

# Brown’s Companions: Briggs, Belton, and Davis

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### I. INTRODUCTION

*Desegregation is not and was never expected to be an easy task. Racial attitudes ingrained in our Nation’s childhood and adolescence are not quickly thrown aside in its middle years.*<sup>1</sup>

Fifty years later, legal commentators generally view the United States Supreme Court’s May 17, 1954, decision in *Brown v. Board of Education*<sup>2</sup> as the epitome of modern judicial activism.<sup>3</sup> One commentator has described the decision as a “triumph of courage over cowardice, integration over segregation, coalition over collision, and diversity over division.”<sup>4</sup> Even those who question its legalistic foundations have universally accepted *Brown* as a constitutionally legitimate decision.<sup>5</sup> Indeed, *Brown* confirmed the ability of the federal

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1. *Milliken v. Bradley*, 418 U.S. 717, 814 (1974) (Marshall, J., dissenting).

2. 347 U.S. 483 (1954).

3. Book Note, *Brown’s Potential, Still Unrealized*, 115 HARV. L. REV. 2034, 2034 (2002) (reviewing WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID: THE NATION’S TOP LEGAL EXPERTS REWRITE AMERICA’S LANDMARK CIVIL RIGHTS DECISION (Jack M. Balkin ed., 2001)).

4. Gerard Toussaint Robinson, *Can the Spirit of Brown Survive in the Era of School Choice? A Legal and Policy Perspective*, 45 HOW. L.J. 281, 283 (2002) (quoting Daniel Gyebi, *A Tribute to Courage on the Fortieth Anniversary of Brown v. Board of Education*, 38 HOW. L.J. 23, 49 (1994)).

5. See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 81-83 (1990) (discussing the *Brown* opinion and its conflict with the “original understanding” of the Fourteenth Amendment); Michael J. Klarman, *Brown, Originalism, and Consti-*

judiciary to “transform good intentions into constitutional law” in the face of determined opposition.<sup>6</sup> In the five decades since *Brown*’s pronouncement, legal scholars and commentators have written exhaustively about the decision and its historical implications.<sup>7</sup> Politicians and civil rights plaintiffs alike have invoked *Brown* to advocate the expansion of personal constitutional rights and as an agent of social change.<sup>8</sup>

While *Brown* has received the attention and the glory (or criticism) through the decades, of equal interest is the fate of the three companion state cases decided with it: *Briggs v. Elliott* (South Carolina), *Gebhart v. Belton* (Delaware), and *Davis v. County School Board* (Virginia).<sup>9</sup> Each case was the subject of protracted litigation for decades after the *Brown* decision. Each state has experienced varying degrees of compliance and resistance, but none have thus far eradicated segregated education to the extent that the *Brown* plaintiffs envisioned.

*Brown*’s overall impact upon desegregation litigation in Delaware, South Carolina, and Virginia remains questionable.<sup>10</sup> In Clarendon County, South Carolina, where *Briggs* initiated the fight against separate-but-equal public schools, post-*Brown* desegregation litigation dragged on for years. During 1955-56, South Carolina prohibited white schools from admitting black students, closed those schools that were under court order to admit black children, and denied funds to schools that used student assignments or busing to further integration.<sup>11</sup> Sixteen years after *Brown* was decided, the Fourth Circuit Court of Appeals invalidated a Clarendon County School Board “freedom-of-choice” scheme that achieved only “token desegrega-

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*tional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1883 (1995) (criticizing a defense of the United States Supreme Court’s interpretation of the Fourteenth Amendment in the *Brown* decision as a legitimate interpretation of that amendment).

6. Robinson, *supra* note 4, at 283. In May 1954, segregated public school systems existed in seventeen states and in the District of Columbia. Pamela W. Carter, *Brown v. Board: 50 Years Later*, 51 LA. B.J. 22, 23 (2003).

7. LEXIS lists more than six thousand citing references to *Brown* in its law reviews and periodicals database.

8. See, e.g., Gruenke v. Seip, 225 F.3d 290, 308 n.7 (3d Cir. 2000) (holding that the right to education protected by *Brown* does not provide a right to social association); Mary C. Cerreto, Olmstead: *The Brown v. Board of Education for Disability Rights, Promises, Limits, and Issues*, 3 LOY. J. PUB. INT. L. 47, 54 (2001) (quoting a House Report that compared existing services for persons with disabilities to separate-but-equal education services considered in *Brown*).

9. The United States Supreme Court consolidated the three state cases for argument under the *Brown* case caption. See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). A fourth case, *Bolling v. Sharpe*, 347 U.S. 497 (1954), was decided concurrently with *Brown* but is not discussed in this Note because the case involved segregated education in the District of Columbia schools, which were under federal and not state supervision.

10. See James L. Hunt, *Brown v. Board of Education After Fifty Years: Context and Synopsis*, 52 MERCER L. REV. 549, 569-70 (2001).

11. Sybil Fix, *Resegregation Creeping into Schools*, CHARLESTON POST & COURIER, Feb. 6, 2000, available at <http://archives.charleston.net/news/education/regs0206.htm>.

tion.”<sup>12</sup> A federal district court subsequently imposed a federally mandated desegregation plan upon Clarendon County.<sup>13</sup> After its implementation, so few white children remained in the county's public schools that the state legislature split the county's total school population into three sub-districts.<sup>14</sup> During the 1996-97 academic year, two of the three sub-districts had substantial black student majorities.<sup>15</sup> As of February 2000, the United States Department of Justice was a party to desegregation suits in twenty-four South Carolina public school districts, including Clarendon County.<sup>16</sup>

In Delaware, as in South Carolina, desegregation proceeded at a snail's pace. By the mid-1960s, state officials assumed that the process of integration was complete and that the state had fully complied with *Brown*.<sup>17</sup> However, an increasingly black student population was simultaneously emerging in the city of Wilmington, located in New Castle County.<sup>18</sup> In 1968, the Delaware General Assembly passed school district reorganization legislation that barred the largely black Wilmington school district from consolidating with other districts.<sup>19</sup> The legislation effectively created all-black schools within the Wilmington district.<sup>20</sup> Black parents saw the Wilmington exclusion as an attempt by the state to circumvent further integration.<sup>21</sup> This belief led to the revival of desegregation litigation that had been dormant for nearly a decade.<sup>22</sup> In 1974, a federal district court found that Wilmington had segregated public schools,<sup>23</sup> and the following year it ordered implementation of an inter-district desegregation plan merging eleven school districts in the Wilmington/New Castle County metropolitan area into one district.<sup>24</sup> After a lengthy appeals process, in 1978 the district court implemented the inter-district plan and created a new school board to oversee its enforcement.<sup>25</sup> The district court further ordered busing of students within the single school district to achieve racial balance.<sup>26</sup> The federal district court oversaw desegregation in

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12. *Brunson v. Bd. of Tr. of Sch. Dist. No. 1*, 429 F.2d 820, 821 (4th Cir. 1970).

13. *Id.*

14. Hunt, *supra* note 10, at 570.

15. *Id.*

16. Fix, *supra* note 11.

17. Raymond Wolters, *The Consent Order as a Sweetheart Deal: The Case of School Desegregation in New Castle County, Delaware*, 4 TEMP. POL. & CIV. RTS. L. REV. 271, 281 (1995).

18. Leland Ware, *Redlining Learners: Delaware's Neighborhood Schools Act*, 20 DEL. LAW. 14, 15 (2002).

19. *Id.*

20. *Evans v. Buchanan*, 393 F. Supp. 428, 438 (D. Del. 1975), *aff'd*, 423 U.S. 963 (1975).

21. Ware, *supra* note 18, at 15.

22. *Id.*

23. *Evans v. Buchanan*, 379 F. Supp. 1218, 1223-24 (D. Del. 1974), *aff'd*, 423 U.S. 963 (1975).

24. Ware, *supra* note 18, at 15.

25. *Evans v. Buchanan*, 447 F. Supp. 982, 991 (D. Del. 1978), *aff'd*, 582 F.2d 750 (3d Cir. 1978).

26. *Id.* at 1011.

New Castle County until 1995, when the court found that New Castle County had a unitary public education system.<sup>27</sup> Five years later, the General Assembly enacted a law requiring that school officials assign students to schools based on location of student residences.<sup>28</sup> Because the law does not require school officials to consider the racial makeup of student populations at any school, there is fear the law will eventually lead to resegregation in Wilmington's public schools.<sup>29</sup>

In Prince Edward County, Virginia, it took more than thirty years of litigation and Internal Revenue Service action before the county accepted integrated schools.<sup>30</sup> White opposition to integration was so intense after *Brown* that state officials eventually closed the county's public schools for five years.<sup>31</sup> An all-white private "academy" emerged to replace the public schools with support from state-funded tuition grants.<sup>32</sup> In 1964, the county reopened the schools after the United States Supreme Court ruled that a federal court could order the imposition of taxation to support school desegregation.<sup>33</sup> During the past four decades, the county has seen gradual student desegregation, thanks in part to changing population demographics.<sup>34</sup>

This Note surveys the pre- and post-*Brown* litigation history of *Briggs*, *Belton*, and *Davis* and their respective progeny, and reviews post-*Brown* Kansas desegregation litigation. It discusses the legal and political machinations undertaken in South Carolina, Delaware, and Virginia to address, or avoid, compliance with *Brown* and its subsequent remedies. This evaluation also includes a survey of subsequent United States Supreme Court decisions that have influenced the characterization of the rights and remedies sought in these cases.

## II. PRE-*BROWN* LITIGATION

### A. *Briggs v. Elliott: The First to Arrive*

South Carolina held the distinction of being one of the first Southern states to integrate its schools after the Civil War<sup>35</sup> and later the first state to constitutionally require segregated public school education.<sup>36</sup> In 1905, South Carolina voters reversed their traditionally

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27. Coalition to Save Our Children v. State Bd. of Educ., 901 F. Supp. 784, 823-24 (D. Del. 1995), *aff'd*, 90 F.3d 752 (3d Cir. 1996).

28. Ware, *supra* note 18, at 14.

29. *Id.*

30. Jennifer E. Spreng, *Scenes from the Southside: A Desegregation Drama in Five Acts*, 19 U. ARK. LITTLE ROCK L. REV. 327, 330 (1997).

31. RICHARD KLUGER, *SIMPLE JUSTICE* 778 (1975).

32. Spreng, *supra* note 30, at 351-52.

33. Griffin v. County Sch. Bd., 377 U.S. 218, 232-33 (1964).

34. Spreng, *supra* note 30, at 372.

35. PETER IRONS, *JIM CROW'S CHILDREN: THE BROKEN PROMISE OF THE BROWN DECISION* 7 (2002).

36. Fix, *supra* note 11.

penurious support for public education by approving the largest tax obligation ever proposed to that point for that state's public schools.<sup>37</sup> Black students did not share in this public largesse. As the twentieth century proceeded, racial discrimination in public school administration became firmly entrenched in South Carolina, as it was throughout the South.<sup>38</sup> By the 1930s, South Carolina spent ten times more toward the education of every white child than every black child.<sup>39</sup> White students attended class an average of 173 days per year, compared to black students' 114 days of attendance.<sup>40</sup> A teacher in a white school could expect to receive three times as much in monthly salary as a teacher in a black school.<sup>41</sup> Ninety-one percent of more than two thousand black schools in South Carolina did not have a single library book for their students.<sup>42</sup>

Clarendon County's dual education system followed this general trend. The county spent \$179 per white pupil and \$43 for every black pupil during the 1949-50 academic year.<sup>43</sup> In Summerton, a Clarendon County community, not until the 1940s did black students attend class in a building that had both electricity and running water.<sup>44</sup> In contrast, white Summerton residents sent their children to a school complete with cafeteria and laboratory facilities.<sup>45</sup>

The dispute that eventually landed *Briggs v. Elliott*<sup>46</sup> before the United States Supreme Court was black student transportation. In July 1947, Levi Pearson, a black Clarendon County resident and father of three, petitioned the county school superintendent to provide one bus to transport black students to their segregated schools.<sup>47</sup> In contrast, the school district had thirty buses at its disposal to transport white students.<sup>48</sup> When the superintendent rejected this request, Pearson filed suit in federal court seeking a permanent injunction to restrain the Clarendon County school board from denying free bus service to black schoolchildren.<sup>49</sup> The stated grounds were that the school board's policy denied Pearson and his children the equal pro-

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37. HENRY ALLEN BULLOCK, *A HISTORY OF NEGRO EDUCATION IN THE SOUTH: FROM 1619 TO THE PRESENT* 114 (1967).

38. *Id.* at 176.

39. *Id.* at 177.

40. *Id.*

41. *Id.* at 180-81.

42. Bianca Tinsley Madden, *In the Thick of the Fray: The Professional Life of Mary Elizabeth Frayser* 89 (1995), <http://www.libsci.sc.edu/histories/biographies/frayser/Fray/title.html>.

43. KLUGER, *supra* note 31, at 8.

44. IRONS, *supra* note 35, at 45.

45. *Id.* at 46.

46. 342 U.S. 350 (1952) (per curiam), *rev'd sub nom.* *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955).

47. KLUGER, *supra* note 31, at 15-16.

48. *Id.* at 4.

49. *Id.* at 17.

tection of the law under the Fourteenth Amendment.<sup>50</sup> Pearson's cause had the backing of, among others, the National Association for the Advancement of Colored People (NAACP) and its chief counsel, Thurgood Marshall.<sup>51</sup> A trial date was set for June 1948; however, the district court dismissed the case the day before trial on grounds that Pearson lacked standing because he paid his property taxes to a school district other than the one his children attended.<sup>52</sup>

The following year, Pearson and the NAACP tried again, using a different tactic. The NAACP, eager to use Clarendon County as a test case, decided to sue the county on Pearson's behalf and that of a class of plaintiffs whose children attended the county's public schools.<sup>53</sup> The NAACP amplified its equal protection complaint to include not merely school bus transportation but all school services, from classrooms to teaching materials.<sup>54</sup> After searching eight months for twenty plaintiffs willing to take the risk, in November 1949, the NAACP filed its federal court complaint, now captioned as *Briggs v. Elliott*, asking for declaratory and injunctive relief.<sup>55</sup>

The *Briggs* case went to trial in United States District Court in Charleston in May 1951.<sup>56</sup> After a pretrial hearing the previous November, Marshall amended his complaint to challenge the constitutionality of all South Carolina segregation laws, not just public school segregation.<sup>57</sup> In challenging the legitimacy of separate-but-equal education, Marshall and the NAACP also sought to eradicate the underlying legal justification for segregation's existence.<sup>58</sup> In adopting a legal rather than political approach, the NAACP determined that once the federal courts invalidated the legal rationale for racial segregation, such action would force the nation's political institutions to

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50. *Id.*

51. *Id.* The NAACP decided to intervene in Pearson's suit because the organization wanted to challenge a white-only school transportation policy. *Id.* at 15.

52. *Id.* at 17.

53. *Id.* at 18.

54. *Id.*

55. *Id.* at 23. The case received its name from Harry Briggs, Sr., a Summerton garage mechanic whose name happened to be first in alphabetical order of the co-plaintiffs and Roderick Elliott, the Clarendon County school board chairman. IRONS, *supra* note 35, at 58-60. Briggs paid dearly for permitting his name to grace the case caption. A month after the filing of the federal lawsuit, he was dismissed from his job and provided a carton of cigarettes as severance pay. *Id.* at 59. Local citizens and officials harassed Briggs to tragicomic proportions, at one point arresting his cow for eating grass around the gravestone of a local white family. *Id.* at 60.

56. JUAN WILLIAMS, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY 199 (1998).

57. MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961, at 157-58 (1994). Marshall amended the complaint at the instigation of United States Circuit Judge Julius Waties Waring, who would later sit on the three-judge panel for the first *Briggs* trial. WILLIAMS, *supra* note 56, at 200. Judge Waring reportedly told Marshall that the time had come "to make law by making history." *Id.*

58. See Karl A. Cole-Frieman, *The Ghosts of Segregation Still Haunt Topeka, Kansas: A Case Study on the Role of the Federal Courts in School Desegregation*, 6 KAN. J.L. & PUB. POL'Y 23, 36 (1996).

abandon all officially sanctioned segregation.<sup>59</sup> However, this strategic approach was a risky one. If it had failed, the NAACP's clients could have ended up in a worse position than before, with no improved facilities and segregated education left intact.<sup>60</sup>

Because the *Briggs* controversy now involved a constitutional question, the 1937 Judiciary Act required that a three-judge district court panel decide the case.<sup>61</sup> During the ensuing two-day trial, the NAACP presented evidence that the segregated school system created inequalities that harmed a black student's self-esteem and ability to learn, an effect not experienced by white students.<sup>62</sup> The school board's attorney nearly sabotaged this strategy when he admitted at the trial's outset that the educational facilities made available to white students and those provided to black students were not equal.<sup>63</sup> The school board sought only additional time to "formulate plans for ending such inequalities."<sup>64</sup>

Although the panel allowed the NAACP to present its evidence,<sup>65</sup> a two-to-one court majority ultimately held that the state would satisfy its constitutional obligations if it provided sufficient funds to equalize black/white student facilities without resorting to integration.<sup>66</sup> On June 23, 1951, the court ordered the state to provide black students with "educational facilities and opportunities equal to those furnished white persons."<sup>67</sup> However, the panel denied the plaintiffs' request for an injunction abolishing segregation.<sup>68</sup>

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59. *See id.*

60. MARK V. TUSHNET, *BROWN V. BOARD OF EDUCATION: THE BATTLE FOR INTEGRATION* 56-57 (1995).

61. KLUGER, *supra* note 31, at 302. The 1937 Judiciary Act was repealed in 1976. Pub. L. 94-381, 90 Stat. 1119 (repealed 1976).

62. IRONS, *supra* note 35, at 69. This evidence included testimony from sociologists such as Kenneth Clark, a psychologist and City College of New York instructor, who testified that segregated education stigmatized black children: "The essence of this detrimental effect is a confusion in the child's concept of his own self-esteem—basic feelings of inferiority, conflict, confusion in his self-image, resentment, hostility towards himself [and] towards whites, [and] intensification of . . . a desire to resolve his basic conflict by sometimes escaping or withdrawing." *Id.* The school board's attorney was unimpressed but did not subject Clark to rigorous cross-examination. *Id.* at 70.

63. *Briggs v. Elliott*, 98 F. Supp. 529, 539-40 (E.D.S.C. 1951) (Waring, J., dissenting), *vacated by* 342 U.S. 350 (1952), *rev'd sub nom.* *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955).

64. *Id.* at 540 (Waring, J., dissenting). Marshall understood that the school board's admission was a ploy to convince the panel that inadequate state funding, and not segregation, was the problem. IRONS, *supra* note 35, at 65-66. Judge Waring also recognized the defendant's strategy, observing in his dissenting opinion that the court majority, in "merely considering this case in the light of another 'separate but equal' case," had chosen to avoid "the entire purpose and reason for the institution of the case." *Briggs*, 98 F. Supp. at 540 (Waring, J., dissenting).

65. IRONS, *supra* note 35, at 66.

66. *Briggs*, 98 F. Supp. at 536-37. "We conclude . . . that if equal facilities are offered, segregation of the races in the public schools as prescribed by the Constitution and laws of South Carolina is not of itself violative of the Fourteenth Amendment." *Id.* The court further declared that its holding was "supported by overwhelming authority which we are not at liberty to disregard on the basis of theories advanced by a few educators and sociologists." *Id.*

67. *Id.* at 538.

68. *Id.* at 537-38.

In his majority opinion, Presiding Judge John J. Parker<sup>69</sup> took pains to remind the litigants that the court “may not ignore the unreversed decisions of the Supreme Court of the United States which are squarely in point and conclusive of the question before us.”<sup>70</sup> That said, the court majority anchored its position on two previous United States Supreme Court decisions, the notorious *Plessy v. Ferguson*<sup>71</sup> and the more obscure *Gong Lum v. Rice*.<sup>72</sup> Of the two cases, only *Gong Lum* focused on segregation in public education.<sup>73</sup> Although *Plessy* only addressed segregation in railroad transportation,<sup>74</sup> the panel nevertheless used it to support its holding that segregated public education did not offend the Equal Protection Clause if all students were provided with “equal facilities and opportunities.”<sup>75</sup>

In choosing to follow *Plessy* and *Gong Lum*, the district court ignored more recent United States Supreme Court decisions in *Sweatt v. Painter*<sup>76</sup> and *McLaurin v. Oklahoma State Regents*.<sup>77</sup> In both cases, the Court, without directly reviewing *Plessy*, struck down on equal

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69. KLUGER, *supra* note 31, at 144. Years earlier, the NAACP had helped to deny Judge Parker a seat on the United States Supreme Court, in part because of statements he had allegedly made asserting that black citizens were politically incompetent. KLUGER, *supra* note 31, at 142. By the 1950s, however, blacks and whites alike were describing Judge Parker as a model federal judge. *Id.* at 144. The NAACP viewed Judge Parker as fair but held little hope of attracting his vote because of the judge’s known reverence for United States Supreme Court precedent. IRONS, *supra* note 35, at 64. Concurring with Judge Parker was United States Circuit Judge George Bell Timmerman, “an outspoken advocate of white supremacy.” KLUGER, *supra* note 31, at 302-03.

70. *Briggs*, 98 F. Supp. at 537.

71. 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

72. 275 U.S. 78 (1927).

73. *Id.* at 80. Plaintiff Gong Lum, a Chinese-American resident of Mississippi, wanted to send his daughter to an all-white public high school in that state. *Id.* at 79-81. The public school’s board of trustees refused to admit the child because she was not Caucasian. *Id.* at 80. Interestingly, Gong Lum did not challenge the constitutionality of segregation per se, but was concerned that his daughter would have to attend an “inferior” all-black school. Christopher A. Bracey, *Louis Brandeis and the Race Question*, 52 ALA. L. REV. 859, 893 (2001). The United States Supreme Court unanimously held that separate-but-equal education applied not just to black students but also “where the issue is as between white pupils and the pupils of the yellow races.” *Gong Lum*, 275 U.S. at 87.

74. *See Plessy*, 163 U.S. at 540. Plaintiff Homer Plessy, a thirty-year-old shoemaker, was arrested when he sat in the “Whites Only” section of a Louisiana railroad car. Carter, *supra* note 6, at 22. He violated a Louisiana law that mandated separate-but-equal accommodations for black and white railroad passengers. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.8 (6th ed. 2000). The United States Supreme Court held that the Louisiana statute did not offend the Equal Protection Clause. *Id.* The Court declared that a societal decision to keep races separate was a cultural phenomenon for which no judicial remedy was available. *Id.* In his famous dissent, Justice John Harlan wrote that any law permitting public or private racial classification was unconstitutional: “Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.” *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting).

75. *Briggs*, 98 F. Supp. at 532. During the *Plessy-Gong Lum* era, courts usually sustained segregated schools under three general principles: First, segregated education was the product of private choice and not of state action; second, educational decision-making was a local responsibility that a court should not disturb unless a decision was made that was clearly egregious; and third, that equal facilities translated into an equal educational experience for both white and black students. Lisa M. Fairfax, *The Silent Resurrection of Plessy: The Supreme Court’s Acquiescence in the Resegregation of America’s Schools*, 9 TEMP. POL. & CIV. RTS. L. REV. 1, 21 (1999).

76. 339 U.S. 629 (1950).

77. 339 U.S. 637 (1950).

protection grounds state laws requiring segregated facilities at state-sponsored graduate and professional schools.<sup>78</sup> The *Briggs* panel distinguished these later cases by asserting that segregated graduate and professional education was “essentially different from that involved in segregation in education at the lower levels.”<sup>79</sup>

In a lengthy dissent, United States Circuit Judge Julius Waties Waring attacked the majority's contention that because the United States Supreme Court had declined to discuss *Plessy* in either *Sweatt* or *McLaurin*, that fact alone proved that the Court still considered *Plessy* valid precedent:

It is astonishing that such an argument should be presented or used in this or any other court. The Supreme Court in *Sweatt* and *McLaurin* was not considering railroad accommodations. It was considering education just as we are considering it here and the Supreme Court distinctly and unequivocally held that the attempt to separate the races in education was violative of the Fourteenth Amendment of the Constitution.<sup>80</sup>

Nonetheless, it was the majority opinion that held the force of law. The district court's decree required the defendants to advise the court within six months about what had been done to furnish black students with educational facilities and opportunities equal to white students.<sup>81</sup> Clarendon County school officials duly filed their report in December 1951, while the NAACP's appeal of the district court's decree rested with the United States Supreme Court.<sup>82</sup> The report noted, in part, that the county had approved more than one-half million dollars to upgrade its black-only school facilities, had raised black teachers' salaries, and made bus transportation available for black students.<sup>83</sup>

The district court sent the report to the United States Supreme Court, which promptly returned it along with an order vacating the

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78. Jerlando F.L. Jackson et al., *Fordice as a Window of Opportunity: The Case for Maintaining Historically Black Colleges and Universities (HBCUS) as Predominantly Black Institutions*, 161 EDUC. L. REP. 1, 3-4 (2002). In *Sweatt*, the United States Supreme Court held that a newly established state law school for blacks did not provide an education equivalent to that of the white-only law school, and unanimously ordered a black law student admitted to the white-only school. *Sweatt*, 339 U.S. at 633-36. In *McLaurin*, the Court found that restrictions imposed upon a black graduate student admitted to a white-only state university produced inequalities so obvious that they “violated even the separate but equal test.” NOWAK & ROTUNDA, *supra* note 74, § 14.8.

79. *Briggs*, 98 F. Supp. at 535.

80. *Id.* at 545 (Waring, J., dissenting). Less than a year later, socially ostracized from the Charleston community, Judge Waring abruptly retired from the federal bench and left for New York, never again to live in his native state. IRONS, *supra* note 35, at 78. Interestingly, Judge Waring, while publicly supporting desegregation, was privately critical of Marshall's performance as the NAACP's chief counsel, criticizing him as “too cautious” and his staff “not sufficiently equipped” to handle the *Briggs* appeal. WILLIAMS, *supra* note 56, at 203.

81. *Briggs*, 98 F. Supp. at 538.

82. *Briggs v. Elliott*, 103 F. Supp. 920, 921 (E.D.S.C. 1952).

83. *Id.* at 922 & n.1.

district court's decree.<sup>84</sup> The Court further instructed the district court to review its June decision and to "take whatever action it may deem appropriate" in consideration of the Clarendon County report.<sup>85</sup> In March 1952, Judge Parker convened another three-judge panel, but the NAACP knew that the court would not change its earlier decision.<sup>86</sup> Ten days after concluding proceedings, Judge Parker issued a unanimous opinion finding the defendants acted "as rapidly as was humanly possible" to provide black students with school facilities similar to those of white students.<sup>87</sup> The panel reissued its decree directing Clarendon County to continue equalizing all educational facilities and opportunities.<sup>88</sup> Judge Parker flatly rejected the plaintiffs' call to eliminate segregation, writing that the court "should not use its power to abolish segregation in a state where it is required by law if the equality demanded by the Constitution can be attained otherwise."<sup>89</sup> The court's decision opened the door for another direct appeal to the United States Supreme Court, which Marshall filed in May 1952.<sup>90</sup> The Court accepted the case for review the following month; thus, *Briggs* became the first of the *Brown* cases to reach the United States Supreme Court.<sup>91</sup>

#### B. Davis v. County School Board: *Tarpaper Shacks*

In April 1951, 456 students of overcrowded, all-black Moton High School in Prince Edward County, Virginia, left class and refused to return until the county provided them a facility equal to the county's all-white high school.<sup>92</sup> So began the campaign for integrated public schools in Virginia.<sup>93</sup>

Separation of the races in Virginia's public schools became the rule almost as soon as the Civil War ended. The 1869-70 General As-

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84. *Briggs v. Elliott*, 342 U.S. 350, 351 (1952) (per curiam), *rev'd sub nom.* *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955).

85. *Id.* Another, unstated, reason for the Court's delay was the upcoming 1952 presidential elections and the Court's desire to avoid any controversial decision that might influence its outcome. IRONS, *supra* note 35, at 77.

86. IRONS, *supra* note 35, at 78. The panel was composed of Judge John J. Parker, Judge George Bell Timmerman, and United States Circuit Judge Armistead Dobie, who had replaced the retired Julius Waties Waring. *Briggs*, 103 F. Supp. at 921. In his majority opinion, Judge Parker observed that the plaintiffs asked for an order abolishing segregated education because Clarendon County had not completed full equalization before the March hearing. *Id.* at 922. Noting the county's pledge to finish equalization by September 1952, Judge Parker wrote that the county was working "as rapidly as any reasonable person could ask." *Id.*

87. *Briggs*, 103 F. Supp. at 922.

88. *Id.* at 923.

89. *Id.* at 922.

90. IRONS, *supra* note 35, at 79; *see also* 28 U.S.C. § 1253 (2000) (authorizing direct appeal to the United States Supreme Court of an order granting or denying a permanent injunction issued by a three-judge federal panel in a civil proceeding).

91. *Briggs v. Elliott*, 72 S. Ct. 1078 (1952) (mem.).

92. WILLIAMS, *supra* note 56, at 206; Spreng, *supra* note 30, at 328.

93. Spreng, *supra* note 30, at 328.

sembly passed laws requiring separate-but-equal education, ostensibly to ensure that its black citizens' interests were "scrupulously guarded" during the post-Civil War "period of readjustment."<sup>94</sup> The state extended this readjustment period into the twentieth century when, in drafting a new constitution in 1902, it included a provision that "[w]hite and colored children shall not be taught in the same school."<sup>95</sup> Virginia's legislature spent little money on education for either white or black children until the Depression, when the times and the New Deal forced it to tackle its dismal educational system.<sup>96</sup>

Prince Edward County's school system was typical of others in Virginia during this era. After World War I, the county built new high schools for its white students.<sup>97</sup> Black students had to attend class in small schoolhouses that offered only a primary-level education.<sup>98</sup> Not until the 1920s would the county provide an eighth grade education for black children.<sup>99</sup> In 1939, all-black Moton High came into existence, the first high school ever provided for black children in the county.<sup>100</sup> By 1951, Prince Edward had a highly developed black school system compared with other Virginia counties of similar population.<sup>101</sup>

Against the all-white Farmville High School, however, Moton High School paled in comparison; it had no gym, cafeteria, science labs, or infirmary.<sup>102</sup> The county school board's answer to Moton High's congested conditions was to install several "tarpaper shacks" adjacent to its main building to serve as temporary classrooms until construction of a new high school was completed.<sup>103</sup> For years, the school board had promised a new building, and indeed one was "on the drawing board."<sup>104</sup> However, officials dragged their feet on approving funds needed to purchase a building site and to begin construction.<sup>105</sup> Black students and parents despaired that construction

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94. *Davis v. County Sch. Bd.*, 103 F. Supp. 337, 339 (E.D. Va. 1952), *rev'd sub nom.* *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955).

95. *Id.* at 338-39, 341 n.1.

96. KLUGER, *supra* note 31, at 458.

97. *Id.*

98. *Id.* at 458-59.

99. *Id.* at 459.

100. IRONS, *supra* note 35, at 82.

101. Spreng, *supra* note 30, at 332.

102. IRONS, *supra* note 35, at 82; Spreng, *supra* note 30, at 328.

103. IRONS, *supra* note 35, at 82; Spreng, *supra* note 30, at 328. These "classrooms" had no electricity or insulation, and woodstoves provided the heat. IRONS, *supra* note 35, at 82. The Moton High building had a capacity of 180. Spreng, *supra* note 30, at 328.

104. Spreng, *supra* note 30, at 333.

105. KLUGER, *supra* note 31, at 468. In December 1950, the school board showed Moton PTA representatives a proposed building site, advised the group that the board "hoped to buy it if a suitable price could be obtained," and stated that in any event a bond issue was necessary to raise construction funds. BOB SMITH, *THEY CLOSED THEIR SCHOOLS* 25 (1965).

would never occur, and so a small group of students hatched a plan to stage a “strike” to promote their cause.<sup>106</sup>

Indeed, the Moton High student uprising received the attention of NAACP lawyers Oliver Hill and Spottswood Robinson, who met with some Moton High students and their parents within days after the strike began.<sup>107</sup> Hill and Robinson told the gathering that they would take the case only if allowed to pursue a strategy similar to that which the NAACP was pursuing in the *Briggs* litigation; the NAACP did not want to sue Prince Edward County only to obtain a new black-only high school that would perpetuate its segregated educational system.<sup>108</sup> The NAACP lawyers told the group that the litigation’s proper objective was to seek elimination of all segregated education in the county.<sup>109</sup> On May 23, several weeks after the initial student walk-out, the NAACP filed suit in United States District Court in Richmond against the Prince Edward County School Board.<sup>110</sup> On behalf of more than a hundred plaintiffs, NAACP lawyers sought an injunction prohibiting Virginia from operating a segregated school system.<sup>111</sup> The plaintiffs requested in the alternative a decree “correcting certain specified inequalities between the white and colored schools.”<sup>112</sup> Subsequent school board approval of a construction budget for the new Moton High School failed to stop the suit from going forward.<sup>113</sup>

Trial in the case of *Davis v. County School Board*<sup>114</sup> began on February 25, 1952, at the federal courthouse in Richmond before another three-judge panel.<sup>115</sup> The NAACP lawyers had little doubt as to its outcome.<sup>116</sup> Their primary purpose was to use the five-day hearing to get as much evidence into the trial court record as possible for another appeal to the United States Supreme Court.<sup>117</sup> As in *Briggs*, the NAACP called expert witnesses to testify to the “psychological and social burdens” that segregated schools placed on their black students.<sup>118</sup> Unlike the *Briggs* defendants, Prince Edward County’s at-

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106. IRONS, *supra* note 35, at 83.

107. Spreng, *supra* note 30, at 328.

108. Donald P. Baker, *Closed*, WASH. POST MAG., Mar. 4, 2001, at W08.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Davis v. County Sch. Bd.*, 103 F. Supp. 337, 338 (E.D. Va. 1952), *rev'd sub nom.* Brown v. Bd. of Educ., 349 U.S. 294 (1955).

113. SMITH, *supra* note 105, at 72. Magically, the board discovered \$874,000 available for new building construction within sixty days of the federal court filing, \$600,000 of which came through a loan from the Virginia State Board of Education’s “literary fund.” *Id.*

114. 103 F. Supp. 337 (E.D. Va. 1952). The plaintiff’s name on the case caption was that of Dorothy E. Davis, a fourteen-year-old Moton High School ninth-grader. KLUGER, *supra* note 31, at 478.

115. IRONS, *supra* note 35, at 87.

116. *Id.* at 88.

117. *Id.*

118. *Id.*

torneys aggressively cross-examined these witnesses and questioned their conclusions.<sup>119</sup> They also produced their own expert witnesses, including a social scientist from Columbia University who contended that black high school students had a better education in the separate-but-equal system.<sup>120</sup> The University of Virginia's president testified that segregation was so embedded in local culture that forced integration would result in less public support for schools "and so injure both races."<sup>121</sup>

A week after concluding the hearing, the three-judge panel held for the Prince Edward County School Board.<sup>122</sup> In a four-page opinion, citing case precedents only in a footnote, the court upheld Virginia's constitutional requirement of segregated public education, holding that it rested "neither upon prejudice, nor caprice, nor upon any other measureless foundation."<sup>123</sup> The panel found that inequalities existed "in respect to buildings, facilities, curricula and buses," and ordered Prince Edward County to correct them "with diligence and dispatch."<sup>124</sup> Noting that the defendants had belatedly embarked upon such a program, the court saw no need to set a deadline for its completion.<sup>125</sup> The NAACP immediately perfected an appeal to the United States Supreme Court, and the *Davis* case joined those that the Court would soon consolidate with *Brown*.<sup>126</sup>

### C. Gebhart v. Belton: *Breakthrough*

As was the case with South Carolina and Virginia, official Delaware's antipathy toward its black citizens was entrenched and longstanding. Although a Union state during the Civil War, Delaware later refused to ratify the Fourteenth Amendment, its legislature declaring categorical opposition to "'measures intended or calculated to equalize or amalgamate the Negro race with the white race, politically or socially.'"<sup>127</sup> Delaware also had in common with South Carolina and Virginia a constitution that required the maintenance of separate schools for black and white children.<sup>128</sup> The academic years of white schools ran twice as long as the black schools.<sup>129</sup> By the 1920s, black illiteracy in the state reached twenty percent, as opposed to just below

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119. *Id.* at 89-90.

120. KLUGER, *supra* note 31, at 503.

121. *Davis v. County Sch. Bd.*, 103 F. Supp. 337, 340 (E.D. Va. 1952), *rev'd sub nom.* *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955).

122. KLUGER, *supra* note 31, at 506.

123. *Davis*, 103 F. Supp. at 339.

124. *Id.* at 340-41.

125. *Id.* at 341.

126. IRONS, *supra* note 35, at 94.

127. KLUGER, *supra* note 31, at 426.

128. *Gebhart v. Belton*, 91 A.2d 137, 140 (Del. 1952), *aff'd sub nom.* *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955).

129. KLUGER, *supra* note 31, at 426-27.

two percent for whites.<sup>130</sup> Black schools received so little money from the state legislature that the du Pont family contributed two million dollars to build dozens of schools for black children during the Twenties.<sup>131</sup> Despite such philanthropic efforts, black students could not get a four-year high school education in Delaware south of Wilmington in 1950.<sup>132</sup>

Delaware's legal skirmish with foes of segregated education began in New Castle County, where more than two-thirds of state residents lived.<sup>133</sup> In Claymont, a Wilmington suburb, teenager Ethel Belton was barred from attending the white-only high school in her own community.<sup>134</sup> Ethel had to ride the bus on a daily twenty-mile round trip to the black Howard High School in Wilmington, which was deficient to the white school in class size and in the quality of its faculty and curriculum.<sup>135</sup> Meanwhile, in nearby rural Hockessin, Sarah Bulah resented having to drive her six-year-old daughter, Shirley, every day to the one-room school for black children, even though a school bus that carried children to the white elementary school passed by her house.<sup>136</sup> Both women attempted to resolve their complaints with state education officials before resorting to the courts, to no avail.<sup>137</sup> The responses were always the same: the Delaware Constitution mandated separate black and white schools, and that was that.<sup>138</sup> In desperation, both Belton and Bulah (by coincidence, since the two women did not know each other) turned to Louis Redding, a prominent Wilmington attorney and the first black member of the Delaware bar.<sup>139</sup>

Redding had just scored a significant victory in the state chancery court in a higher education segregation case, *Parker v. University of Delaware*.<sup>140</sup> Redding represented a group of black students who sought admission to the all-white University of Delaware, which required the students to attend the all-black, unaccredited Delaware State College.<sup>141</sup> The vice-chancellor who decided the *Parker* case, Collins Seitz, examined the two institutions and compared their pro-

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130. *Id.*

131. Eric Ruth, *A History*, WILMINGTON NEWS J., Apr. 9, 2000, Special Section, <http://www.delawareonline.com/newsjournal/local/2000/12/10schools-archive/040920001.html>.

132. *Id.*

133. IRONS, *supra* note 35, at 107.

134. *Brown v. Board of Education* Orientation Handbook, at <http://brownvboard.org/research/handbook/combined/belton.htm> (last revised Jan. 18, 2000) [hereinafter *Brown* Orientation Handbook].

135. *Id.*

136. IRONS, *supra* note 35, at 105.

137. KLUGER, *supra* note 31, at 435.

138. IRONS, *supra* note 35, at 105-06.

139. *Id.* at 106.

140. 75 A.2d 225 (Del. Ch. 1950).

141. *Id.* at 226, 233.

grams of study, physical facilities, faculty, libraries, and other educational amenities.<sup>142</sup> Seitz concluded that Delaware State was so “woefully inferior” to the all-white university that he granted Redding’s request for a permanent injunction and directed the university to admit the black students.<sup>143</sup>

Backed by the NAACP, Redding filed suit on behalf of Belton, Bulah, and a small class of plaintiffs in United States District Court in Wilmington in the spring of 1951.<sup>144</sup> In keeping with the NAACP’s strategy in the Virginia and South Carolina cases, Redding would argue that not only were his clients entitled to the same school bus service as white students received, but that the entire separate-but-equal public education system in Delaware was unconstitutional.<sup>145</sup> Redding relied on NAACP attorney Jack Greenberg to make the case regarding the detrimental psychological effects of a segregated education system upon black children.<sup>146</sup> Redding himself prepared arguments alleging the inferior condition of the black-only school facilities.<sup>147</sup>

Redding requested a three-judge panel for the upcoming trial, but the state successfully argued that the chancery court should first hear the *Belton* and *Bulah* cases, since state and not federal law controlled the litigation.<sup>148</sup> To Redding’s delight, Collins Seitz was in the chancellor’s chair when trial began in October 1951.<sup>149</sup> The chancellor heard testimony from “many expert witnesses in the fields of education, sociology, psychology, psychiatry and anthropology,”<sup>150</sup> all agreeing that separate-but-equal education harmed black schoolchildren.<sup>151</sup> The state called no rebuttal witnesses and relied only on the artless testimony of its superintendent of education, who conceded that the state’s black elementary schools were in fact inferior to the

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142. Jamie Scaringi, *The Delaware Tug-of-War over School Desegregation: Constitutional Case Law v. Legislative and Administrative Actions*, 9 WIDENER L. SYMP. J. 165, 166 (2002).

143. *Parker*, 75 A.2d at 234. The university thus became the first state educational institution to desegregate its undergraduate program in response to a court order. IRONS, *supra* note 35, at 111.

144. KLUGER, *supra* note 31, at 435. Redding filed separate cases on behalf of Belton and Bulah and tried both together, captioned as *Belton v. Gebhart* and *Bulah v. Gebhart*. *Brown Orientation Handbook*, *supra* note 134. The State Board of Education was the principal defendant, with Francis Gebhart representing the board in name. *Id.*

145. RAYMOND WOLTERS, *THE BURDEN OF BROWN: THIRTY YEARS OF SCHOOL DESEGREGATION* 177 (1984).

146. *Id.*

147. *Id.*

148. KLUGER, *supra* note 31, at 435-36.

149. *Id.* at 436.

150. *Belton v. Gebhart*, 87 A.2d 862, 864 (Del. Ch. 1952), *aff'd*, 91 A.2d 137 (Del. 1952), *aff'd sub nom. Brown v. Bd. of Educ.*, 349 U.S. 294 (1955).

151. *Id.* Seitz was particularly impressed with the presentation of psychiatrist Frederic Wertham, who conducted a clinical study of white and black Delaware school children. KLUGER, *supra* note 31, at 443. Wertham determined that “segregation in public and high school creates in the mind of the child an unsolvable conflict” that damages the mental health of black students. *Id.* at 444.

white schools.<sup>152</sup> Lacking sufficient witnesses to support its position, the state's only refuge lay in United States Supreme Court precedent, and it strongly relied on *Gong Lum v. Rice* to support its contention that a state was not constitutionally required to admit a non-white student to a white-only elementary school.<sup>153</sup> After three days of testimony and a quick tour of both white and black elementary schools in New Castle County, Chancellor Seitz took five months to prepare his decision.<sup>154</sup> As he did in *Parker*, the chancellor evaluated the educational opportunities and facilities provided at the white Claymont High School and the black Howard High and Carver Vocational schools to determine whether separate-but-equal education existed in New Castle County.<sup>155</sup> He compared academic subjects, teacher-pupil ratios, extracurricular activities, teacher training, and physical and aesthetic qualities of each building.<sup>156</sup> Upon completing his investigation, Chancellor Seitz concluded that the Howard and Carver schools flunked the separate-but-equal test.<sup>157</sup>

As to whether segregation per se was a violation of equal protection, Chancellor Seitz demurred on the ground that it was not a lower court's place to reject settled constitutional principles without explicit direction from the United States Supreme Court.<sup>158</sup> He speculated that the Court might have reached a different result in *Gong Lum* if sociological and psychological evidence of segregation's effect on black students had been available.<sup>159</sup> Chancellor Seitz concluded that "in our Delaware society, State-imposed segregation in education itself results in the Negro children, as a class, receiving educational opportunities [that] are substantially inferior to those available to white children otherwise similarly situated."<sup>160</sup> Ignoring the defendant's pleas to give the state time to "equalize facilities and opportunities," the chancellor issued an injunction immediately prohibiting the state from denying the plaintiffs the use of equal educational facilities.<sup>161</sup> "To postpone such relief is to deny relief," Chancellor Seitz wrote, "and to say that the protective provisions of the Constitution offer no immediate protection."<sup>162</sup> Therefore, he further ordered that the state school board admit Ethel Belton and her co-plaintiffs to Claymont

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152. IRONS, *supra* note 35, at 113-14.

153. *Belton*, 87 A.2d at 865; *see supra* notes 71-75 and accompanying text.

154. KLUGER, *supra* note 31, at 446-47.

155. *Belton*, 87 A.2d at 866-71.

156. *Id.*

157. *Id.* at 869.

158. *Id.* at 865.

159. *Id.*

160. *Id.*

161. *Id.* at 869-70.

162. *Id.* at 870.

High School, and admit Shirley Bulah to the white children's elementary school in Hockessin.<sup>163</sup>

The chancellor's thorough analysis was not lost on the Delaware Supreme Court, which wasted little time considering and denying the state's subsequent appeal.<sup>164</sup> The supreme court concurred that segregation per se did not violate the Fourteenth Amendment and cited numerous authorities, including *Briggs* and *Davis*, to support its position.<sup>165</sup> The court treated the chancellor's finding that segregated education caused unequal educational conditions for black students as dicta to avoid overruling United States Supreme Court precedent.<sup>166</sup> Accordingly, the court declined to hold that *Plessy* and *Gong Lum* were no longer valid law.<sup>167</sup> The court declared that to so find would send a message that the United States Supreme Court's interpretation of the federal constitution was erroneous: "If so, it is for that Court to say so and not for us."<sup>168</sup> Nevertheless, the supreme court upheld Chancellor Seitz's ruling that the Howard-Carver facilities were "substantially unequal" to the Claymont facilities,<sup>169</sup> as was the black Hockessin elementary school to that community's school for white students.<sup>170</sup> The court held that Belton, Bulah, and their co-plaintiffs were entitled to immediate relief.<sup>171</sup> When the state appealed the Delaware Supreme Court's decision to the United States Supreme Court, the triumvirate of state cases that would join with *Brown v. Board of Education* became complete.<sup>172</sup>

### III. POST-*BROWN* LITIGATION

On May 17, 1954, the United States Supreme Court announced its initial *Brown* decision (*Brown I*), which repudiated fifty-eight years of judicially authorized public school segregation.<sup>173</sup> While the Court pronounced the *Plessy* separate-but-equal doctrine's eventual demise, it did not prescribe the means required to kill it immediately.<sup>174</sup> No one foresaw that it would take almost as long to implement the

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163. *Id.* at 869-71.

164. *See* Gebhart v. Belton, 91 A.2d 137 (Del. 1952), *aff'd sub nom.* Brown v. Bd. of Educ., 349 U.S. 294 (1955).

165. *Id.* at 142.

166. *Id.*

167. *Id.* at 141-42.

168. *Id.* at 142.

169. *Id.* at 148.

170. *Id.* at 152.

171. *Id.* at 149. The court so held because the state's equal protection violation was a violation of a personal right. *Id.*

172. *See* Gebhart v. Belton, 344 U.S. 891 (1952) (mem.).

173. *See* Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

174. *Id.* at 495-96.

Court's new doctrine as it did to eradicate the old separate-but-equal standard.<sup>175</sup>

Aware of *Brown*'s ramifications for the nation's political and social culture, the Court withheld its announcement of a national remedy for more than a year while plaintiffs and defendants briefed and argued the remedy's scope and implementation.<sup>176</sup> Clarendon County, South Carolina, officials bluntly argued they could not and would not immediately desegregate their public schools.<sup>177</sup> Instead, the county pressed the Court to issue an "open" decree that would allow the county to desegregate at the county's discretion.<sup>178</sup> A tempered and deliberate approach was necessary, argued Clarendon County officials, because gradual adherence would engender local respect for the Court's decision.<sup>179</sup> Virginia was less sanguine, insisting the Court had no authority to tell a state how to run its public schools, and that local officials would resist enforcement of any desegregation order, gradual or otherwise.<sup>180</sup> In May 1955, the Court issued its second *Brown* opinion (*Brown II*).<sup>181</sup> In it, the Court remanded all *Brown*-related cases to the lower federal district courts with instructions for those courts to frame decrees ordering plaintiffs' admittance on a race-neutral basis "with all deliberate speed."<sup>182</sup> The Court delegated to the federal district courts the duty to assess whether state authorities were making sincere desegregation efforts<sup>183</sup> and instructed the courts to apply "equitable principles" in enforcing local remedies.<sup>184</sup>

The plaintiffs in *Briggs*, *Belton*, and *Davis* thereafter began the long, torturous process of compelling state and local officials to desegregate their public schools. All would endure intransigent school officials and politicians, and their antipathy toward federal intervention in what was historically the exclusively local domain of public school ed-

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175. See Dennis A. Williams, *A Tale of Two Schools*, NEWSWEEK, May 21, 1984, at 85. Harry Briggs, Sr. later recalled that he thought that integration "might take ten years." *Id.* Thurgood Marshall himself predicted that segregation in all forms would be abolished no later than January 1963, when the nation would observe the one-hundredth anniversary of the Emancipation Proclamation. Alfreda A. Sellers Diamond, *Constitutional Comparisons and Converging Histories: Historical Developments in Equal Educational Opportunity Under the Fourteenth Amendment of the United States Constitution and the New South African Constitution*, 26 HASTINGS CONST. L.Q. 853, 880 n.158 (1999).

176. Hunt, *supra* note 10, at 568-69.

177. KLUGER, *supra* note 31, at 731-32.

178. *Id.* at 731.

179. *Id.* at 732-33.

180. *Id.* at 733.

181. *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955) [hereinafter *Brown II*].

182. *Id.* at 301. The United States Supreme Court affirmed the Delaware Supreme Court's holding that the New Castle County black and white schools were unequal and let stand that court's order requiring the school district to admit Belton and Bulah to white schools. *Id.* The Court overturned that part of the Delaware Supreme Court's holding that segregation per se was not unconstitutional and remanded *Belton* so that the court could adjust its decree. *Id.*

183. *Id.* at 299.

184. *Id.* at 300.

ucation. None of the plaintiffs foresaw that it would take nearly as long to achieve even partial desegregation of the South Carolina, Virginia, and Delaware public schools. In Kansas, where public school desegregation began before *Brown* was decided, administrative lethargy rather than political resistance halted the march of integration and forced the federal court to intervene.

#### A. *South Carolina: The Parker Doctrine*

The United States Supreme Court's failure to provide a timetable in *Brown II* to end public school segregation essentially shifted the burden of effecting change upon the plaintiffs, since the defendants faced no sanction for lack of immediate compliance.<sup>185</sup> The district court's post-*Brown* treatment of *Briggs* in South Carolina set the tone for the level of integration enforcement that the desegregation plaintiffs in Virginia and Delaware could expect from the federal judiciary. It was already evident that no enforcement assistance was forthcoming from Washington. President Eisenhower made it clear that it was the federal courts' responsibility, and not that of the executive branch, to oversee school integration.<sup>186</sup>

In South Carolina, six weeks after release of the United States Supreme Court's *Brown II* opinion, the three-judge *Briggs* panel reconvened, ostensibly to issue orders implementing the Court's directive.<sup>187</sup> In doing so, Presiding Judge John J. Parker took the opportunity to put his own spin on the Court's decision. Speaking in an almost-empty courtroom, Judge Parker read a short opinion in which he offered a narrow interpretation of the Court's directive.<sup>188</sup> He declared that while the Court abolished government-mandated segregated education, it did not explicitly order integration of public elementary schools, nor did the Fourteenth Amendment require such integration.<sup>189</sup> Citing no supporting authorities, Judge Parker held that since the Equal Protection Clause limited only state and not individual action, segregation that resulted from purely individual action

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185. Hunt, *supra* note 10, at 569.

186. STEPHEN E. AMBROSE, *EISENHOWER: SOLDIER AND PRESIDENT* 405 (1990). Indeed, the President believed that the black community was pushing integration "too hard [and] too fast." *Id.* at 406. Eisenhower publicly supported a go-slow approach to desegregation, contending that white Southerners needed more time to accept the reality of an integrated society. *Id.* at 407. The President neither criticized nor endorsed *Brown* for the record, but he expressed disappointment that the Court did not reaffirm *Plessy*. *Id.* at 367. Despite his initial misgivings regarding *Brown*, Eisenhower sent the 101st Airborne Division to quell rioting and to enforce a federal court desegregation order in Little Rock, Arkansas in September 1957. WILLIAM MANCHESTER, *THE GLORY AND THE DREAM* 805 (1974). The President told the nation that "[t]he very basis of our individual rights and freedoms rests upon the certainty that the President and the executive branch of government will support and insure the carrying out of the decisions of the federal courts." *Id.*

187. See *Briggs v. Elliott*, 132 F. Supp. 776 (E.D.S.C. 1955) (per curiam).

188. IRONS, *supra* note 35, at 175.

189. *Briggs*, 132 F. Supp. at 777.

was constitutional.<sup>190</sup> The judge specified no *Brown II* compliance deadline, but in effect gave local school officials carte blanche to impose qualifications upon admission of black children to a particular school.<sup>191</sup>

Judge Parker's logic proved irresistible for other regional federal and state judges who were reluctant to enter any orders beyond cautioning school officials to comply with *Brown II*.<sup>192</sup> The intended, or unintended, consequence of Judge Parker's ruling was to slow the "deliberate speed" of desegregation in Clarendon County and elsewhere to a crawl.<sup>193</sup> It provided judges with a convenient citing authority to rationalize issuance of so-called "go-slow" decrees that allowed local school officials to set their own standards for ending segregation.<sup>194</sup>

Predictably, South Carolina officials employed dilatory legal tactics to evade compliance with *Brown* and for more than a decade were successful in avoiding its strictures. South Carolina, the first state to officially sanction segregation, also became the first state to use its legislative processes to preserve it.<sup>195</sup> South Carolina's legislature established the Gressette Committee, which proposed changes in state laws designed to restore the status quo ante.<sup>196</sup> These changes, all quickly enacted, included repeal of the state's mandatory attendance law and the denial of state funds to any white school forced to accept black students by court order.<sup>197</sup> The legislature further authorized local school boards to decide whether to open or close the public schools and to assign and transfer students at the school board's pleasure.<sup>198</sup> Under this policy, if a court ordered student transfers for desegregation purposes, both the transferor and transferee school would not receive state funds.<sup>199</sup> Both schools would then no longer function as public institutions, and the local school board could then sell or lease the school's property to a segregated private school.<sup>200</sup> In addition, South Carolina joined several other southern states in declaring the *Brown* decision "null and void" within its borders.<sup>201</sup> Because of

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190. *Id.*

191. IRONS, *supra* note 35, at 176.

192. *See generally, e.g.,* Avery v. Wichita Falls Indep. Sch. Dist., 241 F.2d 230 (5th Cir. 1957); Aaron v. Cooper, 143 F. Supp. 855 (E.D. Ark. 1956), *aff'd*, 243 F.2d 361 (8th Cir. 1957).

193. IRONS, *supra* note 35, at 176-77.

194. *Id.*

195. Stanley v. Darlington County Sch. Dist., 879 F. Supp. 1341, 1391 (D.S.C. 1995), *rev'd in part*, 84 F.3d 707 (4th Cir. 1996). A federal district court later found that the Gressette Committee was probably "the most important element of South Carolina's resistance to desegregation." *Id.* at 1397. The committee also provided legal services to school boards to assist them in finding ways to avoid compliance with *Brown*. *Id.*

196. *Id.* at 1391-92.

197. *Id.* at 1392.

198. *Id.*

199. *Id.* at 1394-95.

200. *Id.* at 1395.

201. Fix, *supra* note 11. This was the legal theory of interposition, which held that a state's legal authority was equal to that of the federal government. TUSHNET, *supra* note 57, at 240. If a

these and similar actions, South Carolina was the last state to desegregate in any manner.<sup>202</sup>

Meanwhile, in Clarendon County segregation continued as before. The federal district court terminated the *Briggs* case in 1960,<sup>203</sup> and a new plaintiff, Bobby Brunson, immediately filed suit against the county school district with NAACP assistance.<sup>204</sup> As in *Briggs*, a number of parents joined the suit as plaintiffs.<sup>205</sup> This effort was initially frustrated when the court sustained a defense motion to strike all plaintiffs except Brunson from the suit.<sup>206</sup> The court held that because only Brunson sustained a specific, identifiable personal injury, under Rule 23(a)(3) of the Federal Rules of Civil Procedure, multiple plaintiffs could not sustain a class action against the school district.<sup>207</sup> The Fourth Circuit Court of Appeals reversed.<sup>208</sup> The court of appeals noted that the plaintiffs alleged that the school district operated a biracial school system in which the district based all pupil assignments on racial considerations.<sup>209</sup> The alleged injury was "a question of fact . . . common to all of these objecting plaintiffs" and thus conformed to Rule 23(a)(3).<sup>210</sup> The court of appeals remanded the case to the district court for trial.<sup>211</sup>

*Brunson* proceeded to trial before a single judge in the spring of 1965, five years after replacing *Briggs* and eleven years after the initial *Brown* decision.<sup>212</sup> Upon its completion, the district court found in part that Clarendon County school officials operated segregated public schools, had not made a serious attempt to comply with *Brown II*, and did not intend to obey or implement any desegregation order of

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state differed on the constitutionality of a law passed by Congress, the state could interpose itself between its own citizens and the federal government and refuse to enforce the federal law within that state's borders. *Id.* Although by the 1950s interposition was a long-discredited legal doctrine, some Southern politicians saw it as another means to delay enforcement of *Brown*-inspired desegregation plans. MANCHESTER, *supra* note 186, at 946.

202. *Stanley*, 879 F. Supp. at 1395. In January 1963, under court order, Clemson admitted black transfer student, the first school desegregation of any kind in South Carolina since Reconstruction. *Id.*; see also *Gantt v. Clemson Agric. Coll.*, 320 F.2d 611, 614 (4th Cir. 1963).

203. *Brunson v. Bd. of Tr. of Sch. Dist. No. 1*, 429 F.2d 820, 823 n.1 (4th Cir. 1970) (Sobeloff, J., concurring).

204. See *Brunson v. Bd. of Tr. of Sch. Dist. No. 1*, 30 F.R.D. 369 (E.D.S.C. 1962).

205. *Id.* at 370.

206. *Id.* at 372. Said the district court, "It is the individual who is entitled to the equal protection of the law and . . . may complain that his constitutional privilege has been invaded. He has the right to enforce his constitutional privilege or . . . to waive it. No one else can make that decision for him." *Id.*

207. *Id.*; see FED. R. CIV. P. 23(a)(3).

208. See *Brunson v. Bd. of Tr. of Sch. Dist. No. 1*, 311 F.2d 107 (4th Cir. 1962) (per curiam).

209. *Id.* at 109.

210. *Id.* The court of appeals further noted, "Until the desegregation process is largely accomplished, many subsequent cases may be expected to present common questions of fact, for many individuals are likely to be affected in substantially the same way so long as a school board continues old discriminatory practices." *Id.*

211. *Id.*

212. *Brunson v. Bd. of Tr. of Sch. Dist. No. 1*, 244 F. Supp. 859, 860 (E.D.S.C. 1965).

the United States Supreme Court.<sup>213</sup> As evidence of this lack of effort, the district court found that the Clarendon County school district assigned all 2800 of its black pupils to three elementary schools and one high school, with an all-black faculty and staff.<sup>214</sup> The school board designated one elementary school and one high school for all 330 white students, with an all-white faculty and staff.<sup>215</sup>

Clarendon County also used a “freedom of choice” assignment procedure that the district claimed allowed students to attend the school of their choice within the district and permitted the district to place “each child in the school to which he is best suited for educational potential.”<sup>216</sup> However, while Clarendon County promoted the use of “freedom of choice” under the pretense of ending segregation, the ultimate effect of “freedom of choice” was to simply permit white parents to send their children to white schools.<sup>217</sup> The school district refused to allow a single black student to transfer to a white school under its “freedom of choice” policy.<sup>218</sup> The federal district court brushed aside the county’s argument that the county operated segregated public schools in accordance with the “wishes and desires of the great majority of parents of both races living within the District” and that such a system provided each child with sufficient equal protection.<sup>219</sup> On August 19, 1965, the court ordered the school district to desegregate its public schools and to assign pupils on criteria detailed in the court’s order.<sup>220</sup>

While the federal district court directed the school district to admit the nine named plaintiffs to either the white elementary or the white high school, it did not require Clarendon County to immediately eliminate segregated public education.<sup>221</sup> The court reasoned that entering such an order so close to the start of the 1965-66 academic year would create “administrative difficulties” that made it unrealistic to permit every black student in the district to attend a white school.<sup>222</sup> Thus, the court decreed that the school district was to fully implement desegregation with the beginning of the 1966-67 academic year.<sup>223</sup>

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213. *Id.* at 861.

214. *Id.*

215. *Id.*

216. *Id.*

217. IRONS, *supra* note 35, at 176.

218. *Id.* During the Sixties, “hundreds” of school districts, mainly in the South, adopted “freedom of choice” plans and included procedures allowing local officials final approval over all transfer requests. *Id.*

219. *Brunson*, 244 F. Supp. at 860.

220. *See id.* at 863-65.

221. *Id.* at 863-64.

222. *Id.* at 863.

223. *Id.* at 864. The court noted that other South Carolina federal district courts, as well as the Fourth Circuit, had by now repudiated the “Parker doctrine” and now held that the Fourteenth Amendment protected the rights of black children to attend previously all-white public

Two weeks after the district court entered its ruling, the plaintiffs requested that the court amend its decision on grounds that the plan failed to address faculty desegregation and did not sufficiently inform parents regarding their freedom to choose among the district schools.<sup>224</sup> A hearing on this motion was not held until the following June, at which time the court heard arguments in *Brunson* and in several additional desegregation lawsuits involving other state public schools.<sup>225</sup> In September 1966, the court ordered all defendants to submit desegregation plans for each affected school district within sixty days.<sup>226</sup> Clarendon County officials duly presented a desegregation plan for the 1967-68 academic year, but the court deemed it inadequate and directed the county to provide an amended proposal, which the county did in February 1967.<sup>227</sup> The court approved the amended plan, which included a revamped “freedom of choice” procedure.<sup>228</sup> However, two years later Summerton Elementary School enrolled 145 white students and only twelve black students.<sup>229</sup> Summerton High School had 127 enrolled students, only sixteen of whom were black.<sup>230</sup> The remaining four district schools were one hundred percent black.<sup>231</sup> The conclusion was inescapable. Fifteen years after the *Brown* decision, Clarendon County continued to intentionally operate segregated public schools.

In 1968, the United States Supreme Court in *Green v. County School Board*<sup>232</sup> voiced suspicion of “freedom of choice” plans, holding that it was not enough for a school district to implement such a plan and then declare itself free of segregation.<sup>233</sup> Two years later, the Charleston federal district court found that the Clarendon County school district’s “freedom of choice” method was “inadequate and ineffective . . . to dismantle its dual school system.”<sup>234</sup> The Fourth Circuit Court of Appeals affirmed, the majority giving its tacit blessing to a court-approved Department of Health, Education and Welfare (HEW) desegregation proposal.<sup>235</sup> Three judges filed a dissenting

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schools without qualification. *Id.* at 862 & n.3 (citing case decisions from the Eastern District and the Western District of South Carolina).

224. *Brunson v. Bd. of Tr. of Sch. Dist. No. 1*, 271 F. Supp. 586, 586 (D.C.S.C. 1967).

225. *Id.* at 586-87.

226. *Id.* at 587.

227. *Id.*

228. *Id.* at 587-88.

229. *Brunson v. Bd. of Tr. of Sch. Dist. No. 1*, 429 F.2d 820, 821 (4th Cir. 1970) (Craven, J., concurring and dissenting).

230. *Id.* (Craven, J., concurring and dissenting).

231. *Id.* (Craven, J., concurring and dissenting).

232. 391 U.S. 430 (1968).

233. *Id.* at 440. “Where it offers real promise of aiding a desegregation program to effectuate conversion of a state-imposed dual system to a unitary, non-racial system[,] there might be no objection to allowing such a device to prove itself in operation.” *Id.* at 440-41.

234. *Brunson*, 429 F.2d at 820-21 (Craven, J., concurring and dissenting).

235. *Id.* at 820.

opinion harshly criticizing the HEW plan, arguing that such an “extreme remedy,” with its “unyielding fidelity to the arithmetic of race,” would do nothing to advance integration but would only encourage white flight from the school district.<sup>236</sup>

As authority for this position, the dissenters relied on the recent testimony of Harvard psychologist Thomas Pettigrew, who theorized that integrated education was effective only if desegregation achieved an “optimal level” of black and white students.<sup>237</sup> In other words, black and white students’ educational achievement would begin to deteriorate once a school’s population of black and white students exceeded the optimal level.<sup>238</sup> Pettigrew further asserted that “little advantage is gained for children of either race, and some harm may result, from placing children in a school where they are in a distinct racial minority.”<sup>239</sup> Pettigrew’s analysis irritated one concurring judge, who wrote that the dissenters had embraced an idea that was “no more than a resurrection of the axiom of black inferiority as justification for separation of the races.”<sup>240</sup>

With the Fourth Circuit’s ruling, the case of *Briggs v. Elliott* and its descendants ended. The past three decades have seen mixed results in Clarendon County’s desegregation efforts. In Summerton, most white families ignored the public schools and sent their children to the all-white Clarendon Hall, “one of the many ‘segregation schools’ established in the South as refuges for intolerance.”<sup>241</sup> Eventually, the state legislature divided the county schools into three districts, with a mostly black district in Summerton and two largely white districts.<sup>242</sup> Although black residents eventually controlled the new district’s schools, they did not have the financial resources to replace the district’s dilapidated infrastructure.<sup>243</sup> Not until 1994, four decades after the *Brown* decision, did Summerton voters approve funds for a new high school.<sup>244</sup> Out of 436 students enrolled in the new high school in 2002, approximately ten were white.<sup>245</sup>

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236. *Id.* at 821-22 (Craven, J., concurring and dissenting). Chief Judge Clement W. Haynsworth, soon nominated and rejected for a seat on the United States Supreme Court, joined in the dissenting opinion. *See id.* A separate concurring opinion attacked the notion that a federal court could use the threat of white flight as an excuse to limit desegregation: “More to be feared than white flight in Clarendon County would be any judicial countenancing of the suggestion that abandoning or qualifying a desegregation program is a legally acceptable way to discourage flight.” *Id.* at 827 (Sobeloff, J., concurring).

237. *Id.* at 821 n.1 (Craven, J., concurring and dissenting).

238. *Id.* (Craven, J., concurring and dissenting). Pettigrew hinted that an appropriate ratio was seventy percent white children to thirty percent black children. *Id.* (Craven, J., concurring and dissenting).

239. *Id.* (Craven, J., concurring and dissenting).

240. *Id.* at 826 (Sobeloff, J., concurring).

241. IRONS, *supra* note 35, at 331.

242. *Id.*

243. *Id.* at 331-32.

244. *Id.* at 332.

245. *Id.* at 333.

### B. Virginia: Massive Resistance

Official Virginia reaction to *Brown I* decision was cool but not defiant.<sup>246</sup> Politicians, school officials, and the press called for a rational response to the United States Supreme Court's decision.<sup>247</sup> However, as announcement of the *Brown I* remedy drew near, Prince Edward County officials and residents, anticipating an adverse ruling, began making plans to resist its enforcement.

In April 1955, a group of white residents requested the county appropriate no funds for the public schools in the event the Court ordered the schools to integrate.<sup>248</sup> The supervisors voted to delay authorizing school appropriations until May 31, 1955, the state-mandated deadline for counties to finalize their budgets.<sup>249</sup> On that date, by coincidence, the Court released its *Brown II* opinion, and official Virginia reaction this time was defiance. That night, the Prince Edward County Board of Supervisors met and voted not to provide funds for the county's public schools.<sup>250</sup> Shortly afterward, more than one thousand white residents attended a meeting in Farmville to organize a private white-only school.<sup>251</sup>

In July 1955, three days after the South Carolina federal court issued its initial interpretation of *Brown II*, a three-judge federal panel in Virginia followed suit. The Virginia federal court, in refashioning its previous decree to conform to *Brown II*, held that immediate enforcement of *Brown II*'s strictures was not necessary.<sup>252</sup> The court held it was unrealistic to require Prince Edward County to arrange to desegregate so close to the start of the fall term.<sup>253</sup> The court decreed that Prince Edward County could retain its segregated school system for the upcoming academic year, but that desegregation had to occur at an unspecified future time.<sup>254</sup> The Prince Edward County Board of Supervisors responded by placing the public schools' budget on a month-to-month appropriation schedule.<sup>255</sup>

A full year passed without further judicial effort to enforce *Brown II* in Virginia.<sup>256</sup> In July 1956, the federal three-judge panel met to hear a plaintiffs' request that the court set a firm timetable for Prince Edward County to initiate desegregation and their suggestion

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246. See SMITH, *supra* note 105, at 84-85.

247. *Id.* at 85.

248. *Id.* at 101.

249. See Baker, *supra* note 108.

250. SMITH, *supra* note 105, at 102.

251. Baker, *supra* note 108.

252. Davis v. County Sch. Bd., 149 F. Supp. 431, 432 (E.D. Va. 1957), *rev'd sub nom.* Allen v. County Sch. Bd., 249 F.2d 462 (4th Cir. 1957).

253. Davis v. County Sch. Bd., 142 F. Supp. 616, 617 (E.D. Va. 1956).

254. SMITH, *supra* note 105, at 125.

255. Spreng, *supra* note 30, at 343.

256. Davis, 149 F. Supp. at 432.

that the court order the county to complete public school desegregation by September 1956.<sup>257</sup> Instead of ruling on the plaintiffs' motion, the panel dissolved itself because "questions of the validity of the state constitutional and statutory provisions have been settled [and] these provisions have been declared invalid."<sup>258</sup> Since all that remained was the "enforcement of constitutional rights without reference to any state constitutional or statutory provision," no statutory basis existed for the panel's existence.<sup>259</sup> The panel assigned one of its members, Circuit Judge Sterling Hutcheson, to continue judicial oversight.<sup>260</sup>

Meanwhile, Virginia's governor convened a special session of the General Assembly to enact a series of laws popularly known as "Massive Resistance."<sup>261</sup> These statutes were similar to those enacted in South Carolina in response to *Brown*.<sup>262</sup> Such laws included elimination of compulsory attendance, tuition grants for students who attended private segregated schools, and creation of a state Pupil Placement Board to take over local pupil assignment duties.<sup>263</sup> The General Assembly also ratified a provision allowing the governor to take over a school ordered to integrate and operate it as a segregated school.<sup>264</sup> Finally, another statute authorized local officials to close any public school that a court ordered to provide integrated education.<sup>265</sup> In January 1956, Virginia voters approved a constitutional amendment authorizing issuance of tuition grants to subsidize white parents who sent their children to white-only schools.<sup>266</sup>

Against this background, the NAACP persisted in its litigation against Prince Edward County. In November 1956, the plaintiffs returned to Judge Hutcheson's Richmond courtroom and argued for imposition of a specific deadline for the school board's compliance with the injunction that the three-judge panel issued to conform to *Brown II*.<sup>267</sup> However, Judge Hutcheson refused to fix a time limit for compliance, holding that to do so might compel the school board to shut down the schools entirely.<sup>268</sup> A deadline would only add to the "present state of unrest and racial tension in the county."<sup>269</sup> Judge Hutch-

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257. *Davis*, 142 F. Supp. at 617.

258. *Id.* Judge John J. Parker, who had such a prominent role in the *Briggs* litigation, wrote the panel opinion and thereafter refrained from further involvement in the *Davis* proceedings. *See id.* at 620.

259. *Id.* at 617.

260. *Id.* at 620.

261. Baker, *supra* note 108.

262. *See supra* notes 196-201 and accompanying text.

263. SMITH, *supra* note 105, at 144.

264. *Id.*

265. Baker, *supra* note 108.

266. *Id.*

267. *Davis v. County Sch. Bd.*, 149 F. Supp. 431, 438 (E.D. Va. 1957), *rev'd sub nom.* *Allen v. County Sch. Bd.*, 249 F.2d 462 (4th Cir. 1957).

268. *Id.*

269. *Id.* at 439.

eson described the school board as being “in a position of helplessness” and said he would not force the issue “until the entire situation can be considered and adjustments gradually brought about.”<sup>270</sup> The judge further observed that desegregation presented complicated problems that “cannot be solved by zealous advocates, by an emotional approach, nor by those with selfish interests to advance.”<sup>271</sup>

The district court’s overt sympathy for the Prince Edward community’s predicament did not impress the Fourth Circuit, which quickly reversed Judge Hutcheson’s ruling.<sup>272</sup> The court of appeals held that the judge had missed an opportunity “to say plainly to the defendants that they must comply without further delay.”<sup>273</sup> The court found that concerns that immediate enforcement of *Brown II* would spark community disorder were misplaced:

The fact that the schools might be closed if the order were enforced is no reason for not enforcing it. A person may not be denied enforcement of rights to which he is entitled under the Constitution of the United States because of action taken or threatened in defiance of such rights.<sup>274</sup>

The court of appeals directed Judge Hutcheson on remand to order rapid and reasonable action toward local compliance with the court’s desegregation order.<sup>275</sup> In November 1958, Judge Hutcheson directed the Prince Edward County School Board to “proceed promptly with the formulation of a plan of desegregation.”<sup>276</sup> The judge gave the school board seven years to fully desegregate its public schools on the grounds that the board should have ten years from the date of the *Brown II* decision to comply with its directives.<sup>277</sup> In May 1959, the Fourth Circuit again reversed Judge Hutcheson, finding the judge’s approach too leisurely.<sup>278</sup> “The proceedings of the District Court . . . and the total inaction of the School Board speak so loudly that no argument is needed to show that the last delaying order of the District Judge cannot be approved.”<sup>279</sup> The court of appeals instructed Judge Hutcheson to order the school board to “take immediate steps . . . to permit the entrance of qualified persons into the white school in the school term beginning September 1959.”<sup>280</sup>

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270. *Id.* at 439-40.

271. *Id.* at 438.

272. *See* *Allen v. County Sch. Bd.*, 249 F.2d 462 (4th Cir. 1957) (per curiam).

273. *Id.* at 465.

274. *Id.*

275. *Id.*

276. *Allen v. County Sch. Bd.*, 266 F.2d 507, 508 (4th Cir. 1959) (per curiam).

277. *Id.*

278. *Id.* at 510.

279. *Id.*

280. *Id.* at 511.

Within a month of the Fourth Circuit's decision, the Prince Edward County Board of Supervisors announced that it would not levy taxes or appropriate money to operate the public schools during the coming academic year.<sup>281</sup> By the time the district court issued its order in April 1960 directing Prince Edward County to desegregate its public schools, the county had shut down those schools entirely.<sup>282</sup> At the same time, the newly founded Prince Edward Academy opened its doors to the county's white children.<sup>283</sup>

The public schools would remain closed for five years, though the plaintiffs made efforts to compel the county to reopen them. In April 1961, the federal district court enjoined the county from paying public funds or allowing tax credits to those residents who sent their children to the Prince Edward Academy.<sup>284</sup> The court further ordered the school board to prepare a desegregation plan for implementation "when and if the public schools of Prince Edward County are reopened."<sup>285</sup> The court declined to decide whether the school closings alone violated the Fourteenth Amendment.<sup>286</sup> Noting that the answer first required a determination of whether Virginia law permitted Prince Edward County to close its schools at its prerogative, the court held that the state courts had the proper jurisdiction to address the issue.<sup>287</sup>

Shortly afterward, the federal district court reversed itself and held that it did have jurisdiction to decide the question.<sup>288</sup> The court then ruled that Virginia's public schools were "established . . . maintained, supported and administered in accordance with state law."<sup>289</sup> Therefore, since Prince Edward County did not have sole control of its public schools, the county's closure of the schools was state action within the Fourteenth Amendment's domain.<sup>290</sup> The court sided with the plaintiffs in further holding that the state violated equal protection when it permitted public schools to remain open in some locations

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281. SMITH, *supra* note 105, at 151.

282. Griffin v. Bd. of Supervisors, 322 F.2d 332, 334 (4th Cir. 1963), *rev'd*, 377 U.S. 218 (1964).

283. See SMITH, *supra* note 105, at 167.

284. Allen v. County Sch. Bd., 198 F. Supp. 497, 503 (E.D. Va. 1961).

285. *Id.* at 504.

286. *Id.* at 501.

287. Spreng, *supra* note 30, at 355. The federal district court invoked the abstention doctrine, which requires federal courts to avoid deciding questions of state law upon which state courts have not ruled. R.R. Comm'n v. Pullman Co., 312 U.S. 496, 501 (1941). The Virginia Supreme Court of Appeals promptly held that the county board of supervisors had no constitutional or statutory obligation to provide financial support for public school education. Spreng, *supra* note 30, at 355; see Griffin v. Bd. of Supervisors, 124 S.E.2d 227, 231 (Va. 1962).

288. Allen v. County Sch. Bd., 207 F. Supp. 349, 350-51 (E.D. Va. 1962).

289. *Id.* at 352.

290. *Id.* at 354.

while allowing the closure of public schools in Prince Edward County to avoid integration.<sup>291</sup>

Both plaintiffs and defendants appealed the district court's decision to the Fourth Circuit, which vacated and remanded.<sup>292</sup> The court of appeals held that the federal district court improperly assumed jurisdiction over what was still a question of state law because the case was pending in the Virginia Supreme Court of Appeals but had not yet had a hearing.<sup>293</sup> The federal court of appeals ruled that "controlling questions of state law . . . govern[ing] the application of unquestioned constitutional principles . . . ought to be determined by the state courts."<sup>294</sup> Moreover, when so determined, "the federal courts ought to abstain from constitutional adjudication premised upon their notions of state law which may or may not turn out to be accurate forecasts."<sup>295</sup>

The plaintiffs appealed to the United States Supreme Court, which granted certiorari.<sup>296</sup> In *Griffin v. County School Board*,<sup>297</sup> the Court reversed the Fourth Circuit, holding that the federal district court properly ruled that closing the Prince Edward County schools while schools remained open in other Virginia counties denied equal protection to the plaintiffs.<sup>298</sup> The Court held that the district court "may if necessary to prevent further racial discrimination, require [local and state officials] to exercise the power that is theirs to levy taxes to raise funds adequate to . . . operate . . . without racial discrimination a public school system in Prince Edward County like that operated in other counties in Virginia."<sup>299</sup> The abstention question was irrelevant because the Virginia courts had already ruled on the applicability of its state law to all issues present in the case.<sup>300</sup> Noting that the desegregation case was now thirteen years old, and that the original *Davis* plaintiffs were probably adults past that age when most people attend high school, the Court concluded that Prince Edward County had engaged in "too much deliberation and not enough speed" in failing to recognize black students' constitutional rights.<sup>301</sup> Thus, the federal district court in *Griffin* could order Prince Edward County to provide

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291. *Id.* at 355.

292. *See Griffin v. Bd. of Supervisors*, 322 F.2d 332 (4th Cir. 1963), *rev'd*, 377 U.S. 218 (1964).

293. *Id.* at 343.

294. *Id.* at 344.

295. *Id.*

296. *Griffin v. County Sch. Bd.*, 375 U.S. 391 (1964).

297. 377 U.S. 218 (1964).

298. *Id.* at 225.

299. *Id.* at 233.

300. *Id.* at 229. The Court accepted the argument of the lone dissent in the Fourth Circuit case, which stated that federal judges "have neither the duty nor the right to pressure the state courts to declare federal rights, and they are not bound by conscience or law to engage in a race with the federal courts to declare federal rights." *Griffin*, 322 F.2d at 344-45 (Bell, J., dissenting).

301. *Griffin*, 377 U.S. at 229.

financial support to operate public schools and to impose the taxes required to maintain that support.<sup>302</sup>

After *Griffin*, Prince Edward County's "massive resistance" melted away.<sup>303</sup> The county finally reopened its public schools in September 1964.<sup>304</sup> However, other Virginia counties continued to resist implementing *Brown*-mandated desegregation. Four years after *Griffin* was decided, the United States Supreme Court in *Green v. County School Board* dealt a crippling blow to "freedom of choice" in Virginia when it struck down a three-year-old plan that resulted in no assignments of white students to a black school.<sup>305</sup> The defendant argued that through allowing its students, regardless of race, to choose their schools "freely," the school board discharged its constitutional obligations under *Brown*.<sup>306</sup> The Court unanimously disagreed: "Rather than further the dismantling of the dual system, the plan . . . operated simply to burden children and their parents with a responsibility [*Brown*] placed squarely on the School Board."<sup>307</sup> The Court reiterated its *Brown II* holding that a school district had to either eliminate remnants of past racial discrimination in all areas of public education, including student assignment, teachers and other personnel, busing, extracurricular activities, and facilities, or face federal court supervision.<sup>308</sup>

By the mid-1990s, Prince Edward County had thoroughly integrated its public schools, with ninety percent of its white students enrolled in schools with black majority enrollments.<sup>309</sup> The all-white academy school founded in response to *Brown* lost its tax-exempt status in the 1970s, after which its role in the community diminished.<sup>310</sup> After the academy integrated its student body and faculty in the mid-1980s, the IRS restored its tax exemption.<sup>311</sup> By the early 1990s, the academy educated only twenty percent of Prince Edward County's white schoolchildren.<sup>312</sup> In 1999, approximately thirty-nine percent of system-wide students were white, in a county with a sixty-two percent white population.<sup>313</sup>

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302. *Id.* at 233. The Court has since invoked *Griffin* to uphold a federal court's authority to impose tax increase above a state-mandated tax ceiling. *Missouri v. Jenkins*, 495 U.S. 33, 57-58 (1990).

303. IRONS, *supra* note 35, at 194.

304. Baker, *supra* note 108.

305. 391 U.S. 430, 441 (1968).

306. *Id.* at 437.

307. *Id.* at 441-42.

308. *Id.* at 435.

309. Baker, *supra* note 108.

310. Spreng, *supra* note 30, at 394-96.

311. *Id.* at 395-96.

312. *Id.* at 396.

313. Hunt, *supra* note 10, at 570.

### C. *Delaware: Massive Litigation*

Although *Gebhart v. Belton* officially ended with the *Brown II* decision, *Belton's* progeny showed that Delaware's struggle to fully desegregate its public schools was no less litigious or complicated than that of South Carolina and Virginia. Two years after *Brown II* was announced, a federal district court determined in *Evans v. Buchanan*<sup>314</sup> that Delaware state officials had taken "no appreciable steps" to comply with the decision.<sup>315</sup> The court enjoined the defendant school districts from denying admission of the plaintiffs or other black children to the public schools.<sup>316</sup> The court also ordered the Delaware State Board of Education to submit a plan that would admit students on a non-discriminatory basis beginning in fall 1957.<sup>317</sup>

The State Board eventually submitted a plan calling for gradual integration over a twelve-year period.<sup>318</sup> The federal district court later approved the proposal, asserting that a more rapid elimination of segregation would magnify the "emotional strain upon the whole educational system . . . in a predominantly Southern society."<sup>319</sup> Such strains, the court feared, would "cause neighbors to cease speaking, threats of violence, mass meetings of protest and misguided individuals disguised in sheets to burn crosses on people's lawns."<sup>320</sup> Upon the plaintiffs' appeal, the Third Circuit rejected the district court's reasoning, declaring, "[O]pposition is not a supportable ground for delaying a plan of integration of a public school system."<sup>321</sup> The court of appeals vacated the judgment and ordered the state to submit a revised desegregation scheme for implementation in the fall of 1961.<sup>322</sup> Delaware's two other counties, Kent and Sussex, desegregated their public schools under this plan.<sup>323</sup> The city of Wilmington, located in New Castle County, the subject of the *Belton* litigation, also took action to desegregate its public schools in seeming compliance with *Brown*.<sup>324</sup> After Delaware's last all-black school was closed in 1967, HEW certified the state as the first southern or border state to halt public school segregation.<sup>325</sup>

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314. 152 F. Supp. 886 (D. Del. 1957).

315. *Id.* at 888.

316. *Id.*

317. *Id.* at 888-89.

318. Scaringi, *supra* note 142, at 167.

319. *Evans v. Buchanan*, 172 F. Supp. 508, 512 (D. Del. 1959).

320. *Id.* at 514.

321. *Evans v. Ennis*, 281 F.2d 385, 389 (3d Cir. 1960).

322. *Id.* at 390.

323. WOLTERS, *supra* note 145, at 201-02.

324. *Evans v. Buchanan*, 393 F. Supp. 428, 451 (D. Del. 1975), *aff'd*, 423 U.S. 963 (1975).

325. *Id.* Delaware officials later used the HEW certification in an attempt to prove that the state had fully complied with *Brown II*. WOLTERS, *supra* note 145, at 204.

During this period, however, Wilmington experienced significant demographic change. White flight to the suburbs, the emergence of urban renewal, and displacement brought on by freeway construction combined to convert the city's population to fifty percent black, with its schools ninety percent black.<sup>326</sup> Despite these realities, in 1968 the Delaware General Assembly passed the Educational Advancement Act,<sup>327</sup> which provided "for the effective and orderly reorganization of certain existing school districts."<sup>328</sup> The Act proscribed consolidation of any school district with a minimum student population of 12,000 with any other school district.<sup>329</sup> This provision effectively prevented the Wilmington school district and its growing black student population from merging with white-majority school districts.<sup>330</sup>

The Educational Advancement Act resuscitated the dormant *Evans* desegregation litigation. In 1970, black parents filed suit alleging that the Act created racially identifiable schools because the Act excluded the Wilmington school district from the reorganization process.<sup>331</sup> In 1974, twenty years after the original *Brown* decision, a federal three-judge panel found that out of twenty-two schools in the Wilmington school district, eleven had virtually all-black enrollments and one was nearly all white.<sup>332</sup> In March 1975, a separate panel ruled that, under the United States Supreme Court's recent decision in *Milliken v. Bradley*,<sup>333</sup> the court would consider imposing an inter-district remedy to address desegregation in Wilmington and New Castle County.<sup>334</sup> The State Board directly appealed the three-judge panel's decision to the United States Supreme Court, which summarily affirmed.<sup>335</sup> Three justices dissented, including Justice William Rehnquist, who asserted that the Court should have allowed arguments on the merits of the Educational Advancement Act.<sup>336</sup> Justice Rehnquist noted that the Delaware statute granted the State Board special authority to reorganize its districts without referendum until July 1969.<sup>337</sup> Because the plaintiffs relied on this provision of the Act as

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326. KLUGER, *supra* note 31, at 778.

327. See DEL. CODE ANN. tit. 14, § 1001 (1999).

328. *Id.*

329. Ware, *supra* note 18, at 15.

330. *Id.*

331. *Id.*

332. *Evans v. Buchanan*, 379 F. Supp. 1218, 1222 (D. Del. 1974), *aff'd*, 423 U.S. 963 (1975). The public schools reported an enrollment of more than 14,000 students, eighty-three percent of whom were black. *Id.*

333. 418 U.S. 717 (1974). The *Milliken* Court held that a federal district court could require school districts in a metropolitan area to consolidate into a single school district to accomplish desegregation, but only if those school districts included in the consolidated district had engaged in deliberate inter-district segregation. *Id.* at 744-45.

334. *Evans v. Buchanan*, 393 F. Supp. 428, 446 (D. Del. 1975), *aff'd*, 423 U.S. 963 (1975).

335. See *Buchanan v. Evans*, 423 U.S. 963 (1975) (mem.).

336. *Id.* at 964 (Rehnquist, J., dissenting).

337. *Id.* at 967 (Rehnquist, J., dissenting).

the basis for their cause of action in the district court, Justice Rehnquist contended that the district court could not enjoin the Act's operation since the statute had expired before the district court entered its decree.<sup>338</sup>

Nevertheless, the three-judge panel reconvened to decide how an inter-district remedy would accomplish the court's goal of placing victims of segregated education "in substantially the position which they would have occupied had the violation not occurred."<sup>339</sup> In May 1976, the panel, having previously found that de jure segregation<sup>340</sup> existed in New Castle County, ordered the eleven school districts in northern New Castle County, including Wilmington, fashioned into a single school district.<sup>341</sup> The federal district court further ordered the creation of a five-member interim New Castle County School Board to oversee the new district.<sup>342</sup> The court declared that it would not enforce its consolidation directive if the General Assembly acted to cure the constitutional violation, and it allowed the parties fifteen months to address the situation.<sup>343</sup> Meanwhile, the State Board appealed the federal district court's ruling to the Third Circuit, which narrowly affirmed in May 1977.<sup>344</sup> When the General Assembly subsequently failed to pass remedial legislation, and the State Board did not put forward a responsive pupil assignment proposal, in August 1977 the court ordered that its desegregation scheme proceed.<sup>345</sup>

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338. *Id.* at 968 (Rehnquist, J., dissenting).

339. *Evans v. Buchanan*, 416 F. Supp. 328, 341 (D. Del. 1976), *aff'd*, 555 F.2d 373 (3d Cir. 1977).

340. In the late 1960s, the United States Supreme Court began using the terms "de jure" and "de facto" to distinguish the type of segregation that the *Brown* Court intended to eradicate. Guey Heung Lee v. Johnson, 404 U.S. 1215, 1215-16 (1971) (referring to *Brown* as a "class[ic] case of de jure segregation"). De jure segregation is defined as "racial separation [that] is the product of some purposeful act by government authorities." NOWAK & ROTUNDA, *supra* note 74, § 14.9(a)(2)(a). In contrast, "de facto" segregation arises from changing community demographics and not from state-sponsored segregation. *Id.* Only de jure segregation violates the Equal Protection Clause. *Id.*

341. *Evans*, 416 F. Supp. at 357-58.

342. *Id.* at 357.

343. *Id.* at 358.

344. *See Evans v. Buchanan*, 555 F.2d 373 (3d Cir. 1977) (en banc), *aff'd*, 582 F.2d 750 (3d Cir. 1978). The majority emphasized that a trial court was the best forum to develop remedies in school desegregation cases. *Id.* at 380. Therefore, the court of appeals would defer to the trial court "when it has applied proper legal precepts and remained within determined legal boundaries." *Id.* Three judges dissented, criticizing the majority for not identifying which of the inter-district violations found by the district court required a desegregation remedy in northern New Castle County. *Id.* at 383 (Garth, J., dissenting). The dissenters argued that the district court failed to determine whether the racial disparities were attributable to bona fide equal protection violations, as opposed to economic/social demographics or purely private actions. *Id.* at 390 (Garth, J., dissenting).

345. *See Evans v. Buchanan*, 435 F. Supp. 832 (D. Del. 1977). The district court did grant a stay to allow the State Board to appeal the Third Circuit's affirmance of the district court's March 1975 holding that the Educational Advancement Act was unconstitutional. *Id.* at 848-49. The stay halted only implementation of the one-district plan; the State Board was still required to appoint an interim single district board. *Id.*

Although the State Board made no interim pupil assignment proposal to the district court after the Third Circuit's affirmance in May 1977, it did submit an alternative desegregation remedy that it referred to as "reverse volunteerism."<sup>346</sup> The State Board proposed to assign all Wilmington black students grades seven through twelve to suburban school districts for the 1977-78 academic year.<sup>347</sup> Although the plan required involuntary student reassignment, students would retain the right to elect to remain in their current Wilmington school.<sup>348</sup> After hearing testimony on the State Board's proposal, the district court concluded in its August 1977 ruling that it could not consider the proposal on the merits.<sup>349</sup>

The federal district court observed that the Delaware General Assembly had not passed its own desegregation remedy and that the Third Circuit had earlier cautioned that the state had to either enact its own scheme or comply with the plan that the court of appeals had earlier endorsed.<sup>350</sup> The court further determined that even if it could have considered the State Board's plan, reverse volunteerism was not a viable desegregation cure.<sup>351</sup> The proposal struck the court as reminiscent of the "freedom of choice" plan that the United States Supreme Court rejected as unconstitutional in *Green*, "even though the initial assignment of the students is involuntary."<sup>352</sup> Noting that the proposed reassignments only affected black Wilmington students and no white suburban or city students, the district court concluded that reverse volunteerism would create a "virtually all white public school system" in Wilmington.<sup>353</sup> The court held that because the State Board's proposal assigned responsibility to the plaintiffs for correcting the constitutional violations, reverse volunteerism was an unacceptable remedy.<sup>354</sup>

In January 1978, United States District Judge Murray Schwartz issued a secondary remedial decree.<sup>355</sup> In addition to reorganizing the previously identified eleven-district desegregation area into a single district, the court required that all students attend schools in the former mostly white school districts for nine years and in the former

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346. *Id.* at 841.

347. *Id.* at 838.

348. *Id.*

349. *Id.* at 840.

350. *Id.*

351. *Id.*

352. *Id.* at 841.

353. *Id.*

354. *Id.* at 840.

355. *See* *Evans v. Buchanan*, 447 F. Supp. 982 (D. Del. 1978), *aff'd*, 582 F.2d 750 (3d Cir. 1978). Judge Schwartz took over in 1976 after the three-judge panel that issued the original inter-district desegregation order dissolved itself. Irving Morris, *The Role of Delaware Lawyers in the Desegregation of Delaware's Public Schools: A Memoir*, 9 WIDENER L. SYMP. J. 1, 32 (2002).

mostly black districts for three years.<sup>356</sup> The court also instituted a maximum tax rate to provide funds for the district's operating expenses and authorized the interim board to levy and collect the tax.<sup>357</sup> Finally, to achieve a more precise racial balance in individual schools within the desegregation area, Judge Schwartz ordered busing within the redesigned district.<sup>358</sup>

One month later, the General Assembly finally approved a desegregation plan that split the desegregation area into four districts instead of one.<sup>359</sup> Judge Schwartz quickly enjoined implementation of the four-district scheme, holding that it would only impede the desegregation process because the General Assembly failed to provide a workable plan for pupil assignment or for establishing a tax rate.<sup>360</sup> The State Board also requested that the federal district court prohibit the interim New Castle County School Board from enforcing the specific tax rate mandated in the court's January 1978 order on the ground that the rate exceeded that allowed by state law.<sup>361</sup> Judge Schwartz declined to issue an injunction, holding that the state-mandated rate would "frustrate or imperil the desegregation process in the single school district."<sup>362</sup>

In July 1978, the Third Circuit allowed the federal district court's desegregation plan to ensue.<sup>363</sup> The State Board argued that the United States Supreme Court's recent decision in *Dayton Board of Education v. Brinkman*<sup>364</sup> required the plaintiffs to prove the precise "incremental segregative effect" of the constitutional violations upon the racial composition of the student population.<sup>365</sup> Because the district court made no such inquiry, the State Board asserted, Judge Schwartz abused his discretion in ordering an inter-district remedy.<sup>366</sup> The court of appeals rejected this argument, holding that the *Dayton Board of Education* decision did not apply in a situation such as Dela-

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356. *Evans*, 447 F. Supp. at 1008.

357. *Id.* at 1026. Judge Schwartz expressed his "deep seated reluctance" to involve the district court in taxation matters, insisting he would not have done so "[i]f the political process had provided statutory machinery or a procedure for devising a tax rate for the single district." *Id.*

358. *See Ware*, *supra* note 18, at 15. Judge Schwartz euphemistically referred to this part of the desegregation remedy as "mandatory transportation." *Evans*, 447 F. Supp. at 1011. One commentator has suggested that the federal court espoused busing as a remedy to correct for the "migration of white population and the increase of Wilmington's black population" that the Educational Advancement Act allegedly caused. *Wolters*, *supra* note 17, at 282.

359. *Evans*, 447 F. Supp. at 1043.

360. *Id.* at 1047. Interestingly, Judge Schwartz's order enjoining enforcement of the four-district legislation was one of the rare federal court rulings in the entire *Evans* litigation that Delaware did not appeal to a higher court. *Evans v. Buchanan*, 512 F. Supp. 839, 843 (D. Del. 1981).

361. *Evans v. Buchanan*, 455 F. Supp. 692, 694 (D. Del. 1978).

362. *Id.* at 695.

363. *Evans v. Buchanan*, 582 F.2d 750, 781 (3d Cir. 1978).

364. 433 U.S. 406 (1977).

365. *Evans*, 582 F.2d at 763.

366. *Id.*

ware's, in which there was a "historical pattern of significant [d]e jure segregation with pervasive inter-district effects."<sup>367</sup> However, the Third Circuit granted the State Board's request for a writ of mandamus barring enforcement of the single district tax rate.<sup>368</sup> The court of appeals observed that the district court did not recognize the Delaware General Assembly's statutory resolution of the tax issue with the appropriate "presumption of regularity and constitutionality."<sup>369</sup>

In 1980, the General Assembly approved another four-district reorganization plan for northern New Castle County and embraced the pupil assignment criteria that had been in effect in the single school district since the January 1978 secondary decree.<sup>370</sup> Although the plaintiffs argued that the legislation constituted a new equal protection violation,<sup>371</sup> the federal district court approved the reorganization plan.<sup>372</sup> Judge Schwartz held that the plaintiff failed to establish that the General Assembly had acted "with a racially discriminatory purpose," and that the district reorganization would not hinder desegregation.<sup>373</sup> With this ruling, the *Evans* phase of the Delaware desegregation case ended.

After a decade-long hiatus, the Delaware desegregation case resumed in the early 1990s with a new plaintiff, the Coalition to Save Our Children.<sup>374</sup> In 1990, the Coalition objected to a request from one of the four desegregation area districts to the federal district court for modification of its desegregation order to permit operation of a magnet school plan.<sup>375</sup> The Coalition described the magnet school proposal as a "cruel hoax" because the school district had not secured

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367. *Id.* at 765. The Third Circuit further noted that the State Board had itself admitted that it was not possible to separate incremental segregative effects that the constitutional violations caused from those effects that resulted from demographic changes. *Id.* The court of appeals held, "Where the defendant has dragged its heels and obstructed progress toward desegregation for twenty-six years . . . the burden of proof shifts to the defendant." *Id.*

368. *See id.* at 778.

369. *Id.* The Delaware statute, approved in the midst of the extensive 1978 desegregation litigation, prohibited the interim New Castle County School Board from setting a tax rate for operating expenses higher than that established by the state board. *Id.* at 780 n.29. On remand, the district court granted the injunction, concluding that the General Assembly did not establish the tax rate for the single school district with any intent to impede the court's desegregation decree, even though applying the state's rate would cause the new district to operate at a deficit. *Evans v. Buchanan*, 468 F. Supp. 944, 954 (D. Del. 1979).

370. *Evans v. Buchanan*, 512 F. Supp. 839, 846-47 (D. Del. 1981).

371. *Id.* at 852-53.

372. *Id.* at 874. Judge Schwartz delayed his 1981 ruling for sixty days to allow the General Assembly to enact supplemental legislation empowering the state board to enforce the court-mandated pupil assignment criteria. *Coalition to Save Our Children v. State Bd. of Educ.*, 757 F. Supp. 328, 330 (D. Del. 1991). If the Assembly had not acted, Judge Schwartz would not have approved the reorganization plan. *Evans*, 512 F. Supp. at 874.

373. *Evans*, 512 F. Supp. at 858, 872.

374. Morris, *supra* note 355, at 36. The Coalition was a community group formed to oppose the four-district reorganization plan that the federal court approved in 1981. *Id.* Before becoming the named plaintiff in the desegregation case, the Coalition was an unofficial monitoring committee within the desegregation area. *Id.*

375. *Coalition*, 757 F. Supp. at 331.

funding to establish the magnet school.<sup>376</sup> The court approved the modification request despite its concerns that the school district was not acting in good faith.<sup>377</sup>

The resumption of Delaware's desegregation litigation coincided with two United States Supreme Court decisions that signaled a lessening of the Court's previously inflexible stance toward public school desegregation.<sup>378</sup> In *Green*, the Court identified a "unitary, nonracial system of public education" as the desired result of the desegregation process.<sup>379</sup> A school board must establish "a unitary system" in which segregation was "eliminated root and branch."<sup>380</sup> A school district desiring to avoid federal court oversight of its desegregation plan had to eradicate racial discrimination in several areas of public education.<sup>381</sup> The *Green* Court did not define "unitary status," nor at what point a school system would achieve it.<sup>382</sup>

In *Board of Education v. Dowell*<sup>383</sup> and *Freeman v. Pitts*,<sup>384</sup> however, the Court eased its requirements for a school district to attain unitary status.<sup>385</sup> In *Dowell*, the Court held that a school district was required only to make a good faith effort to eliminate the "vestiges of past discrimination . . . to the extent practicable."<sup>386</sup> The Court reduced its standard further in *Freeman*, holding that only partial compliance with the *Green* factors was acceptable if any present racial imbalance was the result of "demographic changes" unrelated to the previous de jure segregation regime.<sup>387</sup> No school district had a constitutional obligation to maintain racial equilibrium; once the district desegregated and eliminated segregative effects as much as possible, judicial intervention would cease unless a plaintiff proved further acts of deliberate discrimination.<sup>388</sup>

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376. Morris, *supra* note 355, at 40.

377. *Coalition*, 757 F. Supp. at 349. Judge Schwartz cited numerous case authorities supporting the concept of magnet schools as a costly but effective method of voluntary desegregation. *Id.* at 351-52.

378. Ware, *supra* note 18, at 15.

379. *Green v. County Sch. Bd.*, 391 U.S. 430, 436 (1968).

380. *Id.* at 437-38.

381. *Id.* at 436-37; *see supra* note 308 and accompanying text.

382. *See generally Green*, 391 U.S. 430. Some commentators have criticized the Court for not providing a concise definition of unitary status. *See, e.g.*, Monika L. Moore, Note, *Unclear Standards Create an Unclear Future: Developing a Better Definition of Unitary Status*, 112 YALE L.J. 311, 311 (2002).

383. 498 U.S. 237 (1991).

384. 503 U.S. 467 (1992).

385. Fairfax, *supra* note 75, at 3.

386. *Dowell*, 498 U.S. at 249-50. The Court stated that a district court should also consider evidence regarding a school district's compliance with previous desegregation decrees. *Id.* A school district's assurance that it would not again operate public schools in violation of the Fourteenth Amendment is also a legitimate consideration. *Id.* at 247.

387. *Freeman*, 503 U.S. at 496.

388. Wolters, *supra* note 17, at 298.

Applying the United States Supreme Court's revised criteria, in June 1993 the State Board requested Judge Schwartz to bestow unitary status upon the state's four school districts.<sup>389</sup> The following November, the litigants agreed on a consent order that addressed many of the demands the Coalition specified as conditions for avoiding further proceedings.<sup>390</sup> State legislators soon criticized the order for its emphasis on progressive educational issues as opposed to desegregation-specific matters.<sup>391</sup> In March 1994, United States District Judge Sue Robinson described the consent order as a misguided attempt to use the federal court's mandate "to impose quality education" as opposed to remedying specific effects of state-sponsored segregation.<sup>392</sup> The Delaware General Assembly rejected the consent order, effectively killing it.<sup>393</sup> The following year, Judge Robinson held that the New Castle County school districts achieved unitary status and ordered their release from court supervision.<sup>394</sup> In July 1996, the Third Circuit affirmed, observing that New Castle County's school districts achieved an appropriate racial balance and eliminated all remnants of de jure segregation.<sup>395</sup> The court of appeals rejected further federal court oversight, agreeing with the district court that student performance inequalities resulted from socioeconomic forces that were not the product of state action.<sup>396</sup> Delaware officially desegregated its public schools, forty-two years after the initial *Brown* decision.

By the 1999-2000 academic year, the New Castle County school board had further subdivided Wilmington into four school districts.<sup>397</sup> In no district was the percentage of white students more than fifty-four percent, with one-quarter of all Wilmington-area students enrolled in private schools.<sup>398</sup> Yet the white population of New Castle

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389. Morris, *supra* note 355, at 41-42.

390. Wolters, *supra* note 17, at 283-84.

391. *Id.* at 287. For example, the order required schools to develop grading standards that were "sensitive to individual learning styles," prohibited police from suburban communities from investigating crimes allegedly committed in their local schools, and encouraged a "permissive approach to school discipline." *Id.* at 285-87. Legislative resistance to the order surprised many who believed that the General Assembly would have done virtually anything to bring the desegregation proceedings, and court-ordered busing, to a close. *Id.* at 289.

392. *Id.* at 292. Judge Robinson took over the desegregation case in November 1993 from Judge Schwartz, who was so involved in brokering the consent order agreement that he recused himself from further proceedings. *Id.* at 283.

393. *Id.* at 294.

394. *Coalition to Save Our Children v. State Bd. of Educ.*, 901 F. Supp. 784, 823-24 (D. Del. 1995), *aff'd*, 90 F.3d 752 (3d Cir. 1996).

395. *See Coalition to Save Our Children v. State Bd. of Educ.*, 90 F.3d 752 (3d Cir. 1996).

396. *Id.* at 777-78. One commentator recently argued that the Third Circuit might have reached a different result had it applied a broader definition of the term "vestiges." Ryan Tacorda, *Acknowledging Those Stubborn Facts of History: The Vestiges of Segregation*, 50 UCLA L. REV. 1547, 1575 (2003).

397. Hunt, *supra* note 10, at 570.

398. *Id.*

County in 2000, where these districts are located, was about seventy-five percent.<sup>399</sup>

In 2000, the Delaware General Assembly enacted the Neighborhood Schools Act,<sup>400</sup> which required northern New Castle County school districts to develop attendance plans that would allow any student to attend the grade-appropriate school closest to the student's residence.<sup>401</sup> The Act specified that school districts were not to use the racial composition of the schools as a basis for assigning students.<sup>402</sup> The Act's legislative sponsor asserted that shortening a student's daily commute would improve parental involvement in the educational process and reduce student transportation expenses.<sup>403</sup> However, one observer predicted the Act would lead to resegregation because its supporters "erroneously assumed that families have exercised a choice in deciding where they reside and . . . a choice as to which schools their children will attend."<sup>404</sup> A former State Board of Education president called for the Act's repeal, predicting that the scheme would "result in racial isolation for a large segment of the student population."<sup>405</sup>

The Delaware desegregation litigation was, simply put, an abject lesson in political and legal exploitation. One observer described the convoluted relationship between the federal court, the Delaware General Assembly, and the State Board of Education this way: "Each thought it was doing everything possible to achieve school desegregation, but . . . either interfere[d] with [e]ach other or were not around to help when needed."<sup>406</sup> A plaintiffs' lawyer accused State Board of Education attorneys of manipulating the judicial system to delay an inevitable result:

[O]nly a few lawyers at any one time represented the black parents and children while the defendant school boards never wanted for attorneys to represent them. Attorneys did not hesitate to defend the school boards and receive the steady income from public funds in the effort to defer forever or, at least, to delay as an immediate action the desegregation of the public schools of Delaware. The largest and leading Delaware law firms appeared for defendants to defend segregation or to oppose or seek the removal of the desegregation orders. Not one of the defending law firms served pro bono.<sup>407</sup>

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399. *Id.*

400. DEL. CODE ANN. tit. 14, § 223 (Supp. 2002).

401. Scaringi, *supra* note 142, at 171.

402. *Id.* at 172.

403. *Id.*

404. Ware, *supra* note 18, at 19.

405. Scaringi, *supra* note 142, at 172 (citation omitted).

406. *Id.* at 174.

407. Morris, *supra* note 355, at 53. Every Delaware attorney general who served during the four decades of the desegregation litigation argued on behalf of the state board, "the defenders of segregation." *Id.*

#### D. Kansas: Brown After Brown

The Kansas desegregation case was different from those involving South Carolina, Virginia, and Delaware because Kansas state and local politicians and education officials were not adamant defenders of the segregated school system.<sup>408</sup> The Kansas attitude reflected more of a natural reluctance to embrace societal change than opposition to integrated education.<sup>409</sup> Also, unlike the other three states, no one contended that Topeka school officials had not provided equal facilities for both white and black students.<sup>410</sup>

The Topeka Board of Education, perhaps realizing the likelihood that the United States Supreme Court would order its schools to desegregate, made its first official gesture toward integration eight months before the initial *Brown* decision.<sup>411</sup> The Board announced that it would immediately integrate two formerly all-white elementary schools.<sup>412</sup> After the Court remanded *Brown* for further proceedings, the Kansas federal district court approved a Board proposal in which all elementary schools were required to admit black and white students to neighborhood schools in those districts where the students lived.<sup>413</sup> The *Brown* plaintiffs took no appeal, and the case remained inactive for the next twenty-five years.<sup>414</sup>

In 1974, HEW investigated a charge that the Topeka school district allowed school buildings with disproportionately high minority enrollments to fall into disrepair.<sup>415</sup> HEW determined that racial imbalances were present in both the student population and in teacher assignments.<sup>416</sup> The school district responded with a facilities plan that addressed the disparities by closing or repairing several school buildings and constructing some new facilities.<sup>417</sup> The school district avoided HEW intervention because it was still under federal court supervision.<sup>418</sup> In 1979, a new class of Topeka school children and their parents revived the *Brown* litigation (*Brown III*), alleging that school district policies preserved racially identifiable public schools.<sup>419</sup> Such

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408. PAUL E. WILSON, A TIME TO LOSE: REPRESENTING KANSAS IN *BROWN V. BOARD OF EDUCATION* 3 (1995).

409. *Id.*

410. *Id.* at 5. The *Brown* plaintiffs thus focused on the negative impact of segregated education as opposed to the existence of equivalent school facilities. *Id.*

411. Cole-Frieman, *supra* note 58, at 28.

412. *Brown v. Bd. of Educ.*, 671 F. Supp. 1290, 1293 (D. Kan. 1987) [hereinafter *Brown III*].

413. *Brown v. Bd. of Educ.*, 139 F. Supp. 468, 469 (D. Kan. 1955).

414. *Brown III*, 671 F. Supp. at 1292.

415. Cole-Frieman, *supra* note 58, at 32.

416. *Id.* at 33.

417. *Brown III*, 671 F. Supp. at 1308.

418. Cole-Frieman, *supra* note 58, at 33.

419. *Brown III*, 671 F. Supp. at 1294-95. Linda Brown Smith, the plaintiff in the 1950s *Brown* litigation, was also the principal plaintiff in the 1979 litigation. Cole-Frieman, *supra* note 58, at 33.

policies included selection of school site locations, optional attendance zones, boundary locations, and faculty/staff assignments.<sup>420</sup>

After a seven-year discovery process, trial occurred during October 1986 in federal district court in Topeka.<sup>421</sup> The following April, the federal district court held that the Topeka school district was a unitary system.<sup>422</sup> The court further held that existing racial imbalances resulted from present demographic factors and were not caused by “overt or covert intentional segregative conduct.”<sup>423</sup> The court concluded that the plaintiffs had the burden of proving that the racial imbalance present in the school district was the result of de jure segregation and did not meet the burden.<sup>424</sup>

In reaching its decision, the federal district court considered applying the United States Supreme Court decisions in *Keyes v. School District No. 1*<sup>425</sup> and in *Swann v. Charlotte-Mecklenburg Board of Education*<sup>426</sup> to require the school district to prove that segregation did not exist. In *Keyes*, the Court created the presumption that if intentional segregation exists in a school district in any form, no matter how insignificant, the entire district is tainted.<sup>427</sup> In *Swann*, the Court for the first time upheld the use of forced busing of students to schools outside their neighborhoods as an acceptable tool of school desegregation.<sup>428</sup> School officials were required to prove that any desegregation plan creating racial disparity in a student population was “genuinely nondiscriminatory.”<sup>429</sup> The Topeka federal court declined to apply either *Keyes* or *Swann* in *Brown III*, holding that the “passage of time, demographic dynamics and changes in administrative personnel” prevented application of either doctrine.<sup>430</sup> Therefore, the burden of proof remained with the plaintiffs to prove that unlawful segregation did exist within the school district, and the burden did not shift to school district officials to prove otherwise.<sup>431</sup>

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420. *Brown III*, 671 F. Supp. at 1295.

421. *Id.* at 1291. The federal district court allowed *Brown III* to proceed after ruling that the plaintiffs could intervene in the initial *Brown* litigation rather than initiate a separate action. *Brown v. Bd. of Educ.*, 84 F.R.D. 383, 405 (D. Kan. 1979); see FED. R. CIV. P. 24(a)(2).

422. *Brown III*, 671 F.Supp. at 1311.

423. *Id.* The court absolved the State Board of Education from responsibility “for the racial conditions present in the district.” *Id.*

424. *Id.* at 1295.

425. 413 U.S. 189 (1973).

426. 402 U.S. 1 (1971).

427. *Keyes*, 413 U.S. at 208.

428. *Swann*, 402 U.S. at 30.

429. *Id.* at 26.

430. *Brown III*, 671 F. Supp. 1290, 1295 (D. Kan. 1987) .

431. *Id.* In a pre-trial ruling, the federal district court held that the plaintiffs had the initial burden to prove that segregated education existed in Topeka Public Schools and that the state intentionally “brought about or maintained” this condition. *Brown v. Bd. of Educ.*, 84 F.R.D. 383, 399-400 (D. Kan. 1979). If the plaintiffs met this evidentiary threshold, the burden would then shift to the school district to prove “its actions as to other segregated schools within the system were not also motivated by segregative intent.” *Id.* at 400.

In December 1989, the Tenth Circuit Court of Appeals reversed the district court in part, holding that the Topeka school district was not unitary.<sup>432</sup> The court of appeals held that the district court misapplied the burden of proof to the plaintiffs to prove that the district engaged in purposeful discriminatory behavior.<sup>433</sup> Said the majority opinion, "Once a plaintiff has proven the existence of a current condition of segregation, the school district bears the substantial burden of showing that that condition is not the result of its prior de jure segregation."<sup>434</sup> The majority agreed with the district court that *Keyes* did not apply in this case, but for a different reason, that being that the Topeka school district had previously operated a de jure system.<sup>435</sup> According to the majority, the *Keyes* presumption applied only to establish the initial existence of de jure segregation.<sup>436</sup> While the school district "was actively engaged in improving the education of its students,"<sup>437</sup> the court of appeals found the district had become lax in enforcing *Brown II*.<sup>438</sup> Such complacency produced over time an educational system with significant racial disparities in both students and faculty.<sup>439</sup> A dissent sharply accused the majority of bias against the school district and of usurping the trial court's authority to ascertain the level of racial imbalance required to invoke the *Keyes* presumption.<sup>440</sup> The dissent argued that the court of appeals should award the school district unitary status for "substantial integration" despite demographic and social forces beyond its control.<sup>441</sup>

In 1992, the United States Supreme Court vacated the Tenth Circuit's decision and remanded *Brown III* for further consideration in light of the Court's recent *Freeman* and *Dowell* decisions.<sup>442</sup> The Tenth Circuit subsequently reinstated its opinion,<sup>443</sup> holding that *Freeman* and *Dowell* did not affect its conclusion that the district court had wrongly required the plaintiffs to prove the school district's discriminatory intent to maintain segregated schools.<sup>444</sup> The court of appeals directed the district court to fashion a suitable remedy,<sup>445</sup> and in July 1994 the federal district court adopted another Topeka school district remedial proposal.<sup>446</sup> The plan required majority/minority student

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432. *Brown v. Bd. of Educ.*, 892 F.2d 851, 854 (10th Cir. 1989).

433. *Id.* at 861.

434. *Id.*

435. *Id.* at 863 n.27.

436. *Id.*

437. *Id.* at 889.

438. *See id.*

439. *Id.*

440. *Id.* at 951 (Baldock, J., dissenting).

441. *Id.* at 954 (Baldock, J., dissenting).

442. *Bd. of Educ. v. Brown*, 503 U.S. 978, 978 (1992).

443. *Brown v. Bd. of Educ.*, 978 F.2d 585, 593 (10th Cir. 1992).

444. *Id.* at 589.

445. *Id.* at 593.

446. *Cole-Frieman*, *supra* note 58, at 34.

populations at each elementary, middle, and high school to fall within fifteen percent of the majority/minority percentages for all district elementary, middle, and high school students.<sup>447</sup> In July 1999, the district court determined that the school district had satisfied this benchmark at all school levels.<sup>448</sup> With no objection from the plaintiffs, the district court found that the school district had complied in good faith with the court's desegregation order and eliminated past discrimination "to the extent practicable."<sup>449</sup> Topeka, after forty-five years, had achieved a unitary public school system in the eyes of the federal courts.<sup>450</sup>

#### IV. SUMMARY AND CONCLUSION

Although *Briggs v. Elliott*, *Gebhart v. Belton*, and *Davis v. County School Board* are not as familiar to Americans as *Brown v. Board of Education*, these three cases have not served as mere footnotes in American legal history. *Briggs*, *Belton*, *Davis*, and their respective progeny remained on federal court dockets in South Carolina, Delaware, and Virginia for decades after the United States Supreme Court announced its initial *Brown* decision in May 1954. The subsequent desegregation litigation history in these three cases reflects not only the social and economic realities of the times but also illustrates, as Archibald Cox once observed, the "limits to the power of even the Supreme Court to command assent."<sup>451</sup>

*Briggs*, *Belton*, and *Davis* became entwined in the *Brown* litigation through desegregation suits that began as isolated complaints by black students regarding the quality of transportation or facilities provided within a separate-but-equal educational system. In each case, the NAACP represented the plaintiffs and developed what was a significant change in its previous segregation litigation strategy.<sup>452</sup> At first, the lodestar of the NAACP's pre-*Brown* challenges to separate-but-equal education was money and the lack of it made available for black schools in the affected states. While black and white schools were separate, they were certainly not equal in facilities, transportation, or in other essential resources. In developing its trial strategy in *Briggs*, the NAACP, buoyed by recent United States Supreme Court rulings in the *Sweatt* and *McLaurin* cases, decided to argue that it was the institution of segregation itself and not merely inadequate public

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447. *Brown v. Unified Sch. Dist. No. 501*, 56 F. Supp. 2d 1212, 1213-14 (D. Kan. 1999).

448. *Id.* at 1214.

449. *Id.*

450. *Id.*

451. Judith A. Hagley, *Massive Resistance—The Rhetoric and the Reality*, 27 N.M. L. REV. 167, 216 (1997) (citation omitted).

452. See *supra* notes 54-60 and accompanying text.

financing that was harmful. The NAACP feared that states that supported separate-but-equal education would respond by putting more resources into equalizing school facilities while maintaining segregation.<sup>453</sup> Since the Court had already found in the *Sweatt* and *McLaurin* cases that segregated education was harmful to graduate school students, the NAACP anticipated that the Court might make a similar declaration regarding segregated elementary school education.<sup>454</sup>

The NAACP adopted a trial strategy in *Briggs*, also used later in the *Belton* and *Davis* cases, in which it focused on the inability of black students to learn in a segregated school system. The NAACP offered expert testimony regarding the daily psychological stresses and social stigmatization that black students experienced in a segregated environment. While this approach was successful only in the *Belton* trial, the significance of the psychological evidence presented was not lost on the United States Supreme Court in formulating its *Brown I* opinion.<sup>455</sup>

A review of early post-*Brown* desegregation litigation in South Carolina, Delaware, and Virginia paints an unflattering portrait of the federal judiciary. The Parker doctrine, with its unfounded premise that the Constitution forbade government-sanctioned segregation but did not require integration, had great influence upon the federal courts in these states. Although the Parker doctrine's analysis was only theoretically correct, it encouraged federal judges in the southern and border states to acquiesce to public school segregation on grounds that such segregation emanated from freely made decisions of students and school officials.<sup>456</sup> Federal judges were also sympathetic to arguments that any order to compel immediate desegregation would lead to violence in their communities.<sup>457</sup> Federal courts in Virginia and Delaware advocated "go-slow" decrees that gave local officials substantial time to decide when and how desegregation would occur. Prince Edward County officials originally received ten years; New Castle County was allowed twelve. Although appeals courts later overturned both decrees, such judicial actions only promoted further delay and resistance. Officials in Clarendon County, South Carolina, simply ignored *Brown* altogether. It was eleven years after the initial *Brown* decision before a federal court would declare that Clarendon County had continued to operate a segregated school system from the

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453. See TUSHNET, *supra* note 57, at 156.

454. See Amy Stuart Wells, *The "Consequences" of School Desegregation: The Mismatch Between the Research and the Rationale*, 28 HASTINGS CONST. L.Q. 771, 775 (2001).

455. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954).

456. GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 89 (1991).

457. *Id.*

date of that decision.<sup>458</sup> In 2004, it is difficult to imagine how state government officials could so blatantly defy an order of the United States Supreme Court without penalty, yet such was the case in the early post-*Brown* era.

However, the absence of a desegregation timetable in the *Brown* cases was equally unfortunate because it only encouraged such judicial delay.<sup>459</sup> With no specific deadline to meet, local officials ignored *Brown* altogether or applied remedies designed to maintain existing segregated education regimes.<sup>460</sup> Although the *Brown I* opinion was successful in clearly stating the constitutional principles supporting integration, the decision by itself did not directly lead to school district desegregation.<sup>461</sup> While the United States Supreme Court gave federal judges broad authority to apply equity powers in enforcing *Brown II*, judges in the southern states had little motivation to encourage prompt compliance given local contempt for the decision.<sup>462</sup> The indifference of the executive branch toward *Brown* was another issue that affected judicial action toward desegregation.<sup>463</sup> When President Eisenhower announced that desegregation enforcement was a judicial and not an executive responsibility, he signaled that the federal government would not take overt measures to compel obedience to the Court's mandate.<sup>464</sup> Unwilling to see their authority undermined, lower-court federal judges in desegregation cases were usually content to back away and allow the political process to effect change.<sup>465</sup> The *Brown* Court erred when it delegated to federal judges discretion for making desegregation choices; what the Court should have done was to issue strongly worded directives that would have prodded the judges to act with dispatch.<sup>466</sup> The Court would have thus maintained primary enforcement responsibility instead of shifting it to local federal courts that were more susceptible to public pressure.<sup>467</sup> Such ac-

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458. IRONS, *supra* note 35, at 176.

459. *Id.* at 177.

460. Spreng, *supra* note 30, at 337.

461. Michael J. Klarman, Brown, *Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 9-10 (1994).

462. Spreng, *supra* note 30, at 337.

463. Hagley, *supra* note 451, at 187.

464. Cole-Frieman, *supra* note 58, at 47 n.255. Not until September 1957, when President Eisenhower ordered federal troops to Little Rock, did the executive branch use force to implement a federal court desegregation order. See *supra* note 186. By the time the United States Supreme Court issued its 1964 *Griffin* decision, the national political climate had changed, and both the legislative and executive branches were now eager to participate in desegregation enforcement. ROSENBERG, *supra* note 456, at 94. The passage of the 1964 Civil Rights Act, along with later legislative initiatives such as the 1965 Elementary and Secondary Education Act, provided the executive branch with the necessary muscle to enforce integration in the public schools. *Id.*

465. ROSENBERG, *supra* note 456, at 93.

466. J.W. PELTASON, FIFTY-EIGHT LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION 245 (1961).

467. *Id.* at 246. One early post-*Brown I* commentator argued that the Court should have appointed a special master with authority to recommend "the specific tempo of desegregation to

tion would have provided the federal judges with sufficient support to issue their desegregation decrees in a more expeditious fashion.<sup>468</sup> In evaluating the early post-*Brown* decisions made in the *Briggs*, *Belton*, and *Davis* cases, it is instructive that it was usually the appeals courts and not the district courts that enforced the primary desegregation orders.<sup>469</sup>

The United States Supreme Court's evolving jurisprudence influenced each *Brown* defendant state's desegregation activities. After *Brown*, the Court stayed out of the desegregation fray until 1968, when it declared in *Green* that it would tolerate no further delays in eliminating segregated schools.<sup>470</sup> In the early 1970s, the Court advocated the use of multi-district participation (*Keyes*) and authorized the use of busing as a method of achieving racial balance (*Swann*). As the Court began to get tough with school districts that resisted desegregation, so too did the federal district courts. One example occurred in Delaware, where the district court ordered a massive inter-district remedy affecting predominantly black Wilmington schools and mostly white suburban New Castle County schools. The Court's stance began to soften during the 1980s and early 1990s when federal courts in Delaware and Kansas, among other states, began revisiting desegregation cases that were previously resolved. New plaintiffs in these cases produced evidence that the defendant school districts had re-segregated public schools. School officials argued that such re-segregation occurred not because of any intentional state action, but because of demographic and social factors beyond state control.<sup>471</sup>

Faced with a new generation of desegregation cases, the United States Supreme Court in *Dowell* and *Freeman* adopted a more lenient stance toward districts where re-segregation allegedly occurred. School districts now had to prove only that they did their best to eliminate segregated schools, and that any demographic changes that affected their ability to desegregate were unrelated to previous de jure segregation.<sup>472</sup> In espousing a lower standard for determining whether alleged school segregation warrants federal court intervention, the Court has now come full circle. Whereas in *Green* the Court exhibited its impatience with continued resistance to desegregation, its

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be applied in the differing cases" and suggested former president Harry S. Truman for the job. John P. Roche, *Plessy v. Ferguson: Requiescat in Pace?*, 103 PA. L. REV. 44, 57 (1954).

468. Spreng, *supra* note 30, at 337.

469. Not all federal judges were dilatory in ordering and enforcing public school desegregation. For examples of federal judges who ignored the Parker doctrine, see JACK BASS, UNLIKELY HEROES (1981).

470. *Green v. County Sch. Bd.*, 391 U.S. 430, 439 (1968).

471. See generally *Freeman v. Pitts*, 503 U.S. 467 (1992); *Bd. of Educ. v. Dowell*, 498 U.S. 237 (1991).

472. Ware, *supra* note 18, at 15.

*Dowell* and *Freeman* decisions suggest the Court has grown impatient with prolonged federal court supervision of desegregation orders.<sup>473</sup>

As the fiftieth anniversary of the *Brown* decision approaches, it is appropriate to reflect on its mixed legacy. After four decades of on-and-off litigation, the Topeka, Kansas, and New Castle County, Delaware, school districts are now officially desegregated and no longer under federal court supervision. Prince Edward County, Virginia, schools have been described as “probably the best in Virginia’s southern counties.”<sup>474</sup> On the debit side, however, Clarendon County, South Carolina, remains a party to desegregation litigation. Also, a recent Harvard research study confirmed that resegregation continues to occur in American public schools.<sup>475</sup> It seems apparent that while *Brown* has served well as the guiding star for desegregation litigation, it has been only partly successful in improving educational opportunities for black schoolchildren.<sup>476</sup> Nevertheless, the *Brown* opinion stands today as the United States Supreme Court’s most forceful statement on racial equality before the law.<sup>477</sup> The decision represented a historic symbolic declaration that effectively sanctioned the civil rights movement and “encouraged political mobilization against discrimination.”<sup>478</sup>

The late Paul Wilson, a Washburn University School of Law graduate and University of Kansas law professor who represented Kansas in the *Brown* litigation, wrote that once the nature and extent of the state’s duty to desegregate were determined in an adversarial setting, the *Brown* parties should have settled compliance issues in the conference room rather than the courtroom:<sup>479</sup>

[L]aw and litigation do not supply all the answers to human problems. Law provides minimum standards of conduct and defines basic human rights and responsibilities. Litigation provides the means to determine and enforce what the law requires. The resolution of human conflict requires more—understanding, compassion, and mutual respect. These can best be achieved by talking together, by good faith efforts to work things out . . . There is no judicial

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473. See Wendy Parker, *The Decline of Judicial Decisionmaking: School Desegregation and District Court Judges*, 81 N.C. L. REV. 1623, 1645 (2003).

474. TUSHNET, *supra* note 60, at 135.

475. See Gary Orfield, *Schools More Separate: Consequences of a Decade of Resegregation* (2001), at [http://www.civilrightsproject.harvard.edu/research/deseg/Schools\\_More\\_Separate.pdf](http://www.civilrightsproject.harvard.edu/research/deseg/Schools_More_Separate.pdf). The Harvard study concluded that public school resegregation intensified during the 1990s, particularly in the South, where the percentage of black students attending majority white schools decreased from 39.2% in 1991 to 32.7% in 1998. *Id.* at 29. The study blamed the increasing racial imbalance in part on the *Dowell* and *Freeman* decisions. *Id.* at 16.

476. TUSHNET, *supra* note 60, at 135-36.

477. *Id.* at 136.

478. Christopher E. Smith, *Law and Symbolism*, 1997 DETROIT C.L. MICH. ST. U. L. REV. 935, 939 (1997).

479. WILSON, *supra* note 408, at 226-27.

remedy that can require one person to agree with or like or respect another.<sup>480</sup>

People of goodwill who are truly committed to the principles behind the *Brown* decision should heed Wilson's words. If we have learned anything from the legal history of *Brown* and its companions, *Briggs*, *Belton*, and *Davis*, it is that litigation and federal court supervision alone cannot and will never desegregate our public schools to everyone's satisfaction. The absence of a desegregation timetable in the *Brown* opinion was an attempt to encourage the nation to reach a consensus on how to best achieve integrated public education.<sup>481</sup> Five decades later, the American people still struggle toward that common ground. While the federal courts have an essential role in the continuing evolution of public school desegregation, such a role must not encourage our political institutions to abdicate their responsibility to provide leadership that encourages and does not obstruct integrated education. *Brown v. Board of Education* has rightly become one of this nation's foremost legal doctrines, but after fifty years of litigation, discussion, and more litigation, complete realization of the Court's mandate remains elusive.

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480. *Id.* at 226.

481. Hagley, *supra* note 451, at 185.