as well as continuing supervision over them.”<sup>142</sup> The court also again ordered a more robust majority-to-minority transfer policy,<sup>143</sup> including the provision of transportation.<sup>144</sup> Despite an order that schools’ faculties should reflect the district’s racial composition of teachers for the 1969–70 school year,<sup>145</sup> only a few schools had faculties within ratio,<sup>146</sup> and they had no information about the staff.<sup>147</sup> The court asked for compliance within a month’s time of their ruling,<sup>148</sup> which did not occur and the district did not expand bus transportation for students now assigned to schools further from their home.<sup>149</sup>

As seen, review by the Fifth Circuit in this desegregation case would be frequent. A circuit court judge in a 1970 decision in the case called it an “almost Homeric odyssey.”<sup>150</sup> In a summation of school desegregation in a chapter on civil rights in Mobile produced for the city’s tricentennial in 2001, Nicholls concluded, “School officials maintained an obstructionist and intransigent stance, moving extremely slowly and only when forced by explicit court action . . . most [of the delay in desegregation] was purposeful

140. *Id.* at 888 n.4.

141. *Id.* at 887.

142. *Id.* at 888.

143. *Id.*

144. *Id.*

145. *Id.* at 886.

146. *Id.*

147. *Id.*

148. *Id.* at 888.

149. Foley, *supra* note 40, at 192-93. The district did not increase the number of buses used or the number of children bused in comparison with preceding years even though the state would have paid transportation costs. *Id.*

150. Davis v. United States, 422 F.2d 1139, 1140 (5th Cir. 1970).

procrastination by school officials and the elite who guided them.”<sup>151</sup> Even Judge Thomas, who delayed the case as much as possible, commented as the case neared its end in 1996, “I did my best to slow [integration] down. I did not try to stop it.”<sup>152</sup> But, reflecting on the long history, “I was too patient.”<sup>153</sup> Judge Thomas, and perhaps others, hoped that going slowly would change the minds of white Mobilians who were opposed to desegregation. Instead, going slowly may have had the opposite effect, by suggesting that anything more than token desegregation could be avoided, and efforts went to trying to resist desegregation instead of trying to constructively make it work.<sup>154</sup>

### B. *Politics: White Resistance and Black Frustration*

Groups of white parents, angry about any reassignment to former black schools, formed organizations like Stand Together and Never Divide (STAND), which had been allowed to intervene in the desegregation case as well and argued against rezoning.<sup>155</sup> STAND also held rallies in Mobile in the late 1960s that attracted thousands of white residents and decried the dangers of schools attended by black students that would make it unsafe for white students.<sup>156</sup> That group and others urged for a boycott of schools as more widespread plans were implemented. For example, as the appeal was pending before the Supreme Court, some parts of the HEW desegregation plan were implemented, resulting in “no shows” of white students to integrated schools. One such school was Murphy High School, which was paired with Central High School,<sup>157</sup> a school that was just as important to the black community, particularly among African-American professionals, as

151. Nicholls, *supra* note 21, at 260. Indeed, plaintiffs’ lawyers sometimes were not provided with maps of proposed plans nor did they and the district even agree on basic facts about the extent of desegregation. *Mobile School Integration Slowed Down*, Feb 12, 1970 *Los Angeles Times*.

152. Brett Blackledge, *Focus Shifting from Integration*, MOBILE REG., Jan. 8, 1996, at A1.

153. *Id.*

154. Indeed, in remarks after the Supreme Court’s 1971 ruling in the case, LeFlore noted that race relations had declined in Mobile because of resistance to desegregation. PRIDE, *supra* note 45, at 109–10.

155. PRIDE, *supra* note 45, at 62–63.

156. BAGLEY, *supra* note 116, at 141; PRIDE, *supra* note 45, at 62.

157. PRIDE, *supra* note 45, at 192.



Murphy was to the white community.<sup>158</sup> Black students resented having to leave their community to go to a school where they felt unwelcome.<sup>159</sup> Disruption at schools like Murphy made headlines<sup>160</sup> and could be viewed by white parents resistant to desegregation as another, race-neutral reason (e.g., safety) that desegregation would not work. Central, meanwhile, was eventually closed in 1970.<sup>161</sup> Issues beyond teacher or student assignment also arose as black community members asked that curriculum and school traditions (e.g., nickname of Rebels, playing of “Dixie”) in newly desegregated schools be more inclusive of African-American students.<sup>162</sup> The treatment of black students in formerly white schools was not addressed by the courts.

In fact, frustration was growing in the black community, including the formation of a group Neighborhood Organization Workers (NOW), which that felt John LeFlore was too moderate and compromising in working with white leadership.<sup>163</sup> NOW was behind more frequent and more intense actions as a direct action organization to further black equality in a range of ways, including educational opportunity. This group organized marches and rallies calling the school board and its actions racist;<sup>164</sup> they called on the school board and district leadership to resign.<sup>165</sup> In particular, they described the inferiority of resources at black schools, lack of black leadership, and other principles essential to desegregation on equal status that would maximize benefits to all students.<sup>166</sup> Another group proposed splitting the large county district into a mostly white district and a mostly black city

158. *Id.* at 102.

159. Betsy Fancher, *Voices from the South: Black Students Talk about their Experiences in Desegregated Schools*, SOUTHERN REGIONAL COUNCIL 15 (1970).

160. E.g., *Race Clash Erupts at Mobile School*, N.Y. TIMES, Sep. 11, 1970, at 83.

161. Emmett Burnett, *The Sixties*, MOBILE BAY MAGAZINE, Jan. 6, 2014, <https://mobilebaymag.com/the-sixties/>.

162. See, e.g., THE ALA. COUNCIL ON HUMAN RELATIONS ET AL., IT’S NOT OVER IN THE SOUTH: SCHOOL DESEGREGATION IN FORTY-THREE CITIES EIGHTEEN YEARS AFTER *BROWN* (1972); Foley, *supra* note 40, at 199-200.

163. Nicholls, *supra* note 21, at 264-67.

164. PRIDE, *supra* note 45, at 58; Foley, *supra* note 40, at 186.

165. *Id.*

166. *Id.*

district.<sup>167</sup> This was also a time of rising violence in Mobile—marring its image of itself as peaceful—with almost one hundred bombings in 1969 alone.<sup>168</sup> LeFlore had also been targeted in the past.<sup>169</sup> NOW had also invited Stokely Carmichael,<sup>170</sup> who suggested that non-violence would not be a way for blacks to gain equality.<sup>171</sup>

Increasingly, the lack of constructive leadership trying to make desegregation work understandably frustrated black families and emboldened white families to continue to resist and thwart any efforts put in place in Mobile. White parents were encouraged to exercise freedom of choice to avoid integration by political leaders such as Governor George Wallace and groups like the White Citizens Council.<sup>172</sup> School leaders responded by punishing black students who protested injustice.<sup>173</sup> The newspaper continued to make clear its opposition to anything but modest desegregation efforts and framed plaintiffs' requests as hypocritical and dictatorial.<sup>174</sup> Earlier efforts by some white Mobilians to help support and advance peaceful integration were largely absent in the late 1960s.

At the same time, segregation academies were opening in the county. A 1990 newspaper article estimated that sixty such schools opened in the early 1970s in response to more far-reaching desegregation.<sup>175</sup> One such school, Chickasaw Academy, opened in fall 1970 with two hundred and fifty students.<sup>176</sup> Contemporary reports describe parents as feeling that the school system “had ‘lost control’” and the efforts to make every school relatively

167. Roy Innes from Congress of Racial Equity had suggested such an effort in the early 1970s, including a plan in Mobile but that had been opposed by civil rights groups. PRIDE, *supra* note 45, at 94 – 95.

168. Nahfiza Ahmed, *Race, Class, and Citizenship: The Civil Rights Struggle in Mobile, Alabama, 1925 – 1985* 210 (Mar. 1999) (unpublished Ph.D. dissertation, University of Leicester).

169. Nicholls, *supra* note 21, at 265.

170. Foley, *supra* note 40, at 186.

171. Karen Grigsby Bates, *Stokely Carmichael, a Philosopher Behind the Black Power Movement*, NPR, Mar. 10, 2014, <https://www.npr.org/sections/codeswitch/2014/03/10/287320160/stokely-carmichael-a-philosopher-behind-the-black-power-movement>.

172. Foley, *supra* note 40, at 189-90.

173. PRIDE, *supra* note 47, at 87-89.

174. See generally PRIDE, *supra* note 45, chapter 2.

175. Kathy Dean, *Desegregation Prompted ‘White Flight’*, MOBILE REG., May 15, 1990, at 1A.

176. *Id.*



balanced were factors motivating the school's establishment;<sup>177</sup> the district's refusal to provide bus transportation also was a factor.<sup>178</sup> District officials estimated more than seventeen thousand students were enrolled in early 1970s, an increase of nearly 50% over 1963.<sup>179</sup> Civil rights leaders in Mobile also legally challenged the establishment of these academies as an effort to evade desegregation, which prompted the courts to rule that public funds could not go towards them.<sup>180</sup> Some were open for a relatively short period, due to the difficulties of providing comparable educational experiences to the public schools, and students returned to the public schools as families saw desegregation was more settled.<sup>181</sup> The district also had a lenient non-conformers policy, which in fall 1970 led to many school enrollments not meeting HEW projections.<sup>182</sup> It also began a decades-long trend of white students enrolling in schools moving away from downtown Mobile (e.g., west of the interstate in 1970).<sup>183</sup>

Conversely, however, in addition to plaintiffs, other community groups were trying to help ease desegregation tensions. The League of Women Voters supported school desegregation efforts and received a grant under the Emergency School Assistance Program to sponsor workshops and a "Make it Work" campaign.<sup>184</sup> There were also public relations efforts supported by the federal government and local media.<sup>185</sup> Albert Foley, a professor at Spring Hill College and Jesuit priest, also offered trainings hosted at Spring Hill along with other groups and some churches in the area to try to further peaceful integration.<sup>186</sup> To attend such sessions required

177. *Id.*

178. *See* Foley, *supra* note 40.

179. Kathy Dean, *Desegregation Prompted 'White Flight'*, MOBILE REG., May 15, 1990, at 1A.

180. *Id.* Schools receiving no public funds are not required to comply with civil rights laws.

181. *See* Foley, *supra* note 40.

182. *Id.* at 190–92. Non-conforming students attending a high school west of the interstate was a reason that HEW denied Mobile's request for more than \$1 million in emergency desegregation aid. PRIDE, *supra* note 45, at 106.

183. *Id.* (referencing a trend of students leaving schools east of the interstate such as Murphy to enrolling in other schools like Davidson High west of the interstate).

184. THE ALA. COUNCIL ON HUMAN RELATIONS ET AL., IT'S NOT OVER IN THE SOUTH: SCHOOL DESEGREGATION IN FORTY-THREE CITIES EIGHTEEN YEARS AFTER *BROWN* 27–28 (1972).

185. Foley, *supra* note 40, at 199–200.

186. *See id.*

fortitude by participants in early years due to resistance to desegregation efforts. A public relations team was hired that produced commercials to urge quieting racial strife to allow children to learn.<sup>187</sup>

C. *The Supreme Court Weighs In: What does Desegregation Require?*

The question of how far-reaching desegregation efforts were required in Mobile ultimately reached the Supreme Court in October 1970.<sup>188</sup> Though the Fifth Circuit had steadily pushed for more integration, they also remained unsure what was required—with the Court’s recent *Alexander* decision saying what *was not* enough.<sup>189</sup> In *Swann*,<sup>190</sup> which Mobile’s case was combined with, the Chief Justice’s opinion noted first that the primary responsibility for eliminating segregation was that of the local school boards—and that the federal courts only stepped in when boards had defaulted.<sup>191</sup> In *Davis*, the Supreme Court noted that the circuit court had concluded that the school board “almost totally failed to comply” with previous desegregation orders.<sup>192</sup> Likewise, in the *Swann* decision, the Court clarified its opposition to the Mobile school board’s arguments about the authority of the courts. They wrote:

[T]he Mobile school board has argued that the Constitution requires that teachers be assigned on a ‘color blind’ basis. It also argues that the Constitution prohibits district courts from using their equity power to order assignment of teachers to achieve a particular degree of faculty desegregation. We reject that contention.<sup>193</sup>

*Swann* became commonly known as the “busing” decision because it legitimated the use of busing, when necessary, to transport students across the large countywide district in Charlotte, including if needed for non-

187. *Id.* at 200.

188. At this time, both the NAACP Legal Defense Fund and Department of Justice were parties to the case along with local counsel for plaintiffs. *See Davis v. Bd. of Sch. Comm’rs*, 402 U.S. 33, 33 (1971).

189. *Alexander v. Holmes Cty. Bd. of Educ.*, 396 U.S. 19 (1969).

190. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

191. *Id.* at 31–32.

192. *Davis*, 402 U.S. at 35.

193. *Swann*, 402 U.S. at 19.

contiguous zones.<sup>194</sup> These same principles were also applied to the Mobile case. Specific to *Davis*, the U.S. Supreme Court held that the lower courts (and school board) should not have treated the western and eastern part of the district separately in creating school zones and did not include transportation for desegregation purposes.<sup>195</sup> Describing the lengthy process in which the district court and school board had been overruled by the Fifth Circuit to require more far-reaching plans, the Court described what is required of district courts and school leaders:

[They] should make every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation. A district court may and should consider the use of all available techniques including restructuring of attendance zones and both contiguous and noncontiguous attendance zones. The measure of any desegregation plan is its effectiveness.<sup>196</sup>

The most recent Fifth Circuit decisions specifically looked at statistics in determining which plan to adopt.<sup>197</sup> Yet, the Supreme Court noted that the projections for 1970–71 were inaccurate and higher segregation resulted in the eastern part of Mobile,<sup>198</sup> including nine elementary schools (enrolling 64% of black elementary students) that were more than 90% black and more than half of black junior/senior high school students in metropolitan Mobile were attending all or nearly all black schools (instead

194. *Id.* at 28, 29–31.

195. *Davis*, 402 U.S. at 38.

196. *Id.* at 37 (citation omitted).

197. *Foster v. Sparks*, 506 F.2d 805 (5th Cir. 1975); *Panior v. Iberville Parish Sch. Bd.*, 498 F.2d 1232 (5th Cir. 1974); *Flax v. Potts*, 464 F.2d 865 (5th Cir. 1972); *United States v. Tex. Educ. Agency*, 467 F.2d 848 (5th Cir. 1972); *Cisneros v. Corpus Christi Indep. Sch. Dist.*, 448 F.2d 1392 (5th Cir. 1971).

198. *Davis*, 402 U.S. at 37. Although not a focus of the decision, a 1972 report on the status of school desegregation noted that of eighty-one schools in Mobile County, one school was entirely white and another seven had between 90 and 99% white students. *See* ALA. COUNCIL ON HUMAN RELATIONS, *supra* note 186, at ix.

of none as the Fifth Circuit had projected).<sup>199</sup> The Supreme Court remanded for a plan that “promises to realistically work now.”<sup>200</sup>

After the Supreme Court ruling, the Fifth Circuit refused to remand to the district court judge because of concern of further delay.<sup>201</sup> Instead, in July 1971, it ordered a plan that paired some white zones west of the north-south interstate with schools east of the interstate.<sup>202</sup> It also required increased busing for desegregation purposes, for black and white students, along with greater desegregation of the central administration.<sup>203</sup> The plan was the result of a compromise between a somewhat more moderate school district leadership and the plaintiffs.<sup>204</sup> At the same time, this plan still left some all-black schools, which parties agreed would be difficult to desegregate due to residential patterns.<sup>205</sup> The parties agreed to allow three years before returning to court, which retained jurisdiction;<sup>206</sup> plaintiffs also would review new construction plans.<sup>207</sup>

### III. DESEGREGATION STALLS

#### A. *Waning Judicial Oversight*

In September 1971, Judge Brevard Hand was confirmed to replace Judge Thomas and assumed oversight of the school desegregation case.<sup>208</sup>

199. *Davis*, 402 U.S. at 37. The decision doesn’t indicate why the projections were inaccurate, although in an earlier Fifth Circuit decision, the judges commented that the school board had suggested projections were not correct yet refused to provide data with the courts. *Davis v. Bd. of Sch. Comm’rs.*, 430 F.2d 883, 888 n.4 (5th Cir. 1970). Three possibilities include an increased movement of white students to private schools if zoned to majority black schools as described above, leniency by the school board in granting transfer requests from desegregated schools, or both.

200. *Davis*, 402 U.S. at 38.

201. *Davis v. Bd. of Sch. Comm’rs.*, 445 F.2d 318, 318 (5th Cir. 1971); Foley, *supra* note 40, at 196.

202. Foley, *supra* note 40, at 197–99.

203. PRIDE, *supra* note 45, at 112.

204. *Id.* at 111.

205. Foley, *supra* note 40, at 198.

206. PRIDE, *supra* note 45, at 111–12.

207. *Id.*

208. Brian Andrew Duke, *The Strange Career of Birdie Mae Davis: A History of a School Desegregation Lawsuit in Mobile, Alabama, 1963–1997*, at 28–29 (May

Like many white students of his generation, Judge Hand had graduated from Murphy High School.<sup>209</sup> At the time, he was the head of the Republican Party in Mobile.<sup>210</sup> Judge Hand was notable for draping his office wall with a large Confederate battle flag, which he was eventually forced to remove.<sup>211</sup> While the case was operating under a consent order from 1971 and had a biracial committee in place to try to manage details of implementation, litigation did not cease. An example of the persisting difficulty in resolving even small matters due to the history of desegregation efforts was litigation over a decision to rebuild a school according to general parameters that had been established, namely that new school construction would not further segregation.<sup>212</sup> In 1973, this question too ended up back before the Fifth Circuit, which also noted disagreement within the plaintiff class as well.<sup>213</sup> The lengthy legal process and repeated appeals because of the lack of constructive leadership from the district may have inhibited the ability to build political will to reasonably adjudicate any desegregation-related issue outside of the courts. The newspaper continued to highlight negative aspects of desegregation, suggesting that quality was being sacrificed for desegregation.<sup>214</sup> And the state continued to pass laws fueling white resistance to desegregation that were subsequently struck down by federal courts.<sup>215</sup>

The national legal and political context for desegregation had shifted by the time plaintiffs again went back to court in 1975 because the 1971 plan had not been fully implemented and the plan had not achieved a unitary

9, 2009) (unpublished M.A. thesis, Auburn University) (on file with Semantic Scholar).

209. *Id.* at 29.

210. *Id.*

211. Nicholls, *supra* note 21, at 269; plaintiffs had also asked him to disqualify himself in another case because of bias. Duke, *supra* 210, at 89–90 n.70.

212. Davis v. Bd. of Sch. Comm'rs., 483 F.3d 1017, 1019 (5th Cir. 1973).

213. *Id.* at 1022. This was especially sensitive for black Mobilians because much of desegregation efforts, including the 1971 consent order, closed a number of historically black schools, and other historically black schools were persistently not desegregated because of white resistant to attending mostly black schools. Foley, *supra* note 40, at 198, 204. Other issues at the time that were pending before the Fifth Circuit from this case were about faculty desegregation and payment of attorney fees. Davis, 483 F.3d at 1018.

214. PRIDE, *supra* note 45, at 114–15.

215. Foley, *supra* note 40, at 188.

system according to an analysis by a desegregation expert they had retained.<sup>216</sup> At the time, metropolitan Mobile was 59% black while rural areas were over 80% white.<sup>217</sup> More than 40% of black students were in almost all-black schools, and the principals' race often reinforced student composition.<sup>218</sup> There was a two-year delay in even scheduling hearings on the plaintiffs' filing to reopen the case—although Judge Hand made other rulings about minor issues in the case.<sup>219</sup> Hand declared in 1978 that Mobile's schools had desegregated according to what the Supreme Court required, leaving observers to wonder whether additional changes would happen.<sup>220</sup>

A February 1979 report from U.S. Commission on Civil Rights illustrated the progress made—and that yet to be achieved fifteen years after desegregation efforts first began in Mobile County schools. At the time, the district was still operating under the earlier consent order, which had created more than twenty non-contiguous elementary zones,<sup>221</sup> and also closed four black schools.<sup>222</sup> With nearly 64,000 students, the percentage of white students had declined slightly to 57% during the decade of more active desegregation efforts.<sup>223</sup> The teaching force was similar in racial composition prior to more extensive desegregation at 59%.<sup>224</sup> Some black principals had lost their jobs after the pairing and consolidating of black and white schools,<sup>225</sup> and 26% of principals were black.<sup>226</sup> At this time, there had not been a black school board member,<sup>227</sup> although a legal challenge had been filed that would ultimately be successful in switching voting from at-large to

216. *Id.* at 203 (describing Dr. William Field's report).

217. *Id.*

218. *Id.*

219. *Id.* at 204.

220. *E.g.*, Foley, *supra* note 40, at 203; Anne Reeks, *Hand Says Mobile's Schools Desegregated*, MOBILE REG., Mar. 25, 1978, at 7B. Importantly, this was not an official conclusion that the district was unitary. As described below, in 1986 he formally concluded that the district was *not* unitary in student assignment and principals.

221. U.S. COMM'N ON CIVIL RIGHTS, DESEGREGATION OF THE NATION'S PUBLIC SCHOOLS: A STATUS REPORT 54 (Feb. 1979).

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. *See id.*

227. *Id.*



five geographic wards.<sup>228</sup> Two of the five wards elected black representatives, though with a simple majority vote required, the change did not give black residents as much power as hoped.<sup>229</sup> Additionally, 40% of black students were still enrolled in all-black schools, including two high schools and three middle schools<sup>230</sup>—which, alongside community comments, reflected that little had been done since the consent decree was adopted.

Concerns about where to build new schools, including that the location would not exacerbate segregation, continued to stymie the district, resulting in appointing a citizen's committee with black and white members.<sup>231</sup> Rural white children were still not attending city schools.<sup>232</sup> The black community was also concerned about some of the effects of desegregation, specifically the disproportionately higher suspension rate of black students<sup>233</sup> and a proposed magnet school that would cause the closing of another historic black school, Toulminville High School,<sup>234</sup> which was in need of repair.<sup>235</sup> Ultimately, because of the importance of the school to the black community, a new school was built on the same site retaining the name Toulminville until it was renamed after civil rights leader John LeFlore.<sup>236</sup> While the compromise between parties (excluding the Justice Department) and accepted by the court in 1978 set aside seats in the magnet portion of the

228. *Brown v. Moore*, 575 F.2d 298 (5th Cir. 1978); PRIDE, *supra* note 45, at 193–97. Litigation was also required to allow a black school board member to vote on issues before the school board relating to desegregation due to a challenge filed by the white school board president. Nicholls, *supra* note 21, at 261. Thus, when most decisions were made, black school board members—if they had won—were not allowed to have input into the board's desegregation actions.

229. Nicholls, *supra* note 21, at 261. The city council had seven members and required a supermajority (5-2), which allowed for more political power for blacks. *Id.* at 272-73.

230. U.S. COMM'N ON CIVIL RIGHTS, *supra* note 234, at 65.

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. PRIDE, *supra* note 45, at 149-59.

236. *History of John L. LeFlore Magnet High School*, JOHN L. LEFLORE MAGNET HIGH SCH., <https://leflorencpssal.schoolinsites.com/about> (last visited October 28, 2019).

school for 400–500 out-of-zone white students<sup>237</sup>—as well as some seats for out-of-zone black students<sup>238</sup>—at best the school would have been approximately one-third white,<sup>239</sup> which, given Mobile’s history, was unlikely to remain stably desegregated. Indeed, the school would struggle, however, to attract white students<sup>240</sup> despite being a within-school magnet in the early 1980s during which no other high school was allowed to duplicate course offerings.<sup>241</sup>

With the district court largely inactive, parties sought to reduce lengthy litigation and delays and develop potential consent decrees as they had in 1971. District leaders considered plans to negotiate with plaintiffs and the Justice Department that would solve remaining parts of the case and allow for badly needed construction,<sup>242</sup> which had nearly halted all new buildings because of the desegregation case.<sup>243</sup> However, the district and the other parties disagreed with each other’s proposed building plans to try to meet capacity concerns and further desegregation.<sup>244</sup> The following year another proposed compromise plan was unable to garner support because of dissent within the African-American community. Part of the reason was the distrust the African-American community had of district leadership and their refusal to require white students to continue to attend historically black schools like Toulminville or Blount High School in Prichard.<sup>245</sup>

The board majority’s antagonism to the desegregation case remained. In 1979, the board approved along racial lines a motion for the district to ask

237. Davis v. Bd. of Sch. Comm’rs, No. 3003-63-H, 1986 U.S. Dist. LEXIS 27519, at \*72 (S.D. Ala. Mar. 27, 1986).

238. *Id.*

239. *See id.*

240. *Id.* at 73.

241. *Id.* at 76.

242. *School Board Overdue in Seeking Freedom*, MOBILE PRESS REG., Aug. 26, 1979, at 4A.

243. *Desegregation of the Nation’s Public Schools: A Status Report* 54 (Feb. 1979).

244. PRIDE, *supra* note 45, at 154-66.

245. One of the new African-American board members noted that not only were black schools closed but also the names—honoring important figures in Mobile—were also lost. PRIDE, *supra* note 45, at 162. Thus, if Blount were to be replaced by a new school that would be bigger and possibly more integrated, he said it would be essential for the Blount name to go with the new school. *Id.*

the desegregation case to be dismissed,<sup>246</sup> although the Justice Department subsequently convinced the board to reconsider to allow the negotiated construction plan to proceed.<sup>247</sup> However, some members of the school board continued to talk about the difficulty of the board to exercise local control, especially with respect to construction,<sup>248</sup> and in 1980, the board succeeded in asking for the plaintiffs to show cause for the case not to be dismissed.<sup>249</sup> In late 1981, the plaintiffs agreed to an interim order to invite in professional observers to report on the status of school desegregation;<sup>250</sup> in early 1982, a committee of more than one hundred members was appointed.<sup>251</sup>

The mid-1970s through late 1980s were filled with a time-consuming reluctance on the part of the presiding federal judge to make any rulings in the case, repeatedly insisting that the parties negotiate among themselves, with the help of citizens committees, experts retained in the early 1980s, or both.<sup>252</sup> The school board itself was often at odds among the new African-American board members and the white board members.<sup>253</sup> Ultimately, despite coming up with a plan after a year of study to extend the busing plan throughout the entire county, these committees were unable to agree to a consensus that most black and white members could agree to.<sup>254</sup> The committee required a two-thirds vote to submit the plan to Judge Hand,<sup>255</sup> which was impossible in part because of African-American frustration that their community would continue to bear most of the costs of desegregating the schools.<sup>256</sup> The steering committee also rejected both the more widespread plan by its hired expert, Dr. Willis Hawley,<sup>257</sup> as well as more

246. Anne Reeks, *Dismissal of Birdie Mae Davis Case sought by School Board*, MOBILE PRESS REG., Aug. 23, 1979, at B1. An editorial in the daily newspaper supported the board majority. *School Board Overdue in Seeking Freedom*, MOBILE PRESS REG., Aug. 26, 1979.,

247. PRIDE, *supra* note 44, at 163-64.

248. *Id.* at 191.

249. *Mobile Register*, Mar. 27, 1980.

250. *Brown v. Moore*, 583 F. Supp. 391, 393 (S.D. Ala. 1984).

251. PRIDE, *supra* note 45, at 204.

252. E.g., Foley, *supra* note 40; PRIDE, *supra* note 44, at 155, 204, 208-10.

253. *See generally* PRIDE, *supra* note 45, especially 167-218.

254. *Davis v. Bd. of Sch. Comm'rs*, No. 3003-63-H, 1986 U.S. Dist. LEXIS 27519, at \*1-2 (S.D. Ala. Mar. 27, 1986).

255. PRIDE, *supra* note 45, at 209.

256. U.S. COMM'N ON CIVIL RIGHTS, *DESEGREGATION OF THE NATION'S PUBLIC SCHOOLS: A STATUS REPORT* 54 (Feb. 1979).

257. PRIDE, *supra* note 45, at 219.

minor rezoning adjustments to the existing zones from the 1971 decree.<sup>258</sup> Instead, a report from Dr. Mark Smylie was submitted to the court showing that schools were more segregated than in 1971.<sup>259</sup> The case was again back in court in late 1983 about whether the district was unitary, but no opinion from the judge was forthcoming.<sup>260</sup> A series of minor agreements about school construction that would further desegregation between plaintiffs and the school board were the focus of much of this time.<sup>261</sup> The judge ruled in 1986 that the district was not unitary with respect to student assignment and principal assignment and again placed the onus on the parties to develop a plan to address these issues.<sup>262</sup> Any attempts to address broader, comprehensive desegregation that would be permitted by Judge Hand seemed over. Yet, Judge Hand's opinion noted concerns about transfers and non-enforcement of attendance zones particularly affecting historically black schools that had been concerns plaintiffs had raised since the 1960s.<sup>263</sup>

Both the law and politics of school desegregation were again in flux. In lower courts, questions of unitary status were being argued, and the uncertainty of how appeals courts viewed what was now required could have contributed to the length in time before Judge Hand's 1986 ruling. Moreover, Reagan's Justice Department in the early 1980s had switched from asking for rezoning and bus transportation as desegregation remedies to choice-based remedies like magnet schools that were less comprehensive but might appeal more to parents, particularly white parents.<sup>264</sup> Additionally, Judge Hand had appointed Professor Lino Graglia as special master in 1984 to help resolve remaining issues.<sup>265</sup> Graglia, who had been critical of U.S. Supreme Court jurisprudence in school desegregation cases, was so reviled by the plaintiffs that they appealed his appointment and the entire status of the case

258. *Id.*

259. Adline Clarke, "Schools said more segregated now."

260. *Davis*, 1986 U.S. Dist. LEXIS, at \*1-2.

261. *PRIDE*, *supra* note 45, at 220.

262. *Davis*, 1986 U.S. Dist. LEXIS, at \*1-2. Even as he found the district was not unitary with respect to student assignment, Judge Hand also noted that the increase of racial identifiable schools did not alone require student reassignment because he found that demographic changes, not school board actions, were the cause. *Id.* at \*28.

263. *Id.*

264. Chinh Q. Le, *Racially Integrated Education and the Role of the Federal Government*, 88 N.C. L. REV., 725, 742 (2010).

265. *Court Keeps Expert in Segregation Case*, MOBILE REG., Sept. 12, 1984.

to the Eleventh Circuit (ultimately denied).<sup>266</sup> Taken together, the lack of consensus among plaintiffs and little active effort by the courts, which was hoping that the case would end, left desegregation efforts in limbo. Despite any major opinion, the existence of this case, alongside the altering of the school board voting process, was frequently blamed by school board members for preventing basic school district efforts like school renovation.<sup>267</sup>

### B. *The End of Court-Ordered Desegregation*

Given the plaintiffs' frustration with the inaction of Judge Hand in requiring almost any action by the district and repeated delays, alongside the district's desire to end the case, efforts turned to negotiating a consent decree.<sup>268</sup> The district and plaintiffs agreed to a final consent decree in late 1988, approved by the judge in 1989.<sup>269</sup> The agreement represented a different direction than the 1971 consent decree by emphasizing voluntary approaches to integration. One major component, for example, was establishing six new magnet schools in elementary and middle schools that had been difficult to desegregate, as well as making the existing magnet school program at LeFlore High School more robust through more advanced course offerings and additional transportation for students.<sup>270</sup> Some magnet

266. *School Board Chief says Case May Go to U.S. Supreme Court*, MOBILE PRESS, Oct. 4, 1984.

267. PRIDE, *supra* note 45.

268. *Id.* at 221.

269. *Id.*

270. 1988 Consent Order; *Davis v. Carl*, 906 F.2d 533, 534 (11th Cir. 1990). However, Murphy High School began developing an International Baccalaureate (IB) program that began in 1992 and provided an academically rigorous option in a school that had been historically white and has had more white students than LeFlore. *Explore Your School's Changing Demographics*, URBAN INSTITUTE, <https://www.urban.org/features/explore-your-schools-changing-demographics> (last visited May 21, 2020). While this would seemingly compete with LeFlore's ability to draw high-achieving white students to the revised magnet program—particularly given Murphy's history as an all-white school before desegregation—as the population within Mobile had shifted, black students had become nearly half of the enrollment at Murphy by the 1980s. *Cf. School Character and Membership: Murphy High School*, ED.GOV, <https://ocrdata.ed.gov/Page?t=s&eid=274032&syk=8&pid=2494> (last visited Nov. 2, 2019) (explaining that the racial diversity has continued to increase since the



schools were specifically designed to have advanced academic programs that historically had been less likely to be placed in schools that had been largely comprised of African-American students.<sup>271</sup> The consent decree specified the creation of six magnet schools plus LeFlore but also gave guidelines for the establishment of more magnet schools once the district gained expertise in magnet schools. The next, for example, was to be established at Williamson High School, and at least half would be in historically black schools.<sup>272</sup> No further schools however beyond those specifically agreed to were ever built.

Other aspects of the agreement included renovating schools in black neighborhoods, developing programs to improve instruction, guaranteeing a certain amount of future construction to aid integration or for historically black schools, assigning teachers and staff in a desegregated manner, and ensuring that the transfer policy was not exacerbating segregation. In particular, the agreement highlighted that an essential feature of eliminating the vestiges of prior segregation was to make the facilities in black neighborhoods comparable to those of other facilities in the district.<sup>273</sup> There were minor adjustments made to some attendance zone boundaries specifically to try to integrate one of the high schools in Prichard by reassigning some students in largely white Saraland to Vigor (from another largely white school further north in Satsuma).<sup>274</sup> However, the board also agreed not to build a replacement for the other Prichard high school, Blount High School, in an area of the county that would likely lead to more desegregation.<sup>275</sup> Instead they would provide an enhanced curriculum and new teachers while also renovating the school.<sup>276</sup> The establishment of the

1980's with black students comprising 74.8% of total enrollment). Through the end of the *Davis* case, the IB classes were largely comprised of white students. *Enrollment in International Baccalaureate Diploma Programme: Murphy High School*, ED.GOV, <https://ocrdata.ed.gov/Page?t=s&eid=274032&syk=8&pid=2276> (last visited May 21, 2020).

271. Agreement, *Birdie Mae Davis*, Civil Action No. 3003-63-H, Nov. 22, 1988.

272. *Id.*

273. *Id.* at 13–15.

274. *Id.* at 11–12. Commissioner Gilliard pointed out that Judge Hand's ruling was not sufficiently satisfied by the board's proposed solution. He argued that simply busing black students from largely black neighborhoods to predominately white neighborhoods would not remedy the problem at hand. Duke, *supra* note 210, at 79–80.

275. *Id.* at 12–13.

276. *Id.*

magnet schools would also require amending existing boundaries, which the parties pledged would be adjusted in a manner to increase integration to the extent possible.<sup>277</sup> The parties committed to involving the Desegregation Assistance Center at the University of Miami to assist in efforts in eliminating vestiges of discrimination.<sup>278</sup>

The consent decree was to run for four years, and if the terms had been met, the parties agreed they would ask the court to dismiss the desegregation case.<sup>279</sup> In 1993, the parties agreed to renew for another four years because the agreement had not been achieved; it was affirmed by the judge whose impatience to end the case was bolstered by a series of Supreme Court decisions that were the impetus for scores of unitary status decisions.<sup>280</sup>

A 1990 newspaper article during the time in which magnet schools were being phased in noted that most city schools were predominantly minority, including those slated to be converted to magnet schools.<sup>281</sup> This generally reflected the district's longstanding pattern of schools: schools with higher shares of students of color are within the Mobile city limits, and predominately white schools are outside the city.<sup>282</sup> A district administrator also noted, contrary to popular opinion, that busing was more widely used in the non-city areas of the county to bus mostly white students to predominantly white schools instead of busing for racial balance.<sup>283</sup> The magnet schools were among the district's most successfully integrated schools—attracting white students into city schools.<sup>284</sup> Yet even then, just 6% of students were enrolled in these schools.<sup>285</sup>

A series of newspaper articles in January 1996 assessing the state of desegregation as the case neared its end concluded that Mobile County was among the most segregated of similar districts and that black students'

277. Agreement, *supra* note 273, at 8.

278. *Id.* at 12.

279. *Id.* at 20–21.

280. Duke, *supra* note 210, at 129; *Missouri v. Jenkins*, 515 U.S. 70 (1995); *Freeman v. Pitts*, 503 U.S. 467 (1992); *Bd. of Educ. v. Dowell*, 498 U.S. 237 (1991). *See also* GARY ORFIELD & SUSAN EATON, *DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION* (1996).

281. Carol Carpenter, *Unitary System Desired*, MOBILE REG., May 15, 1990, at 4A.

282. *Id.*

283. *Id.*

284. PRIDE, *supra* note 45, at 224; discussed in greater detail further in paper.

285. *Id.*

experiences in the district were inferior to those of white students.<sup>286</sup> While some black leaders cited this as evidence of persisting racism in the district,<sup>287</sup> momentum for dismissal continued. The board had approved moving for the lawsuit's dismissal by a 3-2 vote along racial lines.<sup>288</sup> At the final hearing, the two African-American members of the school board hired their own lawyer to argue—counter to the school board's lawyer—that the case should not be dismissed.<sup>289</sup> They also asked (unsuccessfully) that as part of the final order, the courts require a super-majority vote on major decisions to give the African-American members more influence in decisions.<sup>290</sup> In March 1997, Judge Hand declared MCPSS unitary, ending court oversight of its desegregation efforts on the thirty-fourth anniversary of the lawsuit's filing, <sup>291</sup> a finding he'd presaged for more than a decade given his comments.<sup>292</sup> In his October ruling setting the date for the hearing, Judge Hand wrote, 'The court's patience, and that of the community as a

286. *Test Results a Matter of Racial Separation Scores In Mobile County Show Gap between Predominantly Black and White Schools*, MOBILE REG., Jan. 7, 1996, at 16A. Some of the disparities he found were in gifted and special education identification, failure rates at some of the academic magnet schools, and graduation rates by race. *See Many More Blacks get Suspended Their Parents Tend to Think Disparity is Unfair, but Educators Deny any Biased Treatment*, MOBILE REG., Jan. 7, 1996, at 18A. *Magnet Mix a Success That's What Some Officials Say about the Most Racially Balanced Schools in the System*, MOBILE REG., Jan. 7, 1996, at 16A. 287. E.g., a black school board member who had worked in the district for decades believed that some prejudicial views still remained. *Different Race Means Different Challenge More Black Students are Placed in Classes for Moderate or Mildly Retarded Students than in Classes for the Intellectually Gifted*, MOBILE REG., Jan. 7, 1996, at 17A.

288. Martha Simmons, *School Board OKs End to Discrimination Case Settlement Accepted in Decades-old Birdie Mae Davis Lawsuit*, MOBILE REG., Apr. 10, 1997, at B1.

289. Martha Simmons, *Voting Rules Request Denied*, MOBILE REG., March 6, 1997, at 4A.

290. *Id.* Such an idea had come up earlier. *See Black Members Say Racial Gap Wider*, MOBILE REG., July 1, 1993, at A1.

291. Brett Blackledge, *Birdie Mae Case Dismissed*, MOBILE PRESS REG., Mar. 28, 1997, at A1.

292. E.g., Foley, *supra* note 40, at 205.

whole, is running very thin.”<sup>293</sup> Four years earlier he’d told African-American school board members who believed the district was not yet unitary, “you’re going to have to stand on your two feet sooner or later, not on mine. They are getting old and I am getting tired...”<sup>294</sup> He added that with respect to the court desegregation order, “all things have to come to an end and life has to go on to other things.”<sup>295</sup> The district promised to continue to voluntarily fulfill the consent decree for an additional three years,<sup>296</sup> and later, it voted to continue magnet schools.<sup>297</sup>

### C. Adaptive Discrimination in Mobile

Many contemporary examinations of school desegregation litigation note the relatively limited judicial role in the last several decades as school segregation persists, despite hundreds of court cases and many other enforcement efforts to address school segregation.<sup>298</sup> Wendy Parker has argued that judges should play a more active role in exercising remedial oversight.<sup>299</sup> Erwin Chemerinsky argued that the federal courts are not inherently ill-suited to desegregating schools, but their own jurisprudence has limited their effectiveness.<sup>300</sup> Elise Boddie furthers Chemerinsky’s argument, describing how the federal courts have not recognized the way in which racial discrimination has adapted over the last half-century.<sup>301</sup> By ignoring its adaptation, the Court instead concluded that “[c]auses and effects

293. Martha Simmons, *The Time has Come for Birdie Mae Davis Board, Lawyers, Judge Prepare for Next Week’s Crucial Hearing*, MOBILE REG., Jan. 16, 1997, at 4A.

294. Brett Blackledge, *Judge Says Birdie Mae Davis Case Should End*, MOBILE REG., Dec. 18, 1993, at 1A.

295. *Id.* at 4A.

296. PRIDE, *supra* note 45, at 227.

297. Rebecca Catalanello, *The Attraction of Magnet Schools*, MOBILE REG., Mar. 24, 2002, at 1A, 4A.

298. Erica Frankenberg & Kendra Taylor, *ESEA and the Civil Rights Act: An Interbranch Approach to Furthering Desegregation*, 1 RSF 32, 32–49 (2015).

299. Wendy Parker, *The Supreme Court and Public Law Remedies: A Tale of Two Kansas Cities*, 50 HASTINGS L.J., 475, 479–80 (1999).

300. Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Court’s Role*, in SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK? 29 (John Charles Boger & Gary Orfield eds., 2005).

301. Elise C. Boddie, *Adaptive Discrimination*, 94 N.C.L. REV. 1235 (2016).

that are too remote in time are beyond constitutional remedy.”<sup>302</sup> While Title VI was deliberately vague in order to permit a changing interpretation as the nature of racial discrimination changes, this depends upon effective regulatory enforcement of the prohibition against discrimination.<sup>303</sup> Thus, as a tool it has been limited in how it might address school racial discrimination as it adapts.

Mobile, as a unified city-county district with a white majority and large share of African-American students, was a rare opportunity to achieve meaningful desegregation if it had implemented more comprehensive plans that would have discouraged the movement of white Mobilians in ways that made school desegregation increasingly challenging. As seen, without clear directives, segregation was allowed to persist by a district court judge who resisted any efforts to require segregation—believing it would naturally and peacefully occur despite nine years of inaction.<sup>304</sup> Then, despite repeated reversals by the Fifth Circuit and their impatient directives to prioritize the case, Judge Thomas minimized the extent of desegregation by affirming the pretexts the district argued should prevail. The slow progress through the late 1960s was also a product of a resistant state and local context and a lag in terms of the law recognizing and addressing the ways in which facially race-neutral policies would further resistance to remedying prior segregation and its effects (e.g., freedom of choice).

There were three key time periods for desegregation in Mobile. The first was in 1971 after the Supreme Court held that even the more far-reaching efforts of remedies the Fifth Circuit had ordered were not sufficient.<sup>305</sup> They required that geographic features like interstates could not be used as a reason to have differing levels of desegregation.<sup>306</sup> After that decision, the plaintiffs and school board for the first time came together to negotiate an agreement.<sup>307</sup> As a means to avoid further delay through the legal process and confusion, both sides cited the concessions they had

302. *Id.* at 1301.

303. Political considerations have frequently limited enforcement. *See, e.g.*, STEPHEN C. HALPERN, ON THE LIMITS OF THE LAW: THE IRONIC LEGACY OF TITLE VI OF THE 1964 CIVIL RIGHTS ACT (1995); Charles F. Abernathy, *Title VI and the Constitution: A Regulatory Model for Defining “Discrimination”*, 70 GEO. L.J. 1, 3 (1981).

304. CONSTANCE MOTLEY, EQUAL JUSTICE UNDER LAW 147 (1998).

305. *Davis v. Bd. of Sch. Comm’rs*, 402 U.S. 33, 37–38 (1971).

306. *Id.* at 35–37.

307. *Foley, supra* note 40, at 196–99.



made.<sup>308</sup> Despite the detailed guidelines about structuring integration within diverse schools, there were also unresolved issues that would likely remain segregated. Peace largely held as a result of community efforts and the district's participation in developing and implementing a plan—instead of fighting it. However, the three-year moratorium in asking for further desegregation efforts, coinciding with a new district court judge and legal and political sentiment beginning to shift against desegregation, may have begun to shut the window for comprehensive desegregation in Mobile. Racial discrimination adapted and became increasingly harder to require remedial efforts. This also marked the last time in which the appellate courts would step in to require more far-reaching desegregation efforts.

The second was in the late 1970s and early 1980s. By this time, the case had languished for years on the docket of the second district court judge overseeing the case who had suggested that he thought schools had been desegregated and the parties could work together.<sup>309</sup> The judge had even made suggestions that the district had done all it could but would, in 1986, clarify that the district was not in fact unitary on several factors.<sup>310</sup> With the aid of outside consultants, a wide-ranging plan to reassign students was proposed yet could not muster enough support from the community to be submitted to the judge for formal consideration.<sup>311</sup> Such a lack of a majority to support a plan that would challenge the existing status quo is perhaps not surprising and is a reason that the courts, as a non-majoritarian branch, have often been the place of recourse for those in the minority, such as African-Americans seeking school desegregation.<sup>312</sup>

Finally, the third was in 1988 with the adoption of what would be the final consent decree in the case. It laid out a fairly comprehensive plan for re-envisioning LeFlore High School as a more robust, full-time magnet school.<sup>313</sup> Though there had been doubts when it was built as to whether it could be integrative, the consent decree took considerable length to describe its structure and the prohibition on duplication of course offerings at other

308. *Id.*

309. *Id.* at 202-205; *Hand says Mobile's Schools Desegregated*, MOBILE REG., Mar. 25, 1978.

310. *Davis v. Bd. of Sch. Comm'rs*, No. 3003-63-H, 1986 U.S. Dist. LEXIS 27519 (S.D. Ala. Mar. 27, 1986).

311. *Id.* at \*1-2; PRIDE, *supra* note 45, at 208-10.

312. *See* PRIDE, *supra* note 45.

313. *Davis v. Carl*, 906 F.2d 533, 534 (11th Cir. 1990); Agreement, *supra* note 275.

district high schools to attempt to be unique and thereby attractive to white students.<sup>314</sup> For this and other proposed magnet schools, the agreement was detailed in describing a process to try to maximize access, use historically black schools, and provide attractive educational options.<sup>315</sup> The agreement suggested that these seven schools would be the minimum in terms of what they anticipated<sup>316</sup>—Mobile could then use their expertise from developing these schools to expand. Yet, that never happened nor did any robust integration of LeFlore.<sup>317</sup> Yet, the ambivalence about pressing for racially integrated student bodies is seen in the mixed treatment of the two high schools in Prichard, the predominantly African-American city north of Mobile. Vigor had a mostly white zone from Saraland reassigned while the historically black Blount High School was expressly *not* rebuilt in a site that would have presumably enabled more integration.<sup>318</sup> Instead Blount and other schools in historically black neighborhoods were promised an infusion of funds to make them at least equal to other schools.<sup>319</sup> If white students would not agree to make the schools integrated, the agreement was implicitly pressing for the racially segregated schools to be equal. This would be the last set of concessions from the district before the court declared it unitary.

Some civil rights leaders and even two African-American school board members pressed for continued oversight, but as Boddie argues, the law was ill-equipped to understand persisting racial segregation and inequality as connected to prior constitutional violations that continued to require remedies.<sup>320</sup> Moreover, in the face of continued resistance by the district court judge overseeing the case, plaintiffs' lawyers were increasingly limited in the utility of the legal system to address discrimination.<sup>321</sup> Despite the delay in implementing any type of remedy, and the repeated inadequacies of what was eventually required, desegregation was largely judged to be a failure<sup>322</sup>—with the lesson learned that it could not be done instead of that it had not actually been fully attempted. However, instead of racial

314. Agreement, *supra* note 275, at 3-6.

315. *Id.*

316. *Id.*

317. Rebecca Catalanello, *The Attraction of Magnet Schools*, MOBILE REG., Mar. 24, 2002, at 1a, 4a.

318. Agreement, *supra* note 275.

319. *Id.*

320. Boddie, *supra* note 303, at 1273-74.

321. See e.g., Foley, *supra* note 40, at 202-205; PRIDE, *supra* note 45, at 219-29.

322. See *id.*

discrimination ceasing to exist in Mobile County, the policies adopted to minimize remedying discrimination instead only further rooted school and residential segregation.<sup>323</sup> They also failed to account for the uneven ability of white Mobilians to leave places that were the most affected by efforts to address discrimination. Through a successive series of efforts—some of which were explicitly accepted by the school board<sup>324</sup>—white families could avoid desegregation through transfers to less affected schools, receive no sanction for “non-conforming” to assigned desegregated schools, have the ability to request white teachers, and attend publicly supported private school academies.<sup>325</sup> In subsequent years, white families could move further from the city of Mobile or Prichard—or areas assigned to schools in such places—or to private schools and a neighboring county.<sup>326</sup> While the pattern of white families in Mobile leaving schools with higher percentages of students of color is not an aberration from national trends,<sup>327</sup> during and after the legal case was over,<sup>328</sup> laws facilitated the exit of white students from substantially integrated schools despite the impact this would have on the success of integration. This is especially important because research also finds that white individuals gain comfort over time in integrated settings.<sup>329</sup> Yet for those less familiar, they could cite concerns about safety as a non-racial reason for avoiding integration.<sup>330</sup>

Layered on top of this are beliefs about racial inequality that may not even be fully recognized by those holding them, those in leadership positions, or both. In Mobile, this was shaped in many ways, including by the media and a school board leadership during the 1970s who used concepts like pushing for teacher and student testing to implicitly question the competence

323. Erica Frankenberg, *The Impact of School Segregation on Residential Housing Patterns: Mobile, Alabama, and Charlotte, North Carolina*, in *SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK?* 164, 172, 177 (John Charles Boger & Gary Orfield eds., 2005).

324. Foley, *supra* note 40, at 190-92.

325. Kathy Dean, *Desegregation Prompted ‘White Flight’*, *MOBILE REG.*, May 15, 1990, at 1A.

326. Frankenberg, *supra* note 325, at 170.

327. Chemerinsky, *supra* note 302, at 29, 33.

328. *Id.*

329. Boddie, *supra* note 303, at 1261–62.

330. *Id.* at 1262–63 (noting that there were many explicit mentions of safety by white parents opposing rezoning, without concern for whether such schools were “safe” for African-American parents). *See generally* PRIDE, *supra* note 45.

of African-Americans.<sup>331</sup> Public opinion surveys of Mobile residents note a shift in explanations for racial inequality and perceptions of what should be done to address it during this time period,<sup>332</sup> likely due to a lack of any concerted community conversation about school desegregation or media coverage of race. It was only in 1994 that the newspaper began to cover education, including desegregation, more comprehensively.<sup>333</sup> Instead, whites increasingly believed that racial inequality was due to black people not working hard enough, and while they accepted the goal of racially balancing schools, they thought busing to achieve racial balance instead of allowing parental choice was problematic.<sup>334</sup> Political scientist Richard Pride, studying these changes and ruling out other plausible explanations, ultimately concluded that conservative activists had been successful in reframing local conversations and understanding of racial inequality specifically as it relates to the schools.<sup>335</sup> Such a reframing made it difficult to muster political support for more comprehensive desegregation efforts.

An added layer to struggles over school desegregation was the relatively low funding of Mobile's public schools,<sup>336</sup> and thus, many of the later desegregation considerations included discussions over how much funding was allocated to schools in certain parts of the district, including historically black schools (e.g., 1989 consent decree).<sup>337</sup> State or local funding of schools was not directly part of the *Davis* litigation, but it did affect the case. Additional funds supplied earlier could have enhanced schools to incentivize integration in ways that would have gotten more support of black and white community members. In 2001, after repeated failures during the preceding forty years of any proposed tax increase for

331. Richard A. Pride, *Redefining the Problem of Racial Inequality*, 16 POL. COMM. 147, 153 (1999).

332. *Id.* at 150–51.

333. *Id.* at 162.

334. *Id.* at 157–58.

335. *Id.* at 147.

336. See Kevin Sack, *Cash Crunch Imperils High School Football*, N.Y. TIMES, Feb. 27, 2001, at A14.

337. PRIDE, *supra* note 45, at 221. At the time there were also challenges to the state's system of funding education, which was found to be unconstitutional. See *Ala. Coal. for Equity, Inc. v. Hunt*, No. CV-90-883-R, 1993 WL 204083 (Cir. Ct. Ala., Apr. 1, 1993); Opinion of the Justices, 624 So. 2d 107 (Ala. 1993).

public school funding<sup>338</sup>—including three failures since 1988<sup>339</sup>—a referendum to increase public school funding succeeded.<sup>340</sup> Such funds were desperately needed to support the school district, which had schools with portable classrooms and unairconditioned schools.<sup>341</sup> While state education cuts had precipitated a serious funding crisis, the district’s local funding revenue was a third lower than the state average.<sup>342</sup> Then-superintendent had threatened that the defeat of the measure would lead to cutting of extracurricular activities, including high school football, and also created a stir when he suggested that race might be one reason that people would not support the tax increase.<sup>343</sup>

The judge’s conclusion that the time had come for the Mobile desegregation case to end overlooked the time that it takes remedies to address the complex and changing nature of racial discrimination—and the relevance of prior violations to contemporary inequality. That which existed was constructed and endorsed by the courts as being too far attenuated from the initial violation and due in large part to private choices, without understanding how the choices by policymakers (and the courts) made to resist widespread desegregation shaped those “private” choices. As discussed further below, the rush to terminate court oversight of Mobile’s desegregation case permitted racial discrimination and its effects to persist in the county’s schools. The inequality existing today, twenty years after the desegregation case has ended and more than a half-century after the *Davis* case began, is thus cannot be assigned to governmental actors and without recourse in the contemporary development of school desegregation law.<sup>344</sup>

338. Brenda J. Turnbull, “*Together We Can*” in *Mobile: A Coalition Across Lines of Race and Class*, in PUBLIC ENGAGEMENT FOR PUBLIC EDUCATION: JOINING FORCES TO REVITALIZE DEMOCRACY AND EQUALIZE SCHOOLS 250 (Marion Orr and John Rogers eds., 2011).

339. *Id.*

340. *Id.*

341. J. WAYNE FLYNT, ALABAMA IN THE TWENTIETH CENTURY 22 (2004).

342. Sack, *supra* note 338.

343. Rebecca Catalanello, *Race a Factor in School Tax Debate?*, MOBILE REG. (Mar. 4, 2001), <http://www.al.com/news/?Mar2001/4-a398872a.html>.

344. Boddie, *supra* note 303, at 1291–96.



#### IV. MOBILE SCHOOLS TODAY

Twenty years after its court desegregation order ended, MCPSS looks very different. Though a full description of Mobile is beyond the scope of this article, the city and surrounding county have both affluent areas and places of concentrated, deep poverty that often overlap with racial concentration.<sup>345</sup> Indeed, in other work with a colleague, I found that there was substantial spatial clustering of households by income (both households below poverty line and affluent) as well as the white and black population in the metropolitan area.<sup>346</sup> The populations are also distinct by district boundaries (see table 1).

Table 1: Social Characteristics of Population in Mobile Metropolitan Area, 2006-2010 Estimates

	<b>Baldwin Co.</b>	<b>Mobile</b>	<b>Saraland</b>	<b>Metro Area</b>
<b>Total Population</b>	175,791	401,397	7,223	584,411
<b>White</b>	84.1%	59.5%	70.9%	67.0%
<b>Black</b>	9.4%	35.5%	14.9%	26.9%
<b>Hispanic</b>	3.9%	2.1%	5.9%	2.7%
<b>Asian</b>	0.6%	1.9%	1.3%	1.5%
<b>Household Income over \$150,000</b>	7.0%	4.5%	1.6%	5.2%
<b>Population with Bachelor's Degree</b>	18.1%	13.2%	5.2%	14.7%
<b>Families below Poverty</b>	9.1%	15.9%	8.8%	13.6%

Table adapted from Taylor & Frankenberg, *supra* note 353; Note: Poverty line for family of four was an income of \$21,000

345. Stefanie DeLuca et al., *Segregating Shelter: How Housing Policies Shape the Residential Locations of Low-Income Minority Families*, 647 ANNALS AM. ACAD. POL. & SOC. SCI. 268, 273–74 (2013). For more on school-housing segregation in Mobile *see also* Frankenberg, *supra* note 325, at 164–84.

346. KENDRA TAYLOR & ERICA FRANKENBERG, CONCENTRATED AFFLUENCE, SEGREGATION, AND BOUNDARIES IN THE METROPOLITAN SOUTH (2017).

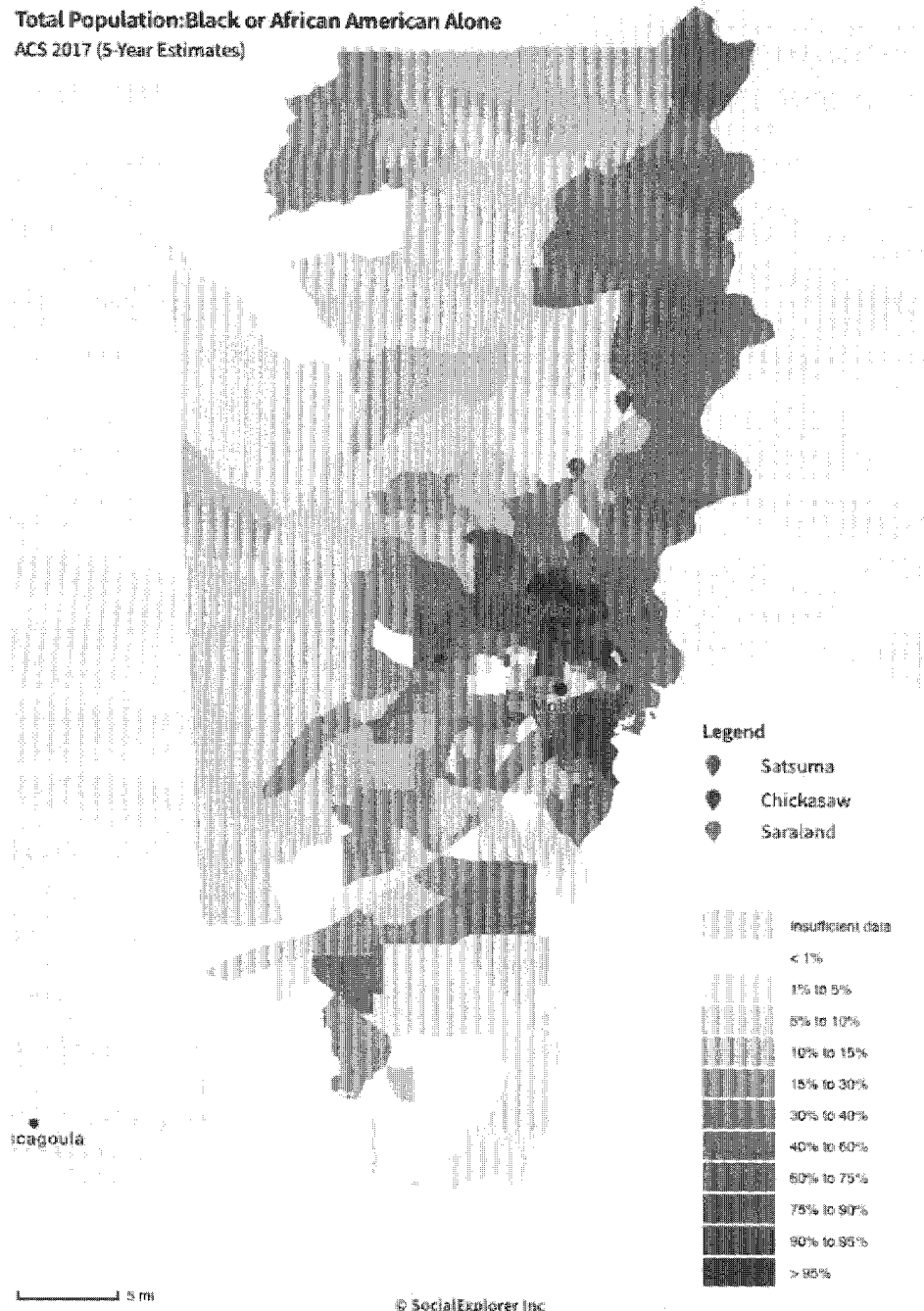
Often, including in discussions about what the MCPSS district could do to further school desegregation, officials lament the segregated residential patterns, which are described as the result of private actions despite the many governmental policies that contributed to existing segregation.<sup>347</sup> Other governmental policies, like housing vouchers, which could help address segregation, instead often result in recipients living in low-opportunity neighborhoods.<sup>348</sup> The black population remained concentrated in eastern Mobile County, although it had expanded westward since 1970 (see map 2).

347. See, e.g., RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017).

348. DeLuca et al., *supra* note 347, at 269.

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Map 2: Mobile County, Black Population by Census Block Group, 2013-2017 Estimates



*Note: legend indicates location of three communities that have formed separate districts.*

In a changed legal and demographic context, this section reviews segregation and integration in public schools in Mobile County during the two decades after unitary status. With the court case over, Mobile County has experienced three separate municipal secessions. Neighboring Baldwin County is also a draw, particularly for more white and affluent families. The magnet schools created in 1988 remain, with varying effectiveness. And segregation in Mobile schools remains persistent and is spreading as demographic patterns reflected above shift. As charter schools and the voucher program take hold, they might also complicate efforts towards school integration in Mobile County. Existing inequality, furthermore, is arguably an outgrowth of the lack of fully addressing prior violations of racial discrimination, including as it changed and adapted over the last half-century.

#### A. School District Secession

Alabama has one of the most permissive school secession laws in the country, and a number of counties have witnessed secession attempts since 2000, many of which have been successful.<sup>349</sup> In Alabama, a community with at least five thousand residents can look into forming its own system.<sup>350</sup> If a district is under a federal desegregation order, a secession should be reviewed to ensure it will not further segregation, although that no longer applies in Mobile County.<sup>351</sup> Under state law, the communities also get possession of

349. *Fractured: The Accelerating Breakdown of America's School Districts: Alabama*, EDBUILD, <https://edbuild.org/content/fractured#AL> (last visited May 22, 2020).

350. *Id.*

351. *E.g.*, *Wright v. Council of Emporia*, 407 U.S. 451 (1972). In fact, a recent proposed secession in Gardendale, Alabama, was prevented in 2018 because of its segregative effect. *See Stout by Stout v. Jefferson Cty. Bd. of Educ.*, 882 F.3d 988 (11th Cir. 2018). However, earlier secessions in the county district from which Gardendale was attempting to secede were successful, and it is unclear why they were permitted to form. *See generally* Erica Frankenberg, *Splintering School Districts: Understanding the Link Between Segregation and Fragmentation*, 34 LAW & SOC. INQUIRY 869 (2009); ERICA FRANKENBERG & KENDRA TAYLOR, CTR. FOR EDUC. AND CIVIL RIGHTS, SCHOOL DISTRICT SECESSIONS: HOW BOUNDARY LINES STRATIFY SCHOOL AND NEIGHBORHOOD POPULATIONS IN JEFFERSON COUNTY, ALABAMA, 1968-2014 (2017). In the last two years, Alabama legislators have proposed bills that would have increased the population required for a municipality to secede. Trisha Powell Crain, *Alabama Lawmaker Wants to Slow Breakaway City School Systems*, AL.COM (Feb. 13, 2019),

public schools that are within municipal boundaries.<sup>352</sup> This state law provision means that countywide districts may be hesitant to invest in new, or renovate, existing school facilities in municipalities that may split from the district, as was the case in Mobile, yet perceptions of neglect may be a factor that municipalities cite in voting to leave the district.<sup>353</sup> In fact, at one of the preliminary meetings, Saraland mayor called the school board president's comments that they might delay improvements to schools in districts looking to secede as "blackmail."<sup>354</sup> In the two decades after MCPSS was declared unitary, three communities have each seceded from the district.<sup>355</sup> Two of the communities are disproportionately white.<sup>356</sup>

Secession discussions first became more substantial in fall 2002 when four north Mobile County municipalities (Chickasaw, Creola, Saraland, and Satsuma; see above map for locations) formed the Delta School Association that would consist of the four communities seceding from MCPSS to become a separate district.<sup>357</sup> Alabama law, however, did not permit a district of

<https://www.al.com/news/2019/02/alabama-lawmaker-wants-to-slow-breakaway-city-school-systems.html>.

352. Crain, *supra* note 353.

353. Mobile County even offered to address some of these concerns and give Chickasaw and Satsuma more autonomy, but the secessions proceeded anyways. Rena Havner Phillips, *Mobile County Schools Offer Deal to Stop Chickasaw, Satsuma from Splitting*, AL.COM (Sep. 9, 2011), [http://blog.al.com/live/2011/09/mobile\\_county\\_schools\\_offer\\_de.html](http://blog.al.com/live/2011/09/mobile_county_schools_offer_de.html). Efforts to offer federated regionalism in merged Memphis–Shelby County, Tennessee, also did not prevent secession. Genevieve Siegel-Hawley et al., *The Disintegration of Memphis-Shelby County, Tennessee: School District Secession and Local Control in the 21st Century*, 55 AM. EDUC. RES. J. 651, 652–53 (2018).

354. Karen Tolkkinen, *Fournier Remarks Get Sharp Reaction*, MOBILE REG., Oct. 11, 2002, at 1A.

355. Kendra Taylor et al., *Racial Segregation in the Southern Schools, School Districts, and Counties Where Districts Have Seceded*, 5 Area Open 1, 10 (2019).

356. *QuickFacts: Satsuma City, Alabama; Saraland City, Alabama*, U.S. CENSUS BUREAU

<https://www.census.gov/quickfacts/fact/table/satsumacityalabama,saralandcityalabama/IPE120218> (last visited Oct. 30, 2019).

357. Chip Drago, *Sarasawumaola?; Intriguing but Unlikely Consolidation of Saraland, Chickasaw, Satsuma, Creola*, MOBILE BAY TIMES, <http://www.mobilebaytimes.com/saraland031908.html>. For decades, there had been discussions of separating the city and county into separate districts, which would have created a largely black city district and white county district. *See also* *Hearing*



multiple municipalities,<sup>358</sup> and thus, communities only had the option of seceding individually to form their own municipal district.

School district secession decisions reflect many varying rationales, and beginning in 2002—shortly after the local tax referendum for the county district’s schools successfully passed<sup>359</sup>—considerable discussion was held in the north Mobile communities and with the district.<sup>360</sup> In 2002, MCPSS was considering building a new Blount High School, which under the 1989 consent decree had been enhanced as a compromise to efforts to integrate it, but it had not been successful at attracting white students.<sup>361</sup> The school was all-black and was one of two high schools in Prichard, an overwhelming black city north of Mobile;<sup>362</sup> the other high school was Vigor, which had become largely black but was more diverse and had originally been the white high school in the area.<sup>363</sup> Because of the growth of students in Satsuma, a largely white community north of Saraland,<sup>364</sup> much of Saraland had been zoned to Vigor as part of final attendance zone changes in the 1980s for the court case,<sup>365</sup> but residents were concerned that, based on the proposed new location of Blount (west of Prichard in Eight Mile), their children would be reassigned to the new school.<sup>366</sup> This new school, long considered because of its integrative potential,<sup>367</sup> was resisted by both the black community that did not want to lose yet another institution and others concerned about

*for a Proposed Two School System Draws Mixed Reactions*, MOBILE BEACON, Apr. 2, 1982.

358. ALA. CODE § 16-14-199 (2019).

359. Turnbull, *supra* note 340.

360. Karen Tolkkinen, *Fournier Remarks Get Sharp Reaction*, MOBILE REG., Oct. 11, 2002, at 1A.

361. PRIDE, *supra* note 45, at 221. As early as the 1982 citizens committee report, they had suggested building a new Blount High School in Eight Mile. *Id.* Prichard leaders protested, asking instead that it become a magnet school, but that also did not occur. *Id.*

362. *Id.* at 160.

363. *Id.* at 101.

364. *QuickFacts: Satsuma City, Alabama; Saraland City, Alabama*, U.S. CENSUS BUREAU <https://www.census.gov/quickfacts/fact/table/satsumacityalabama,saralandcityalabama/IPE120218> (last visited Oct. 30, 2019).

365. Consent Decree, 1988.

366. Karen Tolkkinen, *Blount Rumors on the Agenda*, MOBILE REG., Oct. 10, 2002, at 1B, 3B.

367. PRIDE, *supra* note 45, at 160-162.

whether white families would send their children to largely black schools,<sup>368</sup> which they had rarely been required to do by the district.<sup>369</sup>

The first municipality to secede and form its own district was Saraland in 2006, opening schools in 2008.<sup>370</sup> The district's enrollment nearly doubled in less than a decade of operating schools, with most of the increase coming from white students.<sup>371</sup> City leaders had raised concerns about the county district's leadership for years.<sup>372</sup> The district's period in which accreditation was in probationary status was one such reason.<sup>373</sup> The lack of renovation of schools, such as Adams Middle,<sup>374</sup> was another.<sup>375</sup> Perhaps reflecting their dissatisfaction with the district, city residents had voted against the tax referendum that passed a countywide increase in school taxes

368. *Id.*

369. *See generally* PRIDE, *supra* note 45.

370. Erica Frankenberg, *District Secession Proposal May Further Segregation*, AL.COM (Mar. 29, 2018), [https://www.al.com/opinion/2018/03/district\\_secession\\_proposal\\_ma.html](https://www.al.com/opinion/2018/03/district_secession_proposal_ma.html). *See also* ALEX CRANE, ALA. STATE DEP'T OF EDUC., SARALAND MIDDLE SCHOOL/NELSON ADAMS CAMPUS: SARALAND CITY SCHOOLS 3 (2017).

371. Trisha Powell Crain, *Alabama Public School Enrollment Down, Hispanic Student Population Growing*, AL.COM (Dec. 2, 2018), <https://www.al.com/news/2018/12/alabama-public-school-enrollment-down-hispanic-student-population-growing.html>.

372. Duke, *supra* note 210, at 83.

373. Rena Havner Phillips, *Micromanagement: Actions Landed Mobile County School System on Probation in 2002*, AL.COM (Oct. 11, 2009), [https://www.al.com/live/2009/10/micromanagement\\_actions\\_landed.html](https://www.al.com/live/2009/10/micromanagement_actions_landed.html); Karen Tolkinen, *A Breakaway System*, MOBILE REG., Jan. 30, 2003, at B1.

374. Adams Middle was built originally as a black high school, Nelson L. Adams High School, and was named after the first black millionaire from Africatown. Joe Womack, *Africatown's High School—The Cradle of Mobile's Black Education*, BRIDGE THE GULF (June 11, 2017), <https://bridgethegulfpject.org/blog/2017/africatowns-high-school-cradle-mobiles-black-education>. Each of Saraland's schools now reflects the city name (Saraland Elementary, Middle, and High) although the middle school is known as being at the Nelson Adams campus. *See e.g.*, Crain, *supra* note 373.

375. *See* David Ferrera *Saraland's New \$30 Million High School Set to Open Jan.* 5, AL.COM (Dec. 7, 2009), [https://www.al.com/live/2009/12/saralands\\_new\\_30\\_million\\_high.html](https://www.al.com/live/2009/12/saralands_new_30_million_high.html) (noting that a major reason for Saraland seceding from the county was a concern of neglect).

in 2001.<sup>376</sup> At this time, Saraland had the biggest commercial base of the northern Mobile municipalities but has expanded both commercially and residentially. For example, since 2006, it has had nearly two hundred annexations.<sup>377</sup> In 2010, the city's population was just over thirteen thousand, with over 80% of residents being white.<sup>378</sup> While Mobile's population has declined, Saraland's has increased, which leaders attribute to the school district formation.<sup>379</sup>

In 2012, Chickasaw was the second municipality to secede<sup>380</sup> and has faced a series of financial challenges, including initially refusing to increase taxes to support the new municipal system in 2013.<sup>381</sup> In 2003, the Chickasaw mayor speculated that having its own schools might help offset the city's declining population.<sup>382</sup> In the 2010 Census, it had just over 6,100 residents and 63% were white, continuing a steady decline for the last fifty years.<sup>383</sup> It also had a higher poverty rate than the other municipalities that seceded: 20% of all residents were under the poverty line.<sup>384</sup> Additionally, in comparison to other seceded municipalities, Chickasaw had a higher share of residents

376. Karen Tolkkinen, *A Breakaway System*, MOBILE REG., Jan. 30, 2003, at 1.

377. *Parcel Annexations in Saraland, Alabama*, GIS MOBILE COUNTY.NET, [http://gis.mobilecounty.net/WAB/GIS\\_Engineering\\_Desktop/](http://gis.mobilecounty.net/WAB/GIS_Engineering_Desktop/) (last visited May 21, 2020). It also has a policy that allows non-residents to pay tuition to attend district schools provided they meet academic and behavioral requirements, which may allow the district to be selective on who can cross the district boundary lines and who cannot. SARALAND CITY SCH. SYS., 5.11 NON-RESIDENT STUDENT ADMITTANCE/ENROLLMENT REQUIREMENTS (2016). Business owners and municipal employees may receive a tuition waiver. *Id.*

378. Crain, *supra* note 373, at 3.

379. Lawrence Specker, *Hotter than Baldwin? Saraland Surges in Latest Census Estimates*, AL.COM (May 24, 2018), [https://www.al.com/news/2018/05/hotter\\_than\\_baldwin\\_saraland\\_s.html](https://www.al.com/news/2018/05/hotter_than_baldwin_saraland_s.html).

380. Rena Havner Philips, *Chickasaw, Satsuma School Officials: Today Is a Day for the History Books*, AL.COM (Apr. 5, 2012), [https://www.al.com/live/2012/04/chickasaw\\_satsuma\\_school\\_offic.html](https://www.al.com/live/2012/04/chickasaw_satsuma_school_offic.html).

381. Rena Havner Philips, *'Nobody's Folding,' Chickasaw Superintendent Says After Tax Vote Fails*, AL.COM (Mar. 8, 2013), [https://www.al.com/live/2013/03/nobodys\\_folding\\_chickasaw\\_supe.html](https://www.al.com/live/2013/03/nobodys_folding_chickasaw_supe.html).

382. Tolkkinen, *supra* note 378.

383. *QuickFacts: Chickasaw City, Alabama*, U.S. CENSUS BUREAU <https://www.census.gov/quickfacts/chickasawcityalabama> (last visited May 21, 2020).

384. *Id.*

under the age of eighteen.<sup>385</sup> It shares a border with Prichard, a city with a high black and low-income population, economic challenges, and political acrimony.<sup>386</sup> While it is hard to pinpoint exactly what motivated each secession, according to newspaper accounts at the time, residents disliked sending students to schools outside of Chickasaw, in part due to a county magnet school located in Chickasaw but also because of sending students to high schools located in Prichard.<sup>387</sup> The Chickasaw district operates an elementary school and a middle/high school.<sup>388</sup>

Satsuma was the third municipal district to secede, opening schools in 2012.<sup>389</sup> As of 2010, the city had a little over six thousand residents, 89% of which were white.<sup>390</sup> It operates two schools: Robert E. Lee Elementary<sup>391</sup>

385. *Id.*

386. For example, Chickasaw closed off a street in 2013 leading to an area of Prichard that has a high rate of violence. Robert McClendon, *Chickasaw Erects Barricades on Prichard Border*, AL.COM (Feb. 21, 2013), [http://blog.al.com/live/2013/02/chickasaw\\_erects\\_barricades\\_be.html](http://blog.al.com/live/2013/02/chickasaw_erects_barricades_be.html). Prichard certainly is not alone in terms of political acrimony. One example of this can be seen in the actions of Dan Alexander and the Mobile County school board particularly during the late 1970s and early 1980s. *See generally* PRIDE, *supra* note 45.

387. Rena Havner Philips, *Mayor: Chickasaw Splitting from Mobile County Schools*, AL.COM (Nov. 7, 2010), [http://blog.al.com/live/2010/11/mayor\\_chickasaw\\_splitting\\_from.html](http://blog.al.com/live/2010/11/mayor_chickasaw_splitting_from.html) [hereinafter *Mayor*]. Children from Prichard were also coming in to attend the elementary school in Chickasaw. Rena Havner Philips, *Chickasaw Officials Seeking Students for New School System*, AL.COM (May 14, 2012), [http://blog.al.com/live/2012/05/chickasaw\\_officials\\_seeking\\_st.html](http://blog.al.com/live/2012/05/chickasaw_officials_seeking_st.html).

388. Michael Dumas, *New Chickasaw Elementary School Will Debut Next Week and Give Much-Needed Space to High School Students*, AL.COM (Aug. 4, 2015), [https://www.al.com/news/mobile/2015/08/new\\_chickasaw\\_elementary\\_school.html](https://www.al.com/news/mobile/2015/08/new_chickasaw_elementary_school.html).

389. *Satsuma City Schools: History*, SATSUMA CITY SCHOOLS, <https://www.satumaschools.com/Page/1084> (last visited on May 5, 2020).

390. *QuickFacts: Satsuma City, Alabama*, U.S. CENSUS BUREAU <https://www.census.gov/quickfacts/fact/table/satsumacityalabama,chickasawcityalabama/PST045219> (last visited May 21, 2020).

391. Although for some schools, like Shaw High School, which were the focus of plaintiffs' requests to change mascots and fight songs to be more inclusive of black students when desegregation did eventually make changes, these changes were not uniform across the district. Corey Mitchell, *Schools Named for Confederate Leaders: The Renaming Debate, Explained*, EDUC. WEEK (Apr. 4, 2018), <https://www.edweek.org/ew/issues/confederate-named-schools/index.html>.

and Satsuma High.<sup>392</sup> Like in other secessions,<sup>393</sup> the reasons cited by city leaders and the population were non-racial but instead about the distance to schools (in this case, exacerbated by the Saraland split), the desire for schools to attract homeseekers, and the belief that the new system could “better educate our children than the Mobile County school system.”<sup>394</sup> This remark by a community leader reflects a narrowing vision of whose children a community sees as worth supporting in terms of providing public education that is common across the South where secessions are occurring.<sup>395</sup>

In 2018, an analysis of all secessions in Alabama compared some basic demographic and educational statistics of districts after secessions occurred. Of the three districts that seceded from Mobile County, two had lower per-pupil costs in 2018, and one (Chickasaw) had lower educational performance.<sup>396</sup> Thus, at least to date, two of the systems have not used the local flexibility they sought to increase educational spending as they had discussed prior to the split. Moreover, Chickasaw had a lower share of white students, higher share of students in poverty, and fewer students who were proficient than the county district it left.<sup>397</sup>

Despite these secessions, Mobile County still enrolls approximately 90% of all public school students in the county as of 2016–2017.<sup>398</sup> However,

An earlier report described how black students were subjected to policies such as those governing hair styles that were overly restrictive in comparison to whites in districts including Mobile. THE ALA. COUNCIL ON HUMAN RELATIONS ET AL., IT’S NOT OVER IN THE SOUTH: SCHOOL DESEGREGATION IN FORTY-THREE CITIES EIGHTEEN YEARS AFTER *BROWN* 76 (1972).

392. DR. JOE WALTERS, ALA. STATE DEP’T OF EDUC., SATSUMA CITY SCHOOL SYSTEM 3 (2016).

393. See Erika K. Wilson, *The New School Segregation*, 102 CORNELL L. REV. 139 (2016).

394. Rena Havner Philips, *School Distance Key Issue in Proposed Satsuma Split from Mobile Public Schools*, AL.COM (Jan. 24, 2011), [https://www.al.com/live/2011/01/school\\_distance\\_key\\_issue\\_in\\_p.html](https://www.al.com/live/2011/01/school_distance_key_issue_in_p.html).

395. Siegel-Hawley et al., *supra* note 355.

396. Trisha Powell Crain, *Data Can’t Prove Racism Cause of Alabama School System Split*, AL.COM (Feb. 18, 2018), [https://www.al.com/news/2018/02/motives\\_for\\_alabama\\_school\\_sys.html](https://www.al.com/news/2018/02/motives_for_alabama_school_sys.html).

397. *Id.*

398. See Kendra Taylor et al., *Racial Segregation in the Southern Schools, School Districts, and Counties Where Districts Have Seceded*, 5 AERA OPEN 1 (2019).



the county district has a much lower percentage of white students than Satsuma and Saraland. The districts are more comparable in percentage of free and reduced lunch (FRL) students—though still lower than the county district—while Chickasaw has a much high share of FRL eligible students.

Table 2: Demographic Analysis of Districts in Mobile County, 2016–2017<sup>399</sup>

	Schools	Total enrollment	White %	Black %	FRL %
Saraland	3	3054	78%	15%	39%
Satsuma	2	1417	82%	10%	46%
Chickasaw	2	1056	26%	70%	72%
Mobile County	81	56085	41%	50%	50%
Total	88	61612	43%	48%	50%

### B. Baldwin County

Across Mobile Bay from Mobile County lies Baldwin County, Alabama's other coastal county and part of the Mobile metropolitan area.<sup>400</sup> This large county both reflects its historical roots in agriculture and is increasing in property wealth as a result of the development of beach towns at the southern end of the county.<sup>401</sup> It has always been a mostly white county and district, with disproportionately larger white and affluent populations than Mobile County.<sup>402</sup> If whites, who may disproportionately have more resources, are motivated to leave settings where they may be part of desegregation efforts, Baldwin County would offer an ideal option with close proximity to Mobile.

The district was briefly under a court desegregation order, put in place in 1970, and redrew some attendance zones to attain unitary status.<sup>403</sup> It was

399. *Public Elementary/Secondary School Universe Survey Data*, NAT'L CTR. FOR EDUC. STAT., <https://nces.ed.gov/ccd/pubschuniv.asp> (last visited Nov. 19, 2019) [hereinafter *Universe Survey Data*].

400. *See About Baldwin County*, BALDWINCOUNTYAL.GOV, <https://baldwincountyal.gov/community/about-baldwin-county> (last visited Apr. 18, 2020).

401. *Lee v. Macon Cty. Bd. of Educ.*, 584 F.2d 78, 79 (5th Cir. 1978).

402. *Dillard v. Baldwin Cty. Bd. of Educ.*, 686 F. Supp. 1459, 1462 (M.D. Ala. 1988).

403. *Lee*, 584 F.2d at 79–80.

declared unitary in 1977, and a year later, the Fifth Circuit declined to review building plans that might further segregation.<sup>404</sup> In 1988, plaintiffs successfully challenged the Baldwin County school board's at-large system of representation because it had prevented any African-Americans from being elected.<sup>405</sup>

Of all districts in the state, Baldwin County has seen the largest increase in student enrollment in the last two decades, gaining more than ten thousand new students since 1995–1996, a nearly 50% increase.<sup>406</sup> Stories tracking the decline in the enrollment in MCPSS have pointed to Baldwin County for attracting families with children.<sup>407</sup> Approximately five thousand of the additional students since 1995–1996 are white; there have also been gains in Hispanic and multiracial students.<sup>408</sup> The district was 81% white two decades ago and has also experienced a decline in black students since then (18% black in 1995–1996).<sup>409</sup> This pattern is a continuation of overall population trends in Baldwin County since 1980.<sup>410</sup> In 2018–2019, Baldwin County's enrollment was more than thirty thousand students and 70% white; black students were 11.5%; and Hispanic students 9.5%.<sup>411</sup>

Baldwin County has generally had schools that achieved good accountability ratings. In 2018, for example, no schools were considered failing.<sup>412</sup> Yet, the district has struggled for financial support of its schools even with an increasingly affluent population and higher property wealth.

404. *Id.* at 80.

405. *Dillard*, 686 F. Supp. at 1460.

406. Crain, *supra* note 373.

407. *E.g.*, Rena Havner Phillips, *Mobile County's School Population in Steady Decline*, AL.COM (Mar. 21, 2010), [http://blog.al.com/live/2010/03/mobile\\_county\\_schools\\_populati.html](http://blog.al.com/live/2010/03/mobile_county_schools_populati.html).

Additionally, when the district was facing deep spending cuts before the 2001 tax referendum was approved, some parents noted they were considering moving to Baldwin County if cuts went through. *E.g.*, Sack, *supra* note 338.

408. By contrast, there are eleven thousand fewer white students in Mobile County and nearly five thousand fewer black students since 1996–1997. *See* Crain, *supra* note 373.

409. Crain, *supra* note 373.

410. *See* Frankenberg, *supra* note 372.

411. Crain, *supra* note 373.

412. Cliff McCollum, *Baldwin County Schools Get Good Marks on State Report Card*, GULFcoastNewSToday.COM (Dec. 28, 2018), <http://gulfcostnewstoday.com/stories/baldwin-county-schools-report-card-gets-good-marks,71632>.

Baldwin County voters have, in recent years, not supported property tax increases or renewals that would help the district accommodate its growth.<sup>413</sup> In fall 2018, the school board passed a resolution asking for repeal of the voucher program due to it taking away public funds that would have otherwise been distributed across the state.<sup>414</sup> The county district also faces additional financial challenges from the secession of the beach city of Gulf Shores and its tax revenue due to its wealthy property values.<sup>415</sup>

### C. Magnet Schools

As described above, the central part of the final consent decree in the *Birdie Mae Davis* litigation was the establishment of six magnet schools and one magnet program to help create diverse schools in MCPSS. Originally, there were six magnet schools: three elementary schools and three middle schools.<sup>416</sup> There were elementary-middle pairs for three themes: college preparatory, creative and performing arts, and math/science.<sup>417</sup> At the time of unitary status, these schools enrolled 6% of the district's students.<sup>418</sup> Today, there is a fourth middle school magnet focused on technology that was converted to a magnet school in 2016 because of high demand for the district's other magnet schools at the middle grades.<sup>419</sup> In recent years, the

413. John Sharp, *Baldwin County Voters Approve 3 Mill Renewal, but 1 Mill Loses Out*, AL.COM (Mar. 2, 2016), [https://www.al.com/news/mobile/2016/03/baldwin\\_county\\_voters\\_xxx\\_rene.html](https://www.al.com/news/mobile/2016/03/baldwin_county_voters_xxx_rene.html).

414. Jason Johnson, *Local Schools Call for Repeal of Alabama Accountability Act*, LAGNIAPPE WKLY. (Oct. 24, 2018), <https://lagniappemobile.com/local-schools-call-for-repeal-of-alabama-accountability-act>.

415. John Sharp, *Baldwin School Officials Blast School Split Decision with Gulf Shores As a 'Negative' Impact*, AL.COM (Jan. 18, 2019), <https://www.al.com/news/beaches/2019/01/baldwin-school-officials-blast-school-split-decision-with-gulf-shores-as-a-negative-impact.html>. Acrimonious negotiations between the two districts, including a lawsuit, resulted from trying to interpret the county and new district's respective financial obligations as the districts split.

416. Consent Decree, 1988.

417. *Id.*

418. PRIDE, *supra* note 45, at 224.

419. Chad Petri, *Denton Middle School Begins New Era as Magnet Program*, WKRG.COM (Aug. 9, 2016), <https://www.wkrg.com/news/denton-middle-school-begins-new-era-as-magnet-program/>.

college preparatory elementary and middle schools have become designated as International Baccalaureate (IB) primary and middle level schools.<sup>420</sup>

Additionally, a magnet program was established within LeFlore High School in the early 1980s.<sup>421</sup> It was later enhanced to focus on communications and arts, to add advanced placement courses, and to make a full-day program.<sup>422</sup> LeFlore, located in a historic, middle-class African-American neighborhood and named for Mobile's civil rights leader,<sup>423</sup> did not draw large numbers of white students.<sup>424</sup> It is hard to know how integrated the magnet program was at LeFlore because only entire school numbers are available, but in 1996–1997, of the entire enrollment at LeFlore, only 5% of students were white.<sup>425</sup> It was discontinued as a magnet school in 2007.<sup>426</sup>

The district continued to operate the magnet schools after it was declared unitary,<sup>427</sup> albeit with several notable changes. The locations of

420. Bill Riales, *Phillips Prep Designated International Baccalaureate School*, WKRG.COM (Jan. 7, 2019), <https://www.wkrg.com/local-news/phillips-prep-designated-international-baccalaureate-school/>. Two non-magnet high schools offer the IB Diploma program. *School Choice*, MOBILE COUNTY PUB. SCHS., <https://www.mcpss.com/schoolchoice> (last visited Nov. 17, 2019).

421. PRIDE, *supra* note 45, at 221.

422. Consent Decree, 1988, at 3-6.

423. See *History of John L. LeFlore Magnet High School*, <https://lefloremcpssal.schoolinsites.com/about> (last visited Apr. 18, 2020).

424. Rebecca Catalanello, *The Attraction of Magnet Schools*, MOBILE REG., Mar. 24, 2002, at 1A, 4A.

425. *Universe Survey Data*, *supra* note 401.

426. Rena Havner Philips, *Leflore Getting a New Principal, Again*, AL.COM (May 26, 2010), [https://www.al.com/learning-curve/2010/05/another\\_principal\\_change\\_at\\_leflore.html](https://www.al.com/learning-curve/2010/05/another_principal_change_at_leflore.html). Instead, MCPSS has high school academies, each with a separate theme, and students can apply to each. See *Signature Academies*, MOBILE COUNTY PUB. SCHS., <http://signatureacademies.schoolinsites.com/?DivisionID=21552&ToggleSideNav=ShowAll> (last visited Nov. 17, 2019). In some years, but not the most recent year (2019) LeFlore is one of the district high schools ranked as one of the lowest performing schools under the voucher law (identified as lowest 6%). See, e.g., Trisha Powell Crain, *Failing Alabama Public Schools: 75 on Newest List, Most Are High Schools*, AL.COM (Jan. 24, 2018), [https://www.al.com/news/2018/01/failing\\_public\\_schools\\_75\\_on\\_t.html](https://www.al.com/news/2018/01/failing_public_schools_75_on_t.html).

427. See Bill Riales, *Council Traditional Celebrates 30 Years as a Magnet School*, WKRG.COM (Nov. 14, 2018), <https://www.wkrg.com/local-news/council-traditional-celebrates-30-years-as-a-magnet-school/>.

several of the magnet schools have shifted, including due to the secessions described above. The elementary math and science magnet school was located in Chickasaw, in the northern part of Mobile County.<sup>428</sup> It was eventually relocated to an elementary school in midtown Mobile, further from the downtown Mobile location originally proposed.<sup>429</sup> The elementary arts magnet moved further from downtown towards the middle of Mobile, close to the interstate and another magnet middle school.<sup>430</sup> The newly converted technology magnet school was in a school west of the interstate—an area that historically had a higher percentage of white residents.<sup>431</sup> And the math and science middle school that had been in Chickasaw relocated to a former high school in west Mobile in 2009.<sup>432</sup>

Magnet schools previously provided transportation to some students;<sup>433</sup> however, in part due to state law,<sup>434</sup> magnet school students must now provide their own transportation.<sup>435</sup> Transportation has historically been an important component of any desegregation effort, but especially so for magnet schools that seek to break the linkage between school and housing patterns by attracting students from outside the immediate geographic proximity.<sup>436</sup> Thus, the current policy relies on parents to transport children

428. Rena Havner Philips, *Magnet School Moving from Chickasaw to Downtown Mobile*, AL.COM (Jan. 31, 2013), [https://www.al.com/live/2013/01/magnet\\_elementary\\_school\\_movin.html](https://www.al.com/live/2013/01/magnet_elementary_school_movin.html).

429. See Sally Pearsall Ericson, *The New Eichold-Mertz Magnet School: What Parents Need to Know*, AL.COM (Feb. 10, 2014), [https://www.al.com/live/2014/02/the\\_new\\_eichold-mertz\\_magnet\\_s.html](https://www.al.com/live/2014/02/the_new_eichold-mertz_magnet_s.html).

430. Philips, *supra* note 428.

431. See Rena Philips, *Now Accepting Applications for Denton Magnet School of Technology*, THE WIRE (Apr. 21, 2016), <http://mcpssthewire.com/?p=1489>.

432. See Rena Havner Philips, *Where Will Chickasaw's Magnet School Move?*, AL.COM (Jan. 17, 2012), [https://www.al.com/live/2012/01/where\\_will\\_chickasaws\\_magnet\\_s.html](https://www.al.com/live/2012/01/where_will_chickasaws_magnet_s.html).

433. Elementary school magnets as originally implemented had an extended day, which did not provide transportation. Agreement, *supra* note 284, at B-7–B-8.

434. See Letter from Sadie Cates, Transportation Coordinator, to Parents of Magnet School Students (Aug. 28, 2008), [https://www.southalabama.edu/mathstat/personal\\_pages/carter/cates\\_letter.pdf](https://www.southalabama.edu/mathstat/personal_pages/carter/cates_letter.pdf).

435. By state law, transportation is provided for students living beyond two miles from their non-magnet school. ALA. CODE § 16-8-13 (2019).

436. See *generally* EDUCATIONAL DELUSIONS? WHY CHOICE CAN DEEPEN INEQUALITY AND HOW TO MAKE SCHOOLS FAIR (Gary Orfield, Erica Frankenberg & Associates eds., 2013).



to schools that may be a considerable distance from their home;<sup>437</sup> not all parents, of course, have the means and flexibility to do this.

A number of changes have affected the lottery process, which is used when magnet schools have more applications than available seats.<sup>438</sup> Originally, the district considered whether a student leaving their zoned school would disrupt racial balance.<sup>439</sup> For example, a black student at a predominantly white school would have somewhat lower odds than a black student zoned to a majority black school. That consideration changed once the district was declared unitary, although the district committed to magnet schools' racial diversity until 2000 and a "multicultural setting" after that.<sup>440</sup> A final change in 2017 was the implementation of entrance criteria for magnet school applicants. There are three aspects of enrollment criteria. First, students cannot have above a specified number of absences, tardies, or early dismissals.<sup>441</sup> Second, students must test at grade level on standardized tests or screening tests. Students entering second through eighth grades also must have at least a C average in some subjects and may not have failed any subject.<sup>442</sup> Third, there are requirements regarding discipline, and students cannot have certain types of infractions within the last two or three years.<sup>443</sup> (In the original consent decree establishing the magnet schools, only students who were suspended twice or expelled the preceding year were ineligible for applying to magnet schools.)<sup>444</sup> Students are also required to maintain a seventy or higher average to continue.<sup>445</sup> While federal Magnet Schools Assistance Program (MSAP) regulations give preferences in their competitive grant program to magnet schools that do not have entrance requirements,<sup>446</sup> many other magnet schools around the country have certain academic or behavioral requirements or specialized criteria depending upon

437. See Sadie Cates, *supra* note 436.

438. MCPSS Magnet Schools Program, MOBILE COUNTY PUB. SCHS., <https://www.mcpss.com/magnetschools> (last visited Oct. 29, 2019).

439. Consent Decree, 1988, at B-1, B-2.

440. Rebecca Catalanello, *The Attraction of Magnet Schools*, MOBILE REG., Mar. 24, 2002, at 1A, 4A.

441. MOBILE CTY. PUB. SCH. SYS., POLICIES AND PROCEDURE HANDBOOK 8 (2018).

442. *Id.*

443. *Id.*

444. Consent Decree, 1988.

445. See MOBILE CTY. PUB. SCH. SYS., *supra* note 443, at 1.

446. See 20 U.S.C. § 7231e (2019).

the magnet theme.<sup>447</sup> Such requirements may limit access for all students and impede the magnet school's desegregative ability.<sup>448</sup>

Data is only available for the years prior to the change in the magnet schools' lottery process and admissions criteria. As seen, magnet schools were quite effective when the district was declared unitary. Except for LeFlore, in 1996–1997, the white percentage of each magnet school was within five percentage points of the district percentage. However, the percentage of FRL students was considerably lower than the district share of students, particularly at Phillips Preparatory (a middle school with college prep focus). In 2016–2017, the magnet schools were less reflective of the district's racial diversity. All of the magnet schools had experienced a sharper decline in white percentage than the district as a whole. In 2016–2017, however, almost all of the magnet schools had a disproportionately lower share of FRL students, as was the case two decades earlier. The white percentage of students in several magnet schools was more than five percentage points lower than the district white percentage, although some of these, such as Eichold-Mertz or Denton, might be as a result of moves and phasing in the magnet school. However, Dunbar and Council were original magnet schools in downtown Mobile that were considerably lower than the district in white percentage in 2017 and had experienced substantial decline in white percentage.

447. Martha Minow, *Confronting the Seduction of Choice: Law, Education, and American Pluralism*, 120 YALE L.J. 814, 826–27 (2011).

448. Genevieve Siegel-Hawley & Erica Frankenberg, *Designing Choice: Magnet School Structures and Racial Diversity*, in EDUCATIONAL DELUSIONS? WHY CHOICE CAN DEEPEN INEQUALITY AND HOW TO MAKE SCHOOLS FAIR 107, 107–28 (Gary Orfield, Erica Frankenberg, & Associates eds., 2013); Erica Frankenberg & Chinh Q. Le, *The Post-Parents Involved Challenge: Confronting Extralegal Obstacles to Integration*, 69 OHIO ST. L.J. 1015, 1060 (2008). See JENNIFER AYSCUE ET AL., CIVIL RIGHTS PROJECT/PROYECTO DERECHOS CIVILES, CHOICES WORTH MAKING: CREATING, SUSTAINING AND EXPANDING DIVERSE MAGNET SCHOOLS (2017), <https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/choices-worth-making-creating-sustaining-and-expanding-diverse-magnet-schools>.

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Table 3: Mobile County Magnet Schools at Time of Unitary Status and Twenty Years Later<sup>449</sup>

School	2016–2017			1996–1997		
	Enrollment	White %	FRL %	Enrollment	White %	FRL %
Eichold-Mertz School of Math and Science <sup>450</sup>	459	31%	36%	251	53%	30%
Old Shell Creative Performing Arts	511	35%	37%	245	49%	41%
K.J. Clark Middle School	863	43%	25%	887	53%	29%
Phillips Preparatory Middle School	809	39%	26%	796	57%	18%
Dunbar Creative Performing Arts	519	24%	41%	738	48%	32%
W.H. Council Traditional School	684	31%	27%	516	50%	28%
Jeremiah A. Denton Middle School <sup>451</sup>	448	13%	61%	n/a		

449. *Universe Survey Data*, *supra* note 401.

450. 1996–1997 enrollment is from Chickasaw Math and Science Academy, which relocated to Eichold-Mertz after Chickasaw seceded from MCPSS. *See* Sally Pearsall Ericson, *The New Eichold-Mertz Magnet School: What Parents Need to Know*, AL.COM (Feb. 10, 2014), [https://www.al.com/live/2014/02/the\\_new\\_eichold-mertz\\_magnet\\_s.html](https://www.al.com/live/2014/02/the_new_eichold-mertz_magnet_s.html).

451. Enrollment may include seventh and eighth graders who were part of the school before its conversion to magnet. *See* Taren Reed, *First Day of Classes at*

School	2016–2017			1996–1997		
	Enrollment	White %	FRL %	Enrollment	White %	FRL %
John L. LeFlore Preparatory Academy	n/a <sup>452</sup>			1664	5%	45%
MCPSS	56,085	41%	50%	64,196	49%	54%

#### D. Current Demographics and Segregation in Mobile Schools

Research on school desegregation suggests that plans that encompass much of a metropolitan area, which MCPSS did prior to secession, and that eliminate enclave schools, which MCPSS did not do prior to secession, are likely to not only sustain substantial desegregation but are also associated with higher declines in housing segregation, which in turn helps to perpetuate school integration.<sup>453</sup> Below I describe the extent of segregation in Mobile schools at the time of unitary status, which had enclaves existing as well as schools that had never been successfully desegregated. Today, those patterns still exist, albeit some of these enclaves are now separate districts altogether making it even more unlikely that patterns will change.

Analysis of school-level enrollment patterns in all public schools in Mobile County in 1996–1997 and 2016–2017 shows both commonalities and shifting demographics. At both points in time, there is a fairly strong connection between the percentage of white students and FRL students. In

*New Denton Magnet School of Technology*, MYNBC15.COM (Aug. 10, 2016), <https://mynbc15.com/news/back-to-school/first-day-of-classes-at-new-denton-magnet-school-of-technology>.

452. LeFlore was not a magnet school in 2016–2017. *See* Rena Havner Philips, *LeFlore Getting a New Principal, Again*, AL.COM (May 26, 2010), [https://www.al.com/learning-curve/2010/05/another\\_principal\\_change\\_at\\_leflore.html](https://www.al.com/learning-curve/2010/05/another_principal_change_at_leflore.html); For a list of the current magnet schools, *see MCPSS Magnet Schools Program*, MOBILE CTY. PUB. SCHS., <https://www.mcpss.com/magnetschools> (last visited May 22, 2020).

453. *See, e.g.*, Diana Pearce, *Breaking Down the Barriers: New Evidence on the Impact of Metropolitan School Desegregation on Housing Patterns* 40 (1980) (unpublished report submitted to the Nat'l Inst. of Educ.); SIEGEL-HAWLEY, *supra* note 10.

particular, higher shares of white students were associated with lower shares of FRL students at the school level during both time periods. Across all schools in the county, white isolation—tracking national trends<sup>454</sup>—remains high but has declined. In 1996–1997, white students, on average, attended schools that were 72% white; in 2016–2017, the share was 65%.<sup>455</sup> In both years, white students have much higher exposure to same-race students than is their share of the overall enrollment in the county (49% and 43%, respectively).

In 1996–1997, the year the district was declared unitary, more than twenty thousand students (33% of all students) in the district attended racially isolated schools; over fourteen thousand students attended twenty-one schools with less than 10% white students, and 6,785 attended nine racially isolated white schools with less than 10% students of color.<sup>456</sup> Of the twenty-one racially isolated minority schools, eight had no white students at all and twenty had student enrollments that were 80% or more FRL.<sup>457</sup> 45% of the district's black students went to schools with 90% or more students of color.<sup>458</sup> By contrast, only one of the racially isolated white schools had a majority of FRL students.<sup>459</sup>

Two decades later, the overall number and percentage of students in racially isolated schools has declined slightly, due in large part to the sharp decline in racially isolated white schools.<sup>460</sup> But there had been an increase in the percentage of black students in schools with 90% or more students of color, just over 50% of all black students.<sup>461</sup> In 2016–2017, 959 students went to three 90%–100% white schools; these all had less than 40% FRL.<sup>462</sup> Two of these schools (one new since 1996–1997) were located in western Mobile

454. GARY ORFIELD ET AL., CIVIL RIGHTS PROJECT/PROYECTO DERECHOS CIVILES, HARMING OUR COMMON FUTURE: AMERICA'S SEGREGATED SCHOOLS 65 YEARS AFTER *BROWN* (2019), <https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/harming-our-common-future-americas-segregated-schools-65-years-after-brown>.

455. *Universe Survey Data*, *supra* note 401.

456. *Id.*

457. *Id.*

458. *Id.*

459. *Id.*

460. *Id.*

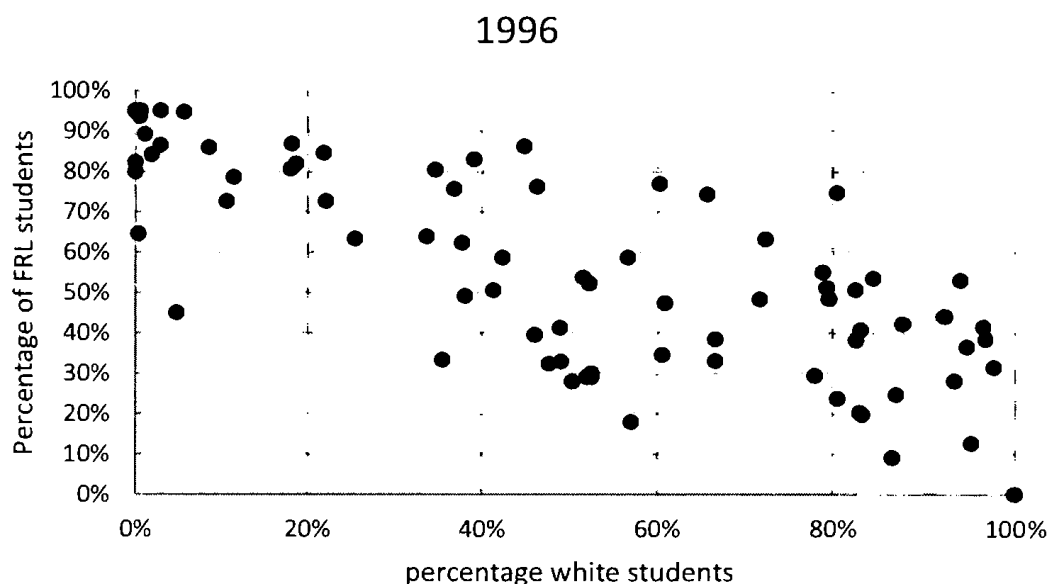
461. *Id.*

462. *Id.*



County, and the other was at the extreme southern end on a peninsula,<sup>463</sup> where the geographic location would make integration challenging. By contrast, the number of students in racially isolated minority schools has increased to 15,403 in twenty-eight schools.<sup>464</sup> All but two of these schools had at least 70% FRL.<sup>465</sup> Four schools were newly built since 1996–1997,<sup>466</sup> and it is unclear the extent to which racial composition of the school enrollment or re-evaluating catchment zone boundaries were part of the construction decision-making process. Thirteen of the twenty-four schools that were open were also 90%–100% students of color two decades earlier.<sup>467</sup>

Figure 1: School-level Relationship of White Students and FRL Eligible Students<sup>468</sup>



463. *Id.*

464. *Id.*

465. *Id.*

466. *Id.* The four new schools do not include schools like Blount High School that are in a new location but remain racially isolated.

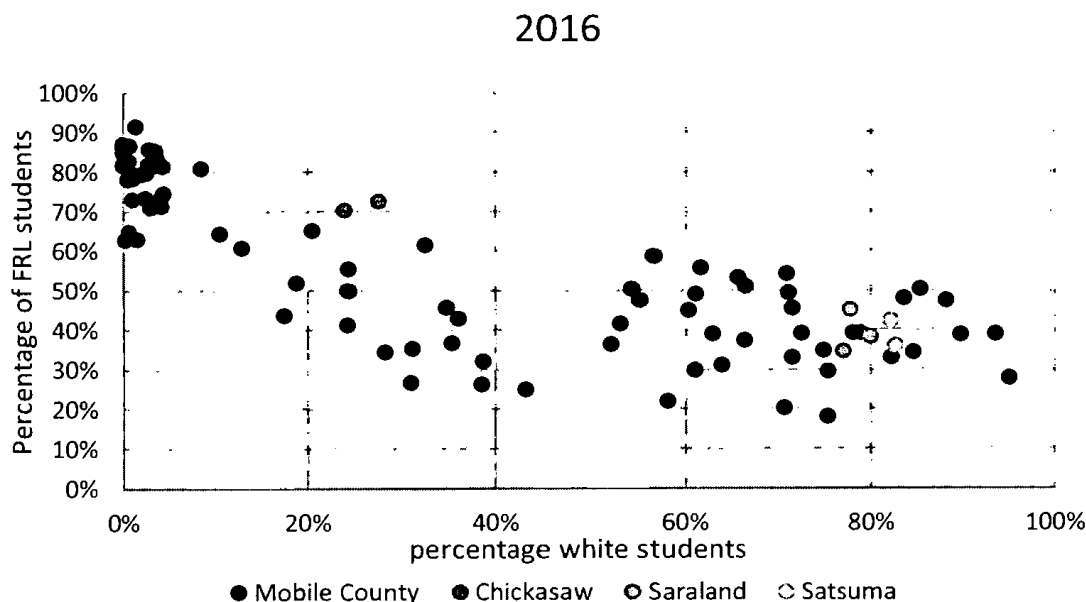
467. *Id.*

468. *Id.*

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Richard Pride described the movement of white students from formerly white schools in the city of Mobile to suburban county schools during the 1970s after the district finally adopted its most comprehensive rezoning plan as a result of the 1971 consent decree.<sup>469</sup> This pattern has continued in the two decades after unitary status. A number of elementary schools experienced fairly sharp racial transition during the ensuing two decades. A dramatic example of racial transition during this time is John Will Elementary school, which had been 52% white (and 52% FRL) in 1996–1997 but was 2% white in 2016–2017.<sup>470</sup> John Will is located in the same western Mobile neighborhood where Clark Magnet School was relocated.<sup>471</sup> Clark, as seen above, is much more racially integrated than John Will.<sup>472</sup> Three other schools have experienced at least a 40 percentage point decline in the percentage of white students.<sup>473</sup> Two schools were more than 60% white in

469. PRIDE, *supra* note 45, at 186. For example, Nan Gray Davis and Grand Bay elementary schools each had an increase of nearly three hundred white students in the 1970s while city schools like Mae Eanes and Old Shell Road had dramatic declines in white students.

470. *Universe Survey Data*, *supra* note 401.

471. *Id.*

472. *Id.*

473. *Id.*

1996–1997 and are now just over 20% white.<sup>474</sup> Both schools are in areas of the county that have historically had higher percentages of white students, one of which is near the location of a newly built school that is 88% white, and may be attracting white students from the older school.<sup>475</sup>

At the high school level, MCPSS has instituted signature academies in which each high school develops a theme, and students are allowed to transfer regardless of where they live for a theme they desire.<sup>476</sup> Transportation is provided for students.<sup>477</sup> Most of the themes are related to career or technical,<sup>478</sup> although two high schools in Mobile offer the International Baccalaureate program.<sup>479</sup> Both have white percentage of enrollment that is at least 20 percentage points lower than in 1996–1997.<sup>480</sup>

As mentioned above, LeFlore is no longer an official magnet program and has nine hundred fewer students in 2016–2017 than two decades earlier.<sup>481</sup> Vigor, a high school in Prichard where some of the students in the seceding towns went, has also experienced dramatic enrollment declines.<sup>482</sup> Such lower enrollments may hamper the ability to offer a wide array of curricular and extracurricular options to attract students. By contrast, Blount High School, which was finally rebuilt in Eight Mile,<sup>483</sup> had one hundred more students in 2016–2017 than two decades earlier.<sup>484</sup> It is still overwhelmingly black—but the 2% of students who are white is an increase from zero white students in 1997.<sup>485</sup> The percentage of economically

474. *Id.*

475. Pearl Haskew Elementary, 88% white in 2016-17, is close to Burroughs Elementary. *Id.*

476. See Sally Pearsall Ericson, *4 More Signature Academies Opening in Mobile County High Schools*, AL.COM (Aug. 7, 2014), [https://www.al.com/news/mobile/2014/08/5\\_more\\_signature\\_academies\\_ope.html](https://www.al.com/news/mobile/2014/08/5_more_signature_academies_ope.html).

477. *Id.* Transportation is no longer provided, however.

478. *Id.*

479. *School Choice*, *supra* note 434.

480. *Universe Survey Data*, *supra* note 401.

481. *Id.*

482. *Id.*

483. Despite protests, the district tore down Blount High School and several other schools that had historically served black students. See Rena Havner Philips, *School System to Tear Down Old Blount, Hillsdale, Glendale Schools*, AL.COM (Nov. 30, 2010), [https://www.al.com/live/2010/11/school\\_system\\_to\\_tear\\_down\\_old.html](https://www.al.com/live/2010/11/school_system_to_tear_down_old.html).

484. *Universe Survey Data*, *supra* note 401.

485. *Id.*

disadvantaged students was also lower, indicating some improvement in diversity.<sup>486</sup>

Meanwhile, the five county high schools with a majority white enrollment are all beyond the city limits.<sup>487</sup> Furthermore, a number of these majority white high schools in the county have an increasing enrollment size. One of the schools that civil rights leader John LeFlore had tried to integrate before filing the lawsuit in 1963, Baker High School, located west of the city limits in the county,<sup>488</sup> remains majority white and has grown from 1,900 to 2,800 students in two decades.<sup>489</sup> Mary G. Montgomery High School, also west of the city,<sup>490</sup> has similarly grown 50% in enrollment over intervening decades;<sup>491</sup> it was 75% white in 2016–2017.<sup>492</sup> And the newest high school located in the southern part of the county outside the city was established since the district was declared unitary.<sup>493</sup> It was also 75% white, enrolling 1,700 students.<sup>494</sup> While some schools in the city may draw from outside the city limits, the sorting at the high school level, particularly after the secession of the three districts, is stark.<sup>495</sup>

The high school that was the first to be desegregated back in 1963 is one such school wrestling with the demographic changes. Murphy High School, located in midtown Mobile east of the interstate,<sup>496</sup> has a non-

486. *Id.*

487. *Id.*

488. *Baker High School (Alabama)*, WIKIPEDIA.ORG, [https://en.wikipedia.org/wiki/Baker\\_High\\_School\\_\(Alabama\)](https://en.wikipedia.org/wiki/Baker_High_School_(Alabama)) (last visited May 22, 2020).

489. *Universe Survey Data*, *supra* note 401.

490. *See About the School*, MOBILE CTY. PUB. SCHS., <https://www.mgmvikings.com/aboutus> (last visited Apr. 18, 2020).

491. *Universe Survey Data*, *supra* note 401.

492. *Id.*

493. *Our History*, MOBILE CTY. PUB. SCHS., <https://www.almabryanthhs.com/aboutus> (last visited Apr. 30, 2020).

494. *Universe Survey Data*, *supra* note 401.

495. Comments made by district leaders reflect some of these trends. *See, e.g.*, Jason Johnson, *MCPSS Shifts Plans for Historic Murphy High School*, LAGNIAPPE WKLY. (Jan. 10, 2010), <https://lagniappemobile.com/mcpss-shifts-plans-historic-murphy-high-school/>.

496. *See About the School*, MOBILE CTY. PUB. SCHS., <https://www.mhspanthers.com/aboutus> (last visited Apr. 18, 2020).

contiguous boundary that also pulls in students from western Mobile.<sup>497</sup> It was originally the first high school in the county for white students and moved to its current location in 1926.<sup>498</sup> The school was briefly relocated to temporary structures on the grounds of another west Mobile school after extensive damage from a 2012 tornado;<sup>499</sup> the school was subsequently renovated in its midtown location.<sup>500</sup> The school was one of the first in southern Alabama to have an International Baccalaureate program starting in the early 1990s<sup>501</sup> and has developed an early college program with the University of Alabama.<sup>502</sup> The district envisions every student enrolling in one of the “Signature Academies” at Murphy.<sup>503</sup> The district had considered making Murphy an open enrollment school to pull students from across the district as a means to increase enrollment generally, implementing academic criteria for admission to the school—perhaps particularly to attract white

497. See, e.g., *Attendance Zone Information*, MOBILE CTY. PUB. SCHS., <https://www.mcpss.com/attendancezones> (last visited Oct. 29, 2019) (indicating Murphy’s High School’s non-contiguous zoning pattern). Over the years, efforts to make the boundaries more contiguous have been discussed, but they have been met with resistance from Murphy families and alumni. See, e.g., Rena Havner Philips, *Mobile Superintendent Drops Plan to Change High School Attendance Borders*, AL.COM (Mar. 15, 2010), [https://www.al.com/live/2010/03/mobile\\_superintendent\\_drops\\_pl.html](https://www.al.com/live/2010/03/mobile_superintendent_drops_pl.html).

498. Murphy High School was originally Barton Academy, founded in the early 1800s. *School History*, MURPHY HIGH SCH. ALUMNI ASS’N, INC., <http://www.murphyalumni.org/School-History.html> (last visited Oct. 29, 2019).

499. Rena Havner Philips, *Who Will Pay to Rebuild Tornado-Damaged Murphy High?*, AL.COM (Dec. 28, 2012), [https://www.al.com/live/2012/12/who\\_will\\_pay\\_to\\_rebuild\\_tornad.html](https://www.al.com/live/2012/12/who_will_pay_to_rebuild_tornad.html).

500. The renovations included a new face for the school auditorium and a red-carpet opening event. Michelle Matthews, *Tornado-Damaged Murphy High School Auditorium Reopens in Grand Style*, AL.COM (May 9, 2016), [https://www.al.com/living/2016/05/mobiles\\_murphy\\_high\\_school\\_aud.html](https://www.al.com/living/2016/05/mobiles_murphy_high_school_aud.html).

501. S.S. *Murphy High School*, INT’L BACCALAUREATE, <https://www.ibo.org/en/school/000646> (last visited Oct. 29, 2019).

502. Emily Hill, *University of Alabama Partners with Murphy High School to Offer College Classes on Campus*, AL.COM (Jan. 27, 2015), [https://www.al.com/news/mobile/2015/01/university\\_of\\_alabama\\_partners.html](https://www.al.com/news/mobile/2015/01/university_of_alabama_partners.html).

503. *Academy Overview*, MURPHY HIGH SCH., <https://www.mhspanthers.com/Academies> (last visited Oct. 29, 2019).



students that may be going to private schools.<sup>504</sup> However, possibly due to concern from other high schools about how such a plan would affect their enrollment, it did not get enough support to be approved.<sup>505</sup>

### E. *On the Horizon: Privatization*

In addition to trends described already affecting Mobile schools, there are two statewide changes that will likely further impact the public schools. In 2013, the state enacted the Alabama Accountability Act (AAA), commonly referred to as a voucher program.<sup>506</sup> It provides public funds for low-income students to attend other public or private schools, with a priority for students who would attend schools designated as “failing.”<sup>507</sup> In 2016–2017, just over four thousand students statewide received voucher funding.<sup>508</sup> The majority of participating students are African-American and low-

504. Jason Johnson, *MCPSS Mulls ‘Open Zone’ School at Murphy High*, LAGNIAPPE WKLY. (Oct. 18, 2017), <https://lagniappemobile.com/mcpss-mulls-open-zone-school-murphy-high/>.

505. *Id.*

506. 2013 Ala. Laws 2013-64.

507. *AAA Report Independent Research 2014-2015*, ALA. DEP’T OF REVENUE, [https://revenue.alabama.gov/wp-content/uploads/2017/05/AAA\\_Report\\_Independent\\_Research\\_2014-2015.pdf](https://revenue.alabama.gov/wp-content/uploads/2017/05/AAA_Report_Independent_Research_2014-2015.pdf), at 1. Families receive a tax credit for making a donation to the fund. Robert McClendon, *Alabama Accountability Act FAQ, A Guide to the Most Radical Education Reform in Decades*, AL.COM (Mar. 1, 2013), [https://www.al.com/wire/2013/03/alabama\\_accountability\\_act\\_faq.html](https://www.al.com/wire/2013/03/alabama_accountability_act_faq.html).

Opponents of the act argued that such funding might instead have gone to the public school districts. See Michael Warrick, *Baldwin County School Board Asks State to Repeal Alabama Accountability Act*, FOX10TV.COM (Oct. 22, 2018), [https://www.fox10tv.com/news/baldwin-co-school-board-asks-state-to-repeal-alabama-accountability/article\\_0ea47b6e-d661-11e8-b0bf-637e9990b488.html](https://www.fox10tv.com/news/baldwin-co-school-board-asks-state-to-repeal-alabama-accountability/article_0ea47b6e-d661-11e8-b0bf-637e9990b488.html) (reporting detractors’ claim that public schools lost \$140 million to tax credits).

508. JOAN M. BARTH ET AL., THE INST. FOR SOC. SCI. RESEARCH, EVALUATION OF THE ALABAMA ACCOUNTABILITY ACT: ACADEMIC ACHIEVEMENT TEST OUTCOMES OF SCHOLARSHIP RECIPIENTS 2016-2017 4 (Sept. 2018), [https://revenue.alabama.gov/wp-content/uploads/2018/09/AAA\\_Report\\_Independent\\_Research\\_2016-2017.pdf](https://revenue.alabama.gov/wp-content/uploads/2018/09/AAA_Report_Independent_Research_2016-2017.pdf).

Public schools could be affected by students who leave them using these public funds or who choose to enroll in schools using this funding.

income.<sup>509</sup> In MCPSS in January 2019, there were nine schools on the list of schools that gave students preference under AAA, including three of the district's twelve high schools.<sup>510</sup>

In 2015, Alabama became the forty-third state to approve a charter school law.<sup>511</sup> In 2017–2018, Mobile was home to the first charter high school in the state,<sup>512</sup> drawing students from a three-county area.<sup>513</sup> Eventually, it plans to expand to 350 students, focusing on over-age, under-credit students.<sup>514</sup> The effect of these and other charter schools, should they be approved, on segregation and opportunity in the public schools should be carefully monitored.<sup>515</sup>

509. *Id.* at i.

510. *AAA Failing School List January 2019*, ALA. STATE DEP'T OF EDUC. (Jan. 2019),

<https://www.alsde.edu/dept/data/AAA%20Tabbed/AAA%20Failing%20School%20List%20January%202019.pdf>. The high schools on the list from Mobile County have few white students. Some researchers have argued that the use of accountability scores to label schools as failing further impedes efforts to get white families to send their children to schools largely comprised of students of color. This is especially important given the choice-based nature of the high school signature academies. *See, e.g.*, AMY STUART WELLS, NAT'L EDUC. POLICY CTR., SEEING PAST THE "COLORBLIND" MYTH OF EDUCATION POLICY: ADDRESSING RACIAL AND ETHNIC INEQUALITY AND SUPPORTING CULTURALLY DIVERSE SCHOOLS (2014), [https://nepc.colorado.edu/sites/default/files/pb-colorblind\\_0.pdf](https://nepc.colorado.edu/sites/default/files/pb-colorblind_0.pdf).

511. Arianna Prothero, *Alabama Governor Signs Measure to Allow Charter Schools*, EDUC. WEEK (Mar. 19, 2015),

[http://blogs.edweek.org/edweek/charterschoice/2015/03/alabama\\_becomes\\_43rd\\_state\\_allowing\\_charter\\_schools\\_to\\_open.html](http://blogs.edweek.org/edweek/charterschoice/2015/03/alabama_becomes_43rd_state_allowing_charter_schools_to_open.html).

512. *Annual Report 2018/2019*, ACCEL DAY & EVENING ACAD. (2019), [https://static1.squarespace.com/static/5d0802cb97b96a0001f97910/t/5da8dbd10931b574f7a4205e/1571347430646/ACCEL\\_AnnualReport\\_2018-2019\\_WEB.pdf](https://static1.squarespace.com/static/5d0802cb97b96a0001f97910/t/5da8dbd10931b574f7a4205e/1571347430646/ACCEL_AnnualReport_2018-2019_WEB.pdf).

513. *Id.* (stating that the school serves Mobile, Baldwin, and Washington counties).

514. *See id.* at 2.

515. The consensus of researchers is that charter schools have segregating effect. *See, e.g.*, Erica Frankenberg et al., *Choice Without Equity: Charter School Segregation*, 19 EDUC. POL'Y ANALYSIS ARCHIVES, Jan. 10, 2011, at 1, <https://epaa.asu.edu/ojs/article/view/779/878>; Erica Frankenberg et al., *Exploring School Choice and the Consequences for Student Racial Segregation Within Pennsylvania's Charter School Transfers*, 25 EDUC. POL'Y ANALYSIS ARCHIVES, Mar. 13, 2017, at 1, <https://epaa.asu.edu/ojs/article/view/2601/1883>; Julian Vasquez Heilig et al., *Choice Without Inclusion?: Comparing the Intensity of Racial*

With limited information available about how these changes might affect students and schools, it is uncertain whether they will increase stratification or withdraw financial resources from the public schools.<sup>516</sup>

## V. REFLECTIONS ON *BROWN* FROM MOBILE'S EXPERIENCE

What would it mean to take *Brown* seriously? The findings from present-day Mobile County should not be surprising, given a failure to take seriously our constitutional requirements of equal protection and the Court's unwillingness to remedy the persisting vestiges of segregation. In many ways, Mobile County, as a countywide district for fifty years after *Brown*, should have provided an ideal setting for realizing school desegregation, given the findings of how such diverse counties provide a demographic advantage that is often not available in other parts of the country with higher fragmentation of metropolitan areas. Moreover, there were a range of civil rights groups and educators working to further school integration in Mobile.<sup>517</sup>

But in many ways, desegregation was fought vigorously and successfully in Mobile, until those working to help accomplish integration grew weary and the costs of integration grew too high for black Mobilians in terms of the lengths of bus rides, the closing of historically black schools, the loss of black educators, and the unequal treatment of black children in many schools. The courts too played an important role by not acknowledging the many ways in which those who sought to resist desegregation were able to do so and by minimizing its extent. Unlike its counterpart in the Supreme

*Segregation in Charters and Public Schools at the Local, State and National Levels*, 9 EDUC. SCI., Sept. 2019, at 1, <https://www.mdpi.com/2227-7102/9/3/205/htm>.

516. See, e.g., Jason Johnson, *Scholarship Families Defend Alabama Accountability Act*, LAGNIAPPE WKLY. (Nov. 28, 2018), <https://lagniappemobile.com/scholarship-families-defend-alabama-accountability-act/>; Johnson, *supra* note 506.

517. One notable exception to this is the role of the major newspaper in Mobile during desegregation, the Mobile Press-Register. Until the mid-1990s, the paper deliberately chose not to write about desegregation, and in earlier years there was concern about whether covering desegregation stoked racial fears. See PRIDE, *supra* note 45; Foley, *supra* note 40. In other regions, the role of media has been a key factor in helping communities implement integration. See, e.g., JENNIFER JELLISON HOLME & KARA S. FINNEGAN, *STRIVING IN COMMON: A REGIONAL EQUITY FRAMEWORK FOR URBAN SCHOOLS* (2018).

Court decisions in April 1971, Charlotte-Mecklenburg, which was remarkably desegregated after the Court decision until it was declared unitary three decades later, desegregation was never meaningfully attempted in a widespread, sustained manner in Mobile County schools. Part of that was due to the failure of the district leadership at the time and the political elite that influenced their decisions. But another major factor was a failure of the courts in failing to implement and enforce effective desegregation requirements out of concern that they would be seen as moving too quickly or seen as abrogating “local control” from the districts. In later years of the *Birdie Mae Davis* case, the judge rarely issued rulings at all,<sup>518</sup> and there were lengthy delays in responding to plaintiffs’ filings.<sup>519</sup> The judge’s public comments signaled his inclination not to require more widespread desegregation efforts, and in 1986, he found that the district had not achieved unitary status, but he gave no guidance about how to address the problem.<sup>520</sup> This permitted racial discrimination to persist and adapt as conditions and the law changed. Further, allowing enclaves to exist may have fueled residential segregation because white families’ residential decisions were affected by uneven spread of desegregation.<sup>521</sup> The association of addresses with majority white school zones was accepted, making any potential changes to further school integration politically challenging.<sup>522</sup> Yet, the law increasingly came to see this as a private decision on the part of homeowners.<sup>523</sup>

518. Duke, *supra* note 210, at 46.

519. See, e.g., Foley, *supra* note 40, at 204.

520. Davis v. Bd. of Sch. Comm’rs, No. 3003-63-H, 1986 U.S. Dist. LEXIS 27519 (S.D. Ala. Mar. 27, 1986).

521. To this issue specifically in Mobile, see Frankenberg, *supra* note 325. See also Pearce, *supra* note 455.

522. At the same time, Mobile is not unique in this respect but is a ubiquitous way in which the law was not able to adapt to address those seeking to evade integration and perpetuate racial inequality within and between districts. See, e.g., GENEVIEVE SIEGEL-HAWLEY, EDUCATIONAL GERRYMANDERING: RACE AND ATTENDANCE BOUNDARIES IN A DEMOGRAPHICALLY CHANGING SUBURB (2013); Erica Frankenberg & Genevieve Siegel-Hawley, *Public Decisions and Private Choices: Reassessing the School-Housing Segregation Link in the Post-Parents Involved Era*, 48 WAKE FOREST L. REV. 397 (2013); David D. Liebowitz & Lindsay Page, *Does School Policy Affect Housing Choices? Evidence from the End of Desegregation in Charlotte-Mecklenburg*, 51 AM. EDUC. RES. J. 671 (2014).

523. Freeman v. Pitts, 503 U.S. 467 (1992).

However, it is also important to recognize the progress that did occur, and likely would not have been accomplished were it not for the use of the law as a reform tool. Moreover, there are students, like me, who did have racially diverse experiences in the Mobile County school system. According to reports filed with the court,<sup>524</sup> my elementary schools, Saraland and John Will, had 15% and 28% black students in 1980, respectively.<sup>525</sup> I was in the second class admitted to Phillips Preparatory School, the academically-focused magnet middle school, which was 44% black in the early 1990s.<sup>526</sup> In 1996, while I was in high school, Murphy High was 52% black.<sup>527</sup> As noted above, all of these schools except Saraland have experienced dramatic racial transformations, with many fewer white students in each.<sup>528</sup> There was inequality in my school experiences while still under court order, and I became increasingly aware of differences between the opportunities in my schools and other schools in the county.<sup>529</sup> Phillips, perhaps as a result of being created from the consent decree in 1988,<sup>530</sup> had no tracking, meaning that classes were not segregated by ability or race. And, although I have no way of knowing how widespread such structures were, my middle and high schools had structures to ensure diverse representation, for example, in extracurricular activities. For some families who sought more diverse schools and had the means to attend them, desegregation was possible and, as seen by public opinion polling at several points in time, younger adults in Mobile by the 1990s who had experienced desegregation had more positive attitudes about its benefits.<sup>531</sup> Unfortunately, in the time since *Brown*, desegregated schooling experiences have been the exception rather than the rule in Mobile, despite a thirty-four-year legal case. Moreover, there is little evidence that white students here were willing to go to schools in which they would be the minority. Where desegregation happened, it was more likely to

524. Duke, *supra* note 210, at 177–79.

525. *Id.* at 185.

526. *Id.* at 192.

527. *Id.* at 196.

528. *Id.* at 177–99.

529. Similarly, high school students in Mobile County continue to note their perceptions of inequality among schools. See MOBILE AREA EDUC. FOUND., THE EQUITY PROJECT: 2016 STUDENT REPORT (2016), <http://www.maef.net/wp-content/uploads/2014/06/Equity-Report-2016-.pdf>.

530. Consent Decree, 1988.

531. PRIDE, *supra* note 45, at 154–56.



require further transportation of black students leaving their neighborhoods and school, where they often left behind rich histories and traditions.

The overwhelming preponderance of social science evidence in the intervening sixty-five years since the *Brown* decision illustrates the importance of integrated schools for students of color, for white students, and for our society.<sup>532</sup> Charles Hamilton Houston and other civil rights lawyers of his era chose to address segregation through the schools because of their belief that early exposure to and learning with one another in our “common school” would help to perpetuate desegregation in other facets of society.<sup>533</sup> Social science evidence has illustrated this self-perpetuating nature of desegregated schools, finding that adults are more likely to live and work in desegregated communities if they attended integrated schools and that black graduates of desegregation are much more likely to have a range of positive outcomes across their life course.<sup>534</sup> Though education is often framed as a private good for an individual student or family, this goes against the origins of the very nature and need for public schools and addressing this is more important than ever at a time in which a majority of the nation’s public school students are students of color.<sup>535</sup> Communities and our nation stand to lose if we are educating students in schools that are not helping to prepare them for college or careers, as is the case in many segregated minority schools because of the lack of resources many of those schools have and decline in the faculty and staff of color.

532. *E.g.*, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Race-Conscious Policies for Assigning Students to Schools: Social Science Research and the Supreme Court Cases*, NAT’L. ACAD. OF EDUC., (Robert L. Linn & Kevin G. Welner eds., 2017); Roslyn Arlin Michelson & Mokubung Nkomo, *Integrated Schooling, Life Course Outcomes, and Social Cohesion in Multiethnic Democratic Societies*, 36 REV. RES. EDUC. 197, 198 (2012).

533. RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* (2004).

534. RUCKER C. JOHNSON WITH ALEXANDER NAZARYAN, *CHILDREN OF THE DREAM: WHY SCHOOL INTEGRATION WORKS* (2019); Marvin P. Dawkins & Jomills Henry Braddock II, *The Continuing Significance of Desegregation: School Racial Composition and African American Inclusion in American Society*, 63 J. NEGRO EDUC. 394, 401–03 (1994); Amy Stuart Wells & Robert L. Crain, *Perpetuation Theory and the Long-Term Effects of School Desegregation*, 64 REV. EDUC. RES. 531, 550 (1994).

535. Erica Frankenberg et al., *Harming our Common Future: America’s Segregated Schools 65 Years After Brown*, L.A.: CIV. RIGHTS PROJECT/ PROYECTO DERECHOS CIVILES & CTR. FOR EDUC. & CIV. RIGHTS.



Will our failures to desegregate or the aspirations of *Brown* define us? Progress in eliminating racial discrimination and its effects has had its fits and starts nationally and in Mobile. Just because we have not lived up to them doesn't mean that we should dismiss those ideas. *Brown* declared a powerful right that public education, where provided, should be available equally to all students regardless of race and that school segregation was inherently unequal.<sup>536</sup> Yet, as seen in Mobile, the declaration of such right in and of itself cannot be enough without the commitment of political leaders and our society to implement that right and remove barriers to fully realizing it. As Elise Boddie notes, "law should treat racial discrimination as an endemic and complex problem that requires systemic, dynamic, and strategic responses and, just as importantly, indefinite vigilance."<sup>537</sup> It will take the law, but it will also require much more—and a recognition that these efforts are required over the long haul. Individuals may be required to make sacrifices as part of a systemic effort to address discrimination.

As one example of how wide-ranging this commitment will entail, we might only consider contemporary education policy topics. Educational reforms like charter schools or school district secession are framed as race-neutral actions or even as democratic acts to provide for local control,<sup>538</sup> when, in fact, they test our very commitment to the ideal of public education for all on an equal and integrated basis. Likewise, voucher programs and other forms of choice, including freedom of choice in earlier eras, appeal to our American ideals of liberty but disguise how the de-investment in the public schools that educate most of our children including—as seen in Mobile—an increasing share of students of color, in fact limits the liberty of most.

We should recommit to the ideals of *Brown*. Research and sixty-five years of experience gives us a guide to actions that would be needed to coming closer to attaining the principles affirmed in the 1954 decision. What is the use of celebrating a decision or declaration of a right that is not enforced or implemented in practice? If *Brown* was a turning point in our nation's commitment to continuing to live up to its ideals, then we must continue the legal and moral imperative to addressing impediments to realizing integrated, high quality schools for all children. Despite the ways in which the federal courts were not able to achieve full integration in Mobile, as seen, federal enforcement and court decisions were crucial in overcoming resistance to

536. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1974).

537. Boddie, *supra* note 303, at 1304.

538. *Id.* at 1257–60.

*Brown* that was far too popular among many local and state politicians who were white. Voting rights efforts, including litigation that gave African-American representatives seats at the table, are also crucial to altering political dynamics at the local level. Legal strategies and leadership from the federal government will likely be necessary, despite recent setbacks to integration.<sup>539</sup> If and when desegregation comes to Mobile in the twenty-first century, perhaps lessons from the *Birdie Mae Davis* case can lead to a more constructive experience where community leaders and educators are working together to devise student and teacher assignment policies that will achieve desired goals, instead of working at cross-purposes, and that one group does not unfairly bear the burden of desegregation efforts. It will require more overt efforts to address segregation through student assignment than has been the case in the more than two decades since unitary status was declared in Mobile. Housing, transportation, and other types of social policy should be part of these efforts. Disrupting the legacy of centuries of racial segregation and discrimination that persists in our nation's metropolitan areas will not be easy, and will require intentional efforts to create and sustain integration. The next sixty-five years depends on all of us, working together, to achieve this promise.

539. Elizabeth DeBray et al., *The Ebbs and Flows of Federal School Integration Policy Since 2009*, AJE FORUM (Sept. 2, 2019), <http://www.ajeforum.com/the-ebbs-and-flows-of-federal-school-integration-policy-since-2009/>.