NOTES

DISTRICT COURT OPINIONS AS EVIDENCE OF INFLUENCE: *GREEN V. SCHOOL BOARD* AND THE SUPREME COURT'S ROLE IN LOCAL SCHOOL DESEGREGATION

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INTRODUCTION

ON July 28, 1967, in what was considered an unsurprising result, three federal district court judges in Montgomery, Alabama decided a school desegregation case in favor of the local school board. Although almost no desegregation had occurred in the school district, the judges not only found the school district's minimal attempts constitutionally adequate, but also went so far as to prohibit the federal government from cutting off funding to force desegregation.[1] One year and one major Supreme Court decision later, one of the same judges, sitting in the same courthouse and hearing a related action, suddenly refused to assume the good faith of local schools and decided sua sponte to conduct an independent review of the district's plan. Based on the limited desegregation results achieved, he now held the same basic desegregation plan, approved by the court a year earlier, constitutionally inadequate.[2]

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[1] Lee v. Macon County Bd. of Educ., 270 F. Supp. 859, 863–66 (M.D. Ala. 1967).

[2] Lee v. Macon County Bd. of Educ., 289 F. Supp. 975, 978–79 (M.D. Ala. 1968).

Several decades ago, the conventional wisdom was that the Supreme Court was among the leading forces in the civil rights movement and was capable of generating significant social change. School desegregation cases were considered prime examples of this capacity to drive major social change. Of these, the most significant was *Brown v. Board of Education* (*Brown I*),[3] arguably "the most important political, social, and legal event in America's twentieth-century history."[4] As this quote from Judge Wilkinson makes clear, the then-dominant view gave courts the central role in the historical framework. Roughly two decades later, however, the Court and the impact of its decisions have been relegated to a secondary role. Today, legal historians posit that judicial decisions are significantly less important for generating social change than major legislative initiatives.[5]

Arguments about the limited influence of courts rely heavily on statistical trends in school desegregation. According to these accounts, major increases in the number of students attending desegregated schools are attributable primarily to legislative and executive actions—for example, the Civil Rights Act of 1964—and not to earlier judicial decisions. Specifically, this view focuses on the fact that the Supreme Court issued its desegregation order in 1955, yet most meaningful school desegregation in the deep South did not occur until the mid- or late 1960s. A decade after the Court held segregation unconstitutional in *Brown I*, roughly two percent of black children living in the South attended school with white children. By the early 1970s, that same figure was over ninety percent.[6] While the statistical evidence itself demonstrates clear increases in integration, the forces driving these changes remain the subject of historical debate.

What is agreed on is that the integration of Southern schools was a slow-moving and uneven process, reflecting the ongoing federal efforts to end school segregation in the South in the face of wide-

[3] 347 U.S. 483 (1954).

[4] J. Harvie Wilkinson III, From *Brown* to *Bakke*: The Supreme Court and School Integration: 1954–1978, at 6 (1979).

[5] Erwin Chemerinsky, Losing Faith: America Without Judicial Review?, 98 Mich. L. Rev. 1416, 1416 (2000) ("[I]t has become increasingly trendy to question whether the Supreme Court and constitutional judicial review really can make a difference.").

[6] Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring About Social Change? 50 tbl.2.1 (2d ed. 2008).

spread resistance from state and local institutions. Immediately following the Court's decision in *Brown II*—mandating school desegregation "with all deliberate speed"[7]— school districts used a variety of tactics to prevent or delay meaningful integration. Local leaders quickly learned to avoid the overt racial mandates of the previous era, instead using tactics that included school closure, student placement based on "objective academic testing," and "school choice" programs. These choice programs, which gradually became the preferred method for perpetuating de facto segregation, ostensibly satisfied desegregation orders by allowing students the "choice" to attend any school in their district. However, as anticipated by advocates of this approach, apparent freedom of choice had little to no effect on the racial composition of schools. The reality was that few black students could or would transfer to previously all-white schools, as black students were often deterred by communal pressure or denied transfer requests due to dubious space constraints. On the other side of the racial divide, white students simply refused to transfer to previously black schools. As a result, school choice programs were "favored overwhelmingly" by Southern school districts.[8] Achieving significant progress in school desegregation thus required careful monitoring or foreclosing the future use of choice programs.

The current dominant historical account explains the rejection of school choice programs and coinciding increases in desegregation that took place in the mid- to late 1960s as the product of congressional initiatives. According to this view, the most important triggers were the 1964 Civil Rights Act ("CRA"), which made segregated public schools ineligible for federal funds, and the 1965 Elementary and Secondary Education Act ("ESEA"), which significantly increased the amount of federal funding available to public schools. These two acts—implemented primarily by the Department of Health, Education, and Welfare ("HEW")—were

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

[8] See, e.g., Moses v. Wash. Parish Sch. Bd., 276 F. Supp. 834, 847–48 (E.D. La. 1967) (citing a July 1967 report of the U.S. Civil Rights Commission and noting that "free-choice plans are favored overwhelmingly by the 1787 school districts desegregating under voluntary plans" and have been adopted by "[a]ll such districts in Alabama, Mississippi, and South Carolina, without exception, and 83 per cent of such districts in Georgia . . . .") (internal quotation marks omitted).

designed specifically to end the use of school choice programs. Accordingly, these legislative acts are now credited with generating the desegregation that failed to follow *Brown*. By attributing school desegregation to the CRA and the ESEA, such an account argues the Supreme Court is ineffective in generating significant social change. Because by presenting this theory Professor Rosenberg, Professor Klarman, and others "revised" the earlier understanding of the Court's central role in school desegregation, this now-dominant interpretation is referred to as the "revisionist" account.

This Note reexamines the revisionist explanation and suggests that legal historians should consider alternative data in evaluating the influence of the judiciary on Southern school desegregation.[9] Indeed, as will be shown, historians already have access to a potentially more accurate basis for evaluating causal forces, one that could help avoid the *post hoc ergo propter hoc* fallacy, a problem common with such statistical analysis. The revisionists' overreliance on school desegregation statistics generates an impoverished view of causal linkages, while the alternative data proposed here offer potentially stronger causal indicators.

This Note proposes greater attention to the holdings and text of federal district court decisions, a widely overlooked set of data with the potential to shed light on the causal links missing in current accounts. These opinions have powerful explanatory potential because they provide a record of the views and reasoning of *local* actors: the federal judges who lived and worked in Southern communities where segregation was entrenched. This evidence is relevant to the broader question of comparative influence: was it judicial decisionmaking or congressional action that led to the foreclosure of avoidance tactics such as school choice?

To demonstrate this explanatory potential, this Note constructs a systematic study of district court decisions addressing school desegregation plans to compare the impact of the 1964 CRA against the

[9] This Note makes no attempt to argue what role branches of government *should* have taken. Compare Michael J. Klarman, From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality 5 (2004) ("This book makes no claim about how judges *should* decide cases."), with Jennifer L. Hochschild, The New American Dilemma: Liberal Democracy and School Desegregation 131–41 (1984) (addressing and justifying the "proper role of courts" in school desegregation).

Supreme Court's 1968 decision in *Green v. School Board of New Kent County*,[10] where the Court first directly restricted school choice programs. Testing the current dominant thesis via district court evidence yields a surprising result: local federal judges were more likely to limit choice programs or force school desegregation when relying on *Green* than when citing legislative or executive mandates. The fact that district court judges made this shift could be an indicator of either congressional or judicial influence. The timing of this shift, the sources of authority relied upon by the judges, and, most importantly, the language and outcomes of these decisions, however, all point toward the dominant influence of *Green*.

Part I of this Note outlines the revisionist account, particularly the view of *Brown*'s limited influence suggested by "the Rosenberg-Klarman diminution of the case."[11] Part II examines Southern school desegregation statistics from the time of the Court's decision in *Brown* through the early 1970s in the context of federal initiatives and key Court holdings. These statistics—the evidentiary linchpin of the revisionist account—do not provide strong independent support for the CRA's superior influence on the desegregation process. Rather, using a timeline framed by the CRA and *Green*, trends in desegregation statistics could just as easily be attributed to the Court's decision in *Green*. Instead of rehashing equivocal statistics, this Note suggests that legal historians look to alternative evidence that might shed light on the relative influence of the Court and Congress. Part III discusses and frames an alternative set of evidence: decisions by the local federal courts that actually forced schools to desegregate in many Southern communities. For each relevant decision, this Note seeks to identify the sources of authority relied on when ordering schools to discontinue or modify "choice" programs to produce desegregation and to identify the shape of the remedy ordered.

Federal district court decisions are particularly relevant to understanding the force of national authorities because these courts were the local bridge between national institutions and local school

[10] 391 U.S. 430 (1968).

[11] David J. Garrow, "Happy" Birthday, *Brown v. Board of Education? Brown*'s Fiftieth Anniversary and the New Critics of Supreme Court Muscularity, 90 Va. L. Rev. 693, 724 (2004) (book review).

boards. District courts also often provided the only avenue of appeal for Southern blacks seeking review of school boards' practices. Greater attention to district courts has the potential to shift the debate from the revisionists' "Court-versus-Congress" dichotomy toward a more complex framing of the desegregation process. Emphasizing district courts' decisionmaking draws attention to institutions that operate below and between these two national authorities, bound by decisions from both and potentially in the crossfire of conflicting directives.

Unlike the simple duality of the revisionist account, this Note suggests the interplay of these institutions may be valuable in furthering the historical understanding of school desegregation. Instead of extrapolating theories of influence from statistical evidence, focusing on district courts draws attention to their intermediary role and recognizes one mechanism through which national authorities reached local schools. Part IV shows that attention to district courts' use of authorities suggests the need for a reassessment of the role courts played in desegregation. The evidence suggests that the Supreme Court may, indeed, have played the primary role in motivating district courts to end deliberately ineffective freedom-of-choice plans that perpetuated segregation.

I. HISTORICAL BACKDROP AND THE REVISIONIST INTERPRETATION

On May 17, 1954, the Supreme Court's unanimous decision in *Brown I* held racial segregation in public schools unconstitutional.[12] The Court emphasized the importance of public education and the psychological impact of segregation but postponed its decision on a remedy.[13] Remedies were addressed one year later, in *Brown II*, when the Court remanded the cases "to the District Courts to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit [all students] to public schools on a racially nondiscriminatory basis with all deliberate speed . . . ."[14]

The *Brown* decisions thrust lower federal court judges into a central role in school desegregation. Though *Brown I* was not the

[12] Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 483, 495 (1954).
[13] Id. at 494–95.
[14] Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294, 301 (1955).

Court's first decision rejecting segregation, previous holdings had not dealt with primary education.[15] Also, unlike previous Supreme Court decisions condemning educational segregation, *Brown II* remanded the case without clearly resolving what constituted impermissible segregation or how it should be remedied. Thus in both *Brown* decisions the Court deliberately refused to elucidate the appropriate remedy. For example, Justice Robert Jackson joined the unanimous decision in *Brown I* in part because it did not declare the immediate unconstitutionality of segregated schools or force prompt integration.[16] *Brown I* made clear that de jure segregation—that is, legally mandated racial separation—should end, but *Brown II* left the issue of precisely when and how schools would be integrated unresolved.

Federal judges were charged with implementing desegregation in Southern states, but *Brown*'s broad language of equal rights and gradualism provided them with little guidance. This lack of specificity would prove particularly challenging for federal district courts in the Fifth Circuit, which at that time was comprised of six Southern states, most of which were considered part of the firmly segregationist deep South: Texas, Louisiana, Mississippi, Alabama, Florida, and Georgia.[17]

Massive resistance to school desegregation followed the *Brown* decisions. Southern political leaders initially attempted outright defiance, with the events in Little Rock, Arkansas being the most famous example. The federal response at Little Rock, however, made clear that Washington was committed to ending de jure school segregation and was willing to use force if necessary, despite intense resistance—and even shows of force—by local and state governments.[18] Southern leaders subsequently adopted more indi-

[15] Compare *Brown I*, 347 U.S. at 483 (segregation in local public schools), with Sweatt v. Painter, 339 U.S. 629 (1950) (segregation in public law school), and Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938) (same). See also Berea Coll. v. Kentucky, 211 U.S. 45 (1908) (upholding a state law that prohibited colleges, public or private, from admitting black students).

[16] Klarman, supra note 9, at 296.

[17] Joel Wm. Friedman, Desegregating the South: John Minor Wisdom's Role in Enforcing *Brown*'s Mandate, 78 Tul. L. Rev. 2207, 2211–12 (2004). Today, the Fifth Circuit includes only half of these states—Louisiana, Texas, and Mississippi—after being split in 1981.

[18] See, e.g., Tony A. Freyer, Little Rock on Trial: *Cooper v. Aaron* and School Desegregation 2 (2007) (describing President Eisenhower's response to Arkansas's defi-

rect plans to prevent or minimize desegregation, chiefly through policies of delay or tokenism.[19] These approaches were rarely, if ever, held contrary to the *Brown* decisions. Indeed, given the Court's general language in *Brown II*, it is difficult to find approaches other than outright defiance that would have been considered a contravention of the Court's holding. The success of these subversive efforts meant that most meaningful desegregation did not occur until the late 1960s, when such ineffective desegregation plans were altered or struck down. Thus, while a decade after *Brown* only about two percent of black children living in the South attended school with white children, by the early 1970s that same figure was over ninety percent.[20] How legal historians understand that change is the subject of this Note.

A. The Revisionist Account

While heralded in popular culture as a major force in school desegregation, the Supreme Court's role in producing meaningful social change is now widely questioned by contemporary legal historians.[21] Professor Gerald Rosenberg's *The Hollow Hope: Can Courts Bring About Social Change*? and Professor Michael Klarman's *From Jim Crow to Civil Rights: The Supreme Court and the*

ance, including the federalizing of National Guard troops and "dispatching paratroopers of the 101st Airborne to Little Rock"); Judge Wiley Branton, Jr., Reflections on the Commemoration of the 50th Anniversary of the Crisis at Little Rock Central High School, 30 U. Ark. Little Rock L. Rev. 313, 318–19 (2008).

[19] See Klarman, supra note 9, at 330–37 (discussing the use of "pupil placement," "grade-a-year desegregation," and other techniques to delay integration of local school districts).

[20] Rosenberg, supra note 6, at 50 tbl.2.1.

[21] See id. at 1–3; Davison M. Douglas & Neal Devins, Introduction: The Pursuit of Equality, *in* Redefining Equality 3, 7 (Neal Devins & Davison M. Douglas eds., 1998) (citing Rosenberg and Klarman and stating that "in recent years fundamental questions have been raised about the extent to which courts have actually delivered equality"); Kenneth Mack, Rethinking Civil Rights Lawyering and Politics in the Era Before *Brown*, 115 Yale L.J. 256, 262 (2005). For more on the traditional "Dynamic Court" perspective, see Alexander Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 23–28 (2d ed. 1986) (arguing that courts, while limited actors, have advantages that enable them to deal with such matters of "principle" more effectively than the executive or legislative branches); Nathan Glazer, Towards an Imperial Judiciary?, 41 Pub. Int. 104, 122 (1975) ("A free people feels itself increasingly under the arbitrary rule of unreachable authorities [i.e., the Justices and the Court], and that cannot be good for the future of the state.").

Struggle for Racial Equality have emerged as the leading revisionist critiques of the Supreme Court's ability to generate social change.[22]

Rosenberg addresses the question of judicial influence by formulating two perspectives: the "Dynamic Court" viewpoint, which frames courts as "powerful, vigorous, and potent proponents of change" and the "Constrained Court" viewpoint, which frames courts as "weak, ineffective, and powerless."[23] His analysis compares these perspectives through a series of major litigation efforts with a particular emphasis on civil rights cases, including school desegregation. He indicates that such issues of "significant social reform" are well-suited to evaluating the "courts' effectiveness" because desegregation is an area where a series of controversial decisions forced courts to address the resistance of complex institutions.[24] Though neither view is an exact fit, Rosenberg concludes the Constrained Court view "is much more powerful" in accurately explaining the ability of judicial decisions to promote social change.[25] Relying primarily on desegregation statistics—with supporting references to political history and survey data—Rosenberg concludes the Court's decisions are "[i]n and of themselves . . . unlikely to change anything," particularly when compared against the actions of the political branches.[26]

Klarman's account "generalized Rosenberg's argument,"[27] and emphasized how internal Court dynamics revealed a limited desire to force change, given dubious constitutional authority for its decisions in the civil rights context.[28] Klarman argues Supreme Court

[22] See generally Klarman, supra note 9; Rosenberg, supra note 6. For discussion of the impact of Klarman and Rosenberg as leading critiques, see Garrow, supra note 11.

[23] Rosenberg, supra note 6, at 2–3.

[24] See id. at 4–6, 17–18, 28–29, 86. Rosenberg is critical of other studies (for example, Michael A. Rebell & Arthur R. Block, Educational Policy Making and the Courts: An Empirical Study of Judicial Activism (1982)) for lacking precisely these two elements and focusing on "trivial" areas of law. Rosenberg is particularly critical of other studies for overemphasizing theory and lacking any discussion of "factual" institutional reform. See Rosenberg, supra note 6, at 28–29.

[25] Rosenberg, supra note 6, at 8.

[26] Gerald N. Rosenberg, The Irrelevant Court: The Supreme Court's Inability to Influence Popular Beliefs About Equality (or Anything Else), *in* Redefining Equality 173, 174–77 (Neal Devins & Davison M. Douglas eds., 1998).

[27] Mack, supra note 21, at 261.

[28] See Klarman, supra note 9, at 312–20 (discussing the Justices' preference for gradualism in the *Brown II* ruling).

decisions in civil rights cases were generally "consistent with the political climate that had developed by the time they were rendered."[29] According to Klarman, the Court cannot stray far from the national consensus because it relies on other branches of government to enforce its mandates. Additionally, because "social and political conditions . . . influence [the] efficacy" of the Court's role in race relations, the Justices must avoid issuing rulings so far out of sync with national beliefs that they would invite circumvention.[30]

Both Klarman and Rosenberg claim history vindicates the thesis that courts are ineffective at generating social change, with *Brown*'s failure to produce an immediate end to segregated schools serving as key evidence. Although, as Klarman argues, *Brown* may have indirectly contributed to the later success of the civil rights movement by sparking widespread violent "backlash"—which, in turn, generated public support for federal civil rights legislation—the decision failed to produce immediate school desegregation.[31] According to the revisionist thesis, this failure to achieve immediate desegregation demonstrates that courts are ineffective drivers of social change.

Yet, on closer examination, what does the statistical evidence actually show about the force of the *Brown* decisions? Given the text of the holdings—specifically the decision to remand the case in *Brown I* and the indecisive "all deliberate speed" standard in *Brown II*—complete and swift desegregation was not the Court's immediate goal.[32] In fact, the simple declaration of unconstitutionality may have been the Court's central aim. Klarman recognizes that "the [J]ustices never seriously considered ordering immediate integration" and that *Brown* "was hardly an order to do anything."[33] Given the context of the times, the very act of declaring

[29] Id. at 342.

[30] Id. at 7.

[31] Michael J. Klarman, How *Brown* Changed Race Relations: The Backlash Thesis, 81 J. Am. Hist. 81, 83–85, 110–12 (1994). See generally Klarman, supra note 9, at 324–40, 357–60 (discussing the delays in desegregating schools post-*Brown*, both inside and outside of the courtroom); Rosenberg, supra note 6, at 52 (noting that desegregation statistics in Southern states remained virtually unchanged in the decade following *Brown*).

[32] Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294, 301 (1955); see Klarman, supra note 9, at 313–20.

[33] Klarman, supra note 9, at 313, 356.

segregation unconstitutional was itself fraught with controversy: in 1954 seventeen states and the District of Columbia still enforced school segregation laws. *Brown*'s outcome was "not inevitable," and with its decision the Court *did* take the significant step of "invalidat[ing] an established practice."[34] As a result, "put[ting] the issue on the map" may have been significant, even without producing immediate, quantifiable changes.[35]

Klarman and Rosenberg can acknowledge these effects and limitations while maintaining a critical stance on the Court's ability to initiate change because both scholars largely assume doctrinal change has very little explanatory value; the Court reached its result in *Brown* because of the inertia of history.[36] This Note considers how examining the lower courts' actions in school desegregation cases can reinvigorate the view that the Court is central to social change. This Note suggests that lower courts relied on and were pushed—at least in part—to renounce segregation by the doctrinal pronouncements of the Court. These claims stand in contrast with the effective dismissal of the impact of doctrinal change and the value of the text by current revisionist historians.

B. The Flawed Causal Chain

Rosenberg, Klarman, and other revisionists have created functionalist interpretations of school desegregation history that use extralegal evidence—primarily desegregation statistics, public opinion, and media accounts—to deemphasize the Court's role.[37] Focusing on how broad external factors—including the lack of a mandate, white resistance, and apathy within the black community—explain desegregation delays, these histories have avoided systematic study of the areas where the Court's decisions may have

[34] Id. at 311.

[35] Id. at 343.

[36] See, e.g., Rebecca J. Scott, Public Rights, Social Equality, and the Conceptual Roots of the *Plessy* Challenge, 106 Mich. L. Rev. 777, 780 (2008) ("In these formulations, 'historical context' takes on an almost fatalistic explanatory value. . . . [M]ost things 'have to' turn out more or less the way they turned out . . . .").

[37] Rosenberg, supra note 6, at 70; see Mark J. Chadsey, Federal Courts and Southern School Desegregation, the Courts Lead a Social Change 46–49 (1996) (unpublished Ph.D. dissertation, State University of New York at Buffalo) (summarizing Rosenberg's study and conclusions).

had a more significant impact.[38] For example, in Klarman's June 1994 article explaining the "backlash thesis"—which proposes that the violent "backlash" against desegregation following *Brown* ultimately galvanized national support for civil rights legislation—the author moves quickly through desegregation statistics and onto the force of legislative action.[39] The article does not address the role of the lower federal courts or their reliance on the Supreme Court. Critics of the revisionist thesis have hinted at the role of federal courts, arguing that the "combination of NAACP litigation and federal court rulings—not the direct consequences of the Civil Rights Act . . . —played the crucial role in producing the dramatic surge in school desegregation . . . ."[40] In spite of these richer accounts incorporating judicial actions and doctrine, however, historians largely ignore the role that district courts played in this process.

This lack of attention to the role of courts and the force of the judiciary is particularly disconcerting given the revisionist emphasis on the efficacy of legislative efforts. Revisionist accounts, like Rosenberg's, do not look simply at the shortcomings of court-ordered change; they also evaluate judicial force by comparing these decisions against later legislative efforts.[41] In these accounts, the limited impact of Supreme Court decisions is demonstrated by comparing post-*Brown* desegregation statistics against those following the 1964 passage of the CRA and ensuing legislation.[42] For example, Rosenberg argues that the CRA—the force of which was brought to bear via guidelines issued by HEW and the passage of ESEA—was the event that actually "had a major impact on school

[38] For discussion of black sociopolitical issues and preferences for gradualism in some black communities, see Tomiko Brown-Nagin, Courage to Dissent (forthcoming, Oxford University Press 2011) (manuscript at ch. 4, on file with author); David L. Kirp, How Now, *Brown*?, 254 The Nation 757, 758 (1992) (noting that "outside the N.A.A.C.P., blacks were mostly uninspired by the [*Brown*] ruling").

[39] Klarman, supra note 31, at 83–85.

[40] Matthew D. Lassiter, Does the Supreme Court Matter? Civil Rights and the Inherent Politicization of Constitutional Law, 103 Mich. L. Rev. 1401, 1420 (2005) (book review).

[41] See infra Part II.

[42] See Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964).

desegregation."[43] Similarly, Rosenberg—by measuring "the contribution of the courts vis-à-vis Congress and the executive branch in desegregating public schools" between 1954 and the late 1960s—concludes "courts had virtually *no direct effect* on ending discrimination in . . . education."[44] In sum, in these revisionist accounts, *Brown* and the Court are cast as largely irrelevant to meaningful change.[45]

Conclusions about *Brown*'s limited force drawn from comparison with legislative efforts of a decade later will invariably suggest that the decision had limited impact; evaluating the case's influence according to statistical outcomes means "purely judicial[] and purely doctrinal" contributions will "not fit at all within [the] interpretive analysis."[46] *Brown* aimed for a declaration of unconstitutionality, unlike the focused, policy-oriented approaches of congressional and executive efforts in the 1960s. Given its structure, the Court's ability to generate change depends on what it says; change stems not merely from the fact of a decision but from the specific direction provided therein. And because *Brown*, unlike *Green*, was largely doctrinal and did not attempt to use the full reach of Supreme Court authority to force immediate desegregation, it cannot properly be used as a measure of the Supreme Court's ability to effectuate social change; any such assessment would find the Court ineffective.

More importantly, the impact of the CRA is often "shown" without supporting causal evidence. Revisionist assumptions thus largely overlook a key aspect of judicial decisionmaking: for a law to be effective, it must be enforced. A declaration at the national level, by Congress or the Court, will have limited value without local implementation. As civil rights historian Charles Payne notes concerning change in 1960s Mississippi, a "bill in itself, though, may have been less important than the willingness of people . . . to insist that it be enforced," a warning particularly relevant in the

[43] Rosenberg, supra note 6, at 47–49. For more discussion of these congressional and executive branch actions and a summary of the relevant content, see infra Section II.A.

[44] Rosenberg, supra note 6, at 49, 70.

[45] Peter H. Schuck, Public Law Litigation and Social Reform, 102 Yale L.J. 1763, 1775 (1993) (book review) (noting Rosenberg's rejection of "the traditional view of *Brown* as social apocalypse").

[46] Garrow, supra note 11, at 716.

civil rights context, where "nothing about the record of the postwar federal government . . . suggest[ed] that Washington was going to enforce any more Black rights than it had to enforce."[47] This lack of enforcement was particularly pronounced in rural communities where repression was more likely, preventing the use of lawsuits that had become a common approach elsewhere.[48] Gauging judicial effectiveness, particularly in a field like segregation, should include consideration of how, exactly, a given decision is transformed into local implementation. More than simple statistical results, this means attention to the causal chain necessary to enforcement.

By gauging the Court's effectiveness according to general statistical trends in desegregation, revisionist legal historians have claimed the CRA had an overall greater impact than the Supreme Court.[49] But this argument is critically flawed in three basic ways. First, this claim about relative influence can be questioned on the basis of the same statistical data.[50] Second, these measurements fail to recognize certain outcomes of the Court's decision; by making immediate widespread desegregation the only relevant "effect," these studies predetermine "effectiveness." Third—and most critically—these studies ignore the causal chain between judicial or legislative action and the statistical results emphasized. Revisionist historians have focused strongly on the claimed result—the eventual desegregation of schools—and the institutions originating such change, Congress or the Court. They have done this, however, largely without considering the intermediary institutions that the Court or Congress relied on to reach the schools where desegregation took place. This missing causal link, from national authority to local institution, deserves greater attention. This Note suggests that focusing on the *text* of district court decisions and the interplay it reveals between district courts and federal authorities may provide legal historians with a valuable avenue for addressing these pitfalls.

[47] Charles M. Payne, I've Got the Light of Freedom: The Organizing Tradition and the Mississippi Freedom Struggle 217–18 (1995).

[48] See generally Mark Tushnet, Making Civil Rights Law: Thurgood Marshall and The Supreme Court, 1936–1961, at 116–25 (1994) (discussing the NAACP's pre-*Brown* litigation strategy in educational segregation cases).

[49] See, e.g., Rosenberg, supra note 6, at 49–54.

[50] See Chadsey, supra note 37, at 77 (recognizing, in his own new analysis of the statistical data on desegregation according to Rosenberg's framework, that "simply looking at percentages of desegregated schools . . . can be misleading").

This study seeks to demonstrate that there is value not only in the appellate-level decisions themselves, but also in examining the flow of influence from the Supreme Court down through the local courts.

II. REEXAMINING THE STATISTICAL EVIDENCE

The revisionists reframed the debate among historians and legal scholars as one focused on trends in statistical evidence. Though heavily used by proponents of limited judicial authority, the same statistics can be viewed as supporting, not diminishing, the importance of judicial decisions in school desegregation. This is particularly true if desegregation results following passage of the Civil Rights Act are compared not to *Brown*, but to *Green*. The superiority of such a comparison is apparent from the closely aligned methods and goals of the CRA and the Court's decision in *Green*. Unlike the broad pronouncements of *Brown*, in *Green* the Court targeted existing segregation practices and provided explicit instructions regarding remedies. Comparing post-CRA and post-*Green* school desegregation statistics suggests federal judicial decisionmaking was, potentially, as influential to lower courts as was the passage of civil rights legislation.

A. A More Accurate Comparison: Green

Green and the CRA both sought to enforce *Brown*'s vague desegregation mandate. The CRA—enacted in 1964, a decade after *Brown*—gave federal officials a variety of tools to address racial discrimination in practices including voting, public accommodations, and education.[51] Most important for school desegregation, the CRA gave the United States Attorney General the power to sue to force desegregation and, under Title VI, prohibit use of federal funds in any program that discriminated on the basis of race.[52]

[51] Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964).

[52] Id. § 601, 78 Stat. at 252 ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."); Stephen C. Halpern, On the Limits of the Law: The Ironic Legacy of Title VI of the 1964 Civil Rights Act 26 (1995). Note that segregated schools were already unconstitutional under *Brown*.

In 1964, federal funding for primary and secondary education was quite limited, but that changed with passage of the ESEA the next year.[53] Under the ESEA, the federal government offered—for the first time—significant direct financial aid to state-run public elementary and secondary schools. Given the lack of constitutional language about education, the ESEA was an "extraordinary transformation" that defined a federal role in an area previously controlled by state and local authorities.[54] Since ESEA Title I, which controlled the distribution of federal funds to state and local education agencies, was broad enough to reach most of the nation's schools, the law effectively put federal money on the table and dared states to refuse.[55] The ESEA gave sudden significance to Title VI of the CRA and became the proverbial carrot dangled in front of recalcitrant local school districts. As education historian Diane Ravitch notes, "[t]here was initially some question as to how much coercive power the federal government would gain with the enactment of Title VI. . . . However, when [the ESEA] passed, the weapon established by Title VI was suddenly loaded."[56] With this legislative foundation, HEW quickly issued guidelines on how schools could desegregate in compliance with the CRA.[57] As described by Commissioner of Education Harold Howe, these federal guidelines were intended to carry out the "congressional directive" of CRA Title VI that federal funds not be used in any discriminatory activity.[58]

By outlining how qualifying desegregation plans would be implemented, these guidelines could displace ineffective judicial

[53] Pub. L. 89-10, 79 Stat. 27 (1965) (codified as amended at 20 U.S.C. §§ 6301–6578 (2006)).

[54] See Hugh Davis Graham, The Uncertain Triumph: Federal Education Policy in the Kennedy and Johnson Years xiii–xxiv (1984); Patrick J. McGuinn, No Child Left Behind and the Transformation of Federal Education Policy, 1965–2005, at 25, 28–39 (2006) (discussing how ESEA helped "initiate[ ] a new era of federal activism in education").

[55] McGuinn, supra note 54, at 31–34 (describing the funding structure of ESEA); see also Diane Ravitch, The Troubled Crusade: American Education, 1945–1980, at 148–49 (1983).

[56] Ravitch, supra note 55, at 163.

[57] Id.

[58] Guidelines for School Desegregation: Hearings Before the Spec. Subcomm. on Civil Rights of the H. Comm. on the Judiciary, 89th Cong. 4 (1966) [hereinafter Hearings] (statement of Harold Howe II, Comm'r of Education).

precedent and force change at the local level. The hope was that HEW and the CRA would succeed where the Court failed, an effort apparent in the language used. The guidelines reflected rulings of the Supreme Court, courts of appeal, and district courts.[59] Of specific importance were rules for "free choice plans," one of "two main areas of controversy" the guidelines sought to address.[60] A significant portion of the HEW guidelines addressed "the legal requirements regarding the effectiveness of free choice plans in desegregating schools."[61] Federal officials had begun to recognize that freedom-of-choice plans placed the "burden of desegregation on Negro or other minority group students and their parents . . . [because] a free choice plan and the effect of longstanding community attitudes often tend to preclude or inhibit the exercise of a truly free choice by or for minority group students."[62]

Clearly aware of this difficulty, the HEW guidelines largely adopted the paradigm courts had already formulated by allowing freedom-of-choice plans to continue "in the absence of reasons to the contrary."[63] Though the presumption was still in favor of acceptability, free choice plans would now be evaluated by

> the extent to which Negro or other minority group students have in fact transferred from segregated schools. Thus, when substantial desegregation actually occurs under a free choice plan, there is strong evidence that the plan is operating effectively and fairly, and is currently acceptable as a means of meeting legal requirements. Conversely, where a free choice plan results in little or no actual desegregation, or where, having already produced some

[59] Id. at 5–8 (memorandum from Ramsey Clark, Deputy Att'y Gen., to Rep. Howard W. Smith, submitted during statement of Harold Howe II, Comm'r of Education).

[60] Id. at 4 (statement of Harold Howe II).

[61] Id.

[62] Id. at 15 (memorandum from HEW on Authority for the 1966 School Desegregation Guidelines, submitted during statement of Harold Howe II (quoting HEW Guidelines § 181.54 Requirements for Effectiveness of Free Choice Plans)); see also Marian Wright Edelman, Southern School Desegregation, 1954–1973: A Judicial-Political Overview, 407 Annals Am. Acad. Pol. & Soc. Sci. 32, 38 (1973) (noting that, because free choice plans "placed the burden on black parents and schoolchildren to seek desegregation, often at great personal risk," they often resulted in "very little desegregation").

[63] Hearings, supra note 58, at 15–17 (memorandum from HEW on Authority for the 1966 School Desegregation Guidelines, submitted during statement of Harold Howe II).

> degree of desegregation, it does not result in substantial progress, there is reason to believe that the plan is not operating effectively and may not be an appropriate or acceptable method of meeting constitutional and statutory requirements.[64]

Aware that freedom-of-choice plans could be ineffective at producing desegregation, the guidelines directed the government to attend closely to the operation of free choice programs and monitor local progress.

These federal legislative and executive efforts to promote desegregation are clearly distinct from *Brown* in ways that make direct comparisons unsound. Unlike *Brown*'s broad language, these programs sought to force desegregation via targeted responses to ongoing local avoidance.[65] In the process, the federal government accepted the role of desegregation evaluator, assessing the effectiveness of specific plans in accordance with federally created standards. This distances these legislative efforts from *Brown*'s generalized proclamation of rights and avoidance of facing immediate desegregation.[66] Any comparison of *Brown* with federal efforts such as the CRA and the HEW guidelines is, therefore, predetermined to find the former less effective than the latter in forcing school desegregation.

Like the congressional efforts of the mid-1960s, and unlike *Brown*, the Supreme Court's 1968 decision in *Green* directly addressed the efficacy of freedom-of-choice school desegregation programs. The Court announced that the "burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*."[67] The case

[64] Id. at 16.

[65] See Neal Devins & James B. Stedman, New Federalism in Education: The Meaning of the Chicago School Desegregation Cases, 59 Notre Dame L. Rev. 1243, 1248 (1984) ("The federal government no longer assumed that local governments could operate federal programs without much supervision, became suspicious that funds were being diverted from statutory purposes, and launched a wide variety of studies and evaluations to ascertain program impact.").

[66] Klarman, supra note 9, at 356 ("[J]udges [attempting to desegregate under *Brown*] could point to no order from above commanding desegregation at any particular time or in any particular manner.").

[67] *Green*, 391 U.S. at 439; see also Garrow, supra note 11, at 715–16 (discussing the role of the Fifth Circuit Court of Appeals in addressing similar cases and applying similar, concrete mandates on local school districts).

arose in New Kent County, Virginia—at the time a rural community of 4500 with a roughly equal number of white and black residents. Filed in 1965, the lawsuit initially charged the local school board with operating segregated schools in violation of *Brown*. The board responded by adopting a "'freedom-of-choice' plan for desegregating . . . [under which students] may annually choose between the New Kent and Watkins schools and pupils not making a choice are assigned to the school previously attended; first and eighth grade pupils must affirmatively choose a school."[68] New Kent was previously an all-white school and Watkins was previously all black. Under the plan, not a single white student transferred and eighty-five percent of the black students remained at the all-black Watkins School. Highlighting the county's residential integration, the lack of previous efforts by the school board, and the limited progress in desegregation, the Court found that "the school system remains a dual system."[69] The Court ordered the school board to "formulate a new plan" and "fashion steps which promise realistically to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools."[70]

In *Green*, the Supreme Court took significant strides beyond *Brown*. Most importantly, unlike in *Brown*, the Court attempted to exercise its affirmative power by adopting a firm stance that would force improvements in school desegregation. The potential for judicially driven change depends on the language of the decision, and in *Green*, the Court was clear: it wanted schools to "realistically" and "promptly" desegregate.[71]

Yet, in adopting this more active stance, the Supreme Court was also careful not to declare all freedom-of-choice plans unconstitutional. Rather, like the CRA, the Court found that simply implementing a plan did not absolve school boards of the responsibility for moving to a unitary school system. The Court concluded that in this instance freedom-of-choice failed to achieve desegregation, but, generally, choice plans "offer[ed] real promise" for desegregating schools.[72] The holding in *Green* also resembled the HEW

[68] *Green*, 391 U.S. at 433–34.
[69] Id. at 432, 438, 441.
[70] Id. at 442.
[71] Id.
[72] Id. at 440.

guidelines in several significant respects.[73] First, and most importantly, *Green* placed an affirmative duty on local school boards to end dual school systems, just as the HEW guidelines had. Second, the Court, like the guidelines, provided specific suggestions of how school boards might achieve desegregation. Third, again like the guidelines, the Court suggested desegregation plans should be evaluated on the basis of outcomes, specifically the percentage of students desegregated by a given approach.[74] As a result, the decision in *Green* threatened to invalidate the desegregation approach then used by the vast majority of Southern school districts.[75]

The shared language, goals, and nature of these attempts to use federal authority to force school desegregation demonstrate that the CRA and the HEW guidelines are more appropriately compared to the Court's 1968 decision in *Green*, not its 1954 decision in *Brown*. This Note, therefore, suggests any comparison of the relative force of the judiciary and legislature should evaluate the rates of Southern school desegregation in response to *Green*, not *Brown*.

B. Statistical Equivocation

Using the CRA and *Green* as the key points for comparison, the statistical evidence potentially bolsters, rather than diminishes, the significance of judicial decisionmaking in school desegregation. This Section attempts to demonstrate that the desegregation statistics relied upon by revisionist theorists can also be used to contradict claims about the limited role of courts. The object of the analysis is not to prove the effectiveness or ineffectiveness of courts, but rather to suggest the highly conjectural nature of the current "empirical" approach and to demonstrate the need to look to alternative sources of historical evidence.

Little desegregation took place immediately after *Brown*, but the process accelerated rapidly in the 1960s. Relying on data from

[73] Wilkinson, supra note 4, at 117 ("*Green* mirrored to a great extent . . . the approach of the 1966 HEW guidelines.").

[74] *Green*, 391 U.S. at 441–42 (suggesting "reasonably available other ways, such for illustration as zoning, promising speedier and more effective [results,]" and "other courses which appear open to the Board, such as zoning").

[75] See, e.g., Moses v. Wash. Parish Sch. Bd., 276 F. Supp. 834, 847–48 (E.D. La. 1967) (noting that freedom-of-choice plans were "favored overwhelmingly" by Southern school districts under desegregation orders).

the Southern Education Reporting Service, the Civil Rights Commission, and the HEW Office of Civil Rights, Rosenberg reconstructs this shift to support conclusions about the limited influence of the "constrained" court.[76] Yet trends in both the rate at which desegregation increased and the overall percentage of students attending integrated schools indicate that the passage of the CRA may not have been the pivotal moment suggested by revisionists.

Regarding enrollment trends, after remaining constant for several years after *Brown*, the percentage of Southern black students attending elementary and secondary school with whites began to roughly double each year starting in the 1961–62 school term, three years before the passage of the CRA. Although, by the 1963–64 school year, this still meant less than two percent of all Southern black students attended interracial high schools, the significant *rate* of change is still apparent. Rosenberg deemphasizes these rates of change in favor of the second metric: absolute integration percentages. The absolute percentages improved significantly by 1966–67, when nearly seventeen percent of all black students in the South attended school with whites (far more than in 1963–64, when only about one percent of blacks did so). These numbers, however, increased even more dramatically after *Green*: in 1968–69 the same figure jumped to thirty-two percent, and by 1970–71 it was almost eighty-six percent.[77]

While this statistical evidence demonstrates a clear upward trend in desegregation throughout the late 1960s, it is a questionable basis for claiming the superiority of the CRA or the courts in the school desegregation process. If the claim is that the changing *rate* at which desegregation increased matters most, the desegregation trend could be identified as beginning between 1960–63, when the small number of integrated schools began to increase rapidly. Accordingly, this changing rate could support a claim that a major shift in desegregation actually began well before the passage of the CRA or the Supreme Court's decision in *Green*.

Rosenberg and others, however, suggest the *absolute number* of students attending integrated schools is more important. Indeed, the data show that number rose drastically between the academic

[76] See Rosenberg, supra note 6, at 50 tbl.2.1, 52–54.
[77] Id.

year before the passage of the CRA, when 34,105 black students attended school with whites, and the 1966–67 year when roughly half a million black students attended school with whites, an increase of over 450,000. Again, however, the statistics might also undermine the revisionists' claim that legislative action was the driving force. In the first full academic year following *Green*, the number of black students in integrated schools jumped even more dramatically, from 900,000 to over 2.7 million students, an increase of nearly *two million* students.[78] Using *Green* as the point of comparison, the data appear inconclusive, at best. Accordingly, identifying what actually drove the increases in desegregation requires looking beyond simple enrollment statistics and searching for potential causal forces.

Surveys of those involved in the desegregation process also raise questions about the revisionist thesis and suggest courts may have played a major role. Perhaps best known is a survey, conducted in the late 1970s, after the bulk of desegregation took place, of superintendents leading school districts with some minority enrollment.[79] Superintendents were split about what they considered the "source of intervention" during major periods of desegregation, with thirty-four percent considering the courts to be the primary source, twenty-five percent considering HEW the primary source, and the rest attributing desegregation to state and local authorities.[80] Critics of judicial authority—including Rosenberg—acknowledge this data convey that courts played an important, if not leading, role beginning in 1968, though they downplay the survey as possibly underestimating the influence of HEW.[81] This data set is of greater importance when compared against the statistical trends discussed above: more than eighty-five percent of principals surveyed in the Southeast indicated that the "year[s] of greatest desegregation" occurred

[78] Id.

[79] See generally U.S. Comm'n on Civil Rights, Reviewing A Decade of School Desegregation 1966–75: Report of a National Survey of School Superintendents (1977). By the mid-1970s desegregation slowed as the Court issued a series of decisions limiting desegregation remedies, including *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 54–55 (1973) (finding broad inequalities in school funding constitutionally permissible), and *Milliken v. Bradley*, 418 U.S. 717, 746–747 (1974) (limiting availability of interdistrict busing).

[80] U.S. Comm'n on Civil Rights, supra note 79, at 18 tbl.2.2.

[81] See Rosenberg, supra note 6, at 53.

from 1968–71,[82] the years immediately following *Green*. As summarized by the Civil Rights Commission, the data indicate school districts in the deep South "were most likely to be desegregated under pressure from the courts."[83]

The evidence suggests that desegregation statistics alone are unpersuasive in proving the limitations of the courts in the desegregation context. Aware of this shortcoming, legal historians have looked to join these statistics with theories of institutional reach and the influence of other historical forces.[84] Unfortunately, this marriage of the statistical and the theoretical proposed by revisionists overlooks the important causal relationships between the legislative or judicial authority and the decisionmaking by local school boards. Moreover, there already exists crucial historical evidence about the desegregation process as it unfolded during the formative years of the 1960s and early 1970s: district court decisions.

III. USING FEDERAL DISTRICT COURT DECISIONS AS ALTERNATIVE EVIDENCE

Desegregation was inherently a local process. Only by integrating schools in each neighborhood and community would constitutional directives from Washington make a difference. Accordingly, it was in local communities that the push of federal mandates and the pull of established local practices were most felt. Caught between the two, federal district court opinions provide a window into the workings of this process and therefore may offer the type of evidence legal historians have overlooked in understanding the forces driving school desegregation. Studying not simply outcomes, but also what the text of decisions shows about the relative influence of different federal authorities, may provide valuable evidence about the role of the judiciary and the force of federal authorities. Accordingly, this Part details an examination of federal district courts' school desegregation decisions in the Fifth Circuit between 1964–1971, which can assist legal historians in gauging the relative influence of these federal authorities.

[82] U.S. Comm'n on Civil Rights, supra note 79, at 24 tbl.2.4.

[83] Id. at 25.

[84] See generally Klarman, supra note 9, at 344–63 (examining *Brown*'s "direct effects" on civil rights); Rosenberg, supra note 6, at 72–103.

A. District Courts as Local Actors

> [Federal appellate] judges are not more courageous or more enlightened than district judges. They are just not on the firing line, not as exposed to built-in pressures and allegiances, not as tied by birth, education, residence, professional experience and other ties to one state and to one section of a state. And rarely do they have to condemn and enjoin their golfing, fishing, or gin rummy companions.[85]

This statement by Judge Wisdom—informed by his experience on the United States Court of Appeals for the Fifth Circuit—emphasizes the difficulties facing judges at the district court level. These difficulties were particularly challenging in cases involving Southern school desegregation. *Brown* had effectively charged the district courts with overseeing school desegregation. Local leaders, along with most of their white constituents, sought to avoid school desegregation.[86] Moreover, even where the local schools attempted prompt compliance, district courts still had to combat secondary efforts by state legislatures and private organizations looking to disrupt or prevent desegregation.[87] Federal district courts—though not looking to lead a major social change—were sometimes cast as the only authority in a given locale willing or able to defend desegregation from such interference.[88] District court judges were criticized, vilified, and even risked physical injury for upholding federal law.[89]

Emphasizing local experience and authority draws the focus to the role of district court judges rather than those at the circuit

[85] John Minor Wisdom, The Frictionmaking, Exacerbating Political Role of Federal Courts, 21 Sw. L.J. 411, 420 (1967).

[86] See, e.g., Klarman, supra note 9, at 350 (describing attempts by southerners to "delay and evade [desegregation] as much as possible").

[87] See, e.g., United States v. Crenshaw County Unit of the United Klans of Am., 290 F. Supp. 181, 185 (M.D. Ala. 1968) (issuing an injunction against Ku Klux Klan members attempting to interfere with court-approved desegregation).

[88] See, e.g., Ala. NAACP State Conference of Branches v. Wallace, 269 F. Supp. 346, 349 (M.D. Ala. 1967) (striking down an Alabama statute aimed at repudiating federal desegregation efforts).

[89] Friedman, supra note 17, at 2230 (noting that District Judge J. Skelly Wright was "hung in effigy on more than a single occasion, victimized by obscene telephone calls and cross burnings at home, and reviled by most members of his local community" because of his efforts to enforce *Brown*'s mandate in New Orleans's school districts).

court level. Like district judges, Southern circuit judges attempted to generate meaningful, long-term change by implementing the Supreme Court's directives, despite *Brown*'s ambiguity.[90] However, as appellate judges, their role remained clearly distinct. As evident from the above quote—made by one of the leading Fifth Circuit judges—federal appellate judges were largely removed from the communities where desegregation orders were carried out. In acting to promote desegregation, appellate judges were not issuing specific local mandates, but were instead reshaping "inadequate" Supreme Court pronouncements.[91] The circuit judges thus played a major role by reinterpreting precedent to expand constitutional protections and procedural safeguards in favor of civil rights claimants.[92] Yet studying how these judges reshaped constitutional doctrine is distinct from the concerns of this Note, which focuses on how the Court's cases were implemented and weighed by district court judges acting at the local level.

School desegregation required district court judges to evaluate and combat an array of local efforts aimed at avoidance and delay. Southern school and local officials—relying heavily on the imprecision in *Brown*—constructed "a wide array of desegregation policies that could be used to circumvent *Brown*."[93] The most common were freedom-of-choice plans; "pupil placement schemes," which assigned students to schools on the basis of ostensibly neutral criteria, including academic performance; "transfer options," which gave parents the option to transfer their child; and "grade-a-year plans," which limited desegregation to one grade per year.[94] Although some districts attempted extreme anti-desegregation tactics, such as closing all the public schools, these defiant efforts were struck down by district courts.[95] A decade after *Brown*, many

[90] Jack Bass, Unlikely Heroes 16–17 (1981) ("[The judges of the Fifth Circuit] not only accepted the [c]onstitutional philosophy that extended downward from the Warren Court, but reinforced it upward and outward, stretching and expanding the law to protect rights and liberties granted by the Constitution.").

[91] See id. at 22, 24 (insisting that the "Supreme Court's reluctance to exert leadership created a void that the Fifth Circuit filled").

[92] Id. at 17 (describing the Fifth Circuit's "landmark decisions that struck down barriers of discrimination" in a number of areas beyond education).

[93] Klarman, supra note 9, at 318.

[94] Id.

[95] See, e.g., Allen v. County Sch. Bd., 207 F. Supp. 349, 355 (E.D. Va. 1962) ("[T]he public schools of Prince Edward County may not be closed to avoid the effect of the

Southern school districts had implemented one of the above policies, attempting to avoid meaningful desegregation via circumvention and tokenism.[96]

By the early 1960s, with *Brown* now more than a decade old, district courts increasingly recognized the wrangling over implementation strategies had become pivotal to the legal battle over desegregation. As articulated by one district court, "so-called 'massive resistance' had been abandoned and the 'freedom of choice' program [era] begun."[97] Yet recognition cannot be equated with motivation to force desegregation. As discussed by Rosenberg and Klarman, judges remained part of the same communities as the parties at bar, which powerfully influenced their decisionmaking.[98] In these communities, political rhetoric and social conservatism led to a toxic environment where "'a moderate' became a man who dared open his mouth, an 'extremist' one who favored eventual compliance with the law, and 'compliance' took on the connotations of treason."[99] Additionally, remedies available for addressing desegregation were sometimes further restricted by the Courts of Appeal.[100]

Yet the most important influence on court decisions remained the relevant national authorities, both legislative and judicial. To return to Judge Wisdom's observations of court behavior, this is the burden that federal district court judges had to bear.[101] Ala-

law of the land as interpreted by the Supreme Court, while the Commonwealth of Virginia permits other public schools to remain open at the expense of the taxpayers.").

[96] See Klarman, supra note 9, at 330–34.

[97] Griffin v. Sch. Bd., 239 F. Supp. 560, 562 (E.D. Va. 1965).

[98] Klarman, supra note 9, at 354–60 (discussing district judges' "[p]ersonal and political incentives not to press desegregation"); Rosenberg, supra note 6, at 18 ("To the extent that lower-court judges are part of a given community, ordering massive change in their community may isolate them and threaten the respect of the court.").

[99] Bass, supra note 90, at 81 (internal citation omitted).

[100] See, e.g., Carson v. Warlick, 238 F.2d 724, 729 (4th Cir. 1956) (applying an individual, rather than class-based, standard for the evaluation of segregation plans, reversing what had been a valuable strategic move in *Brown*); see also Friedman, supra note 17, at 2259.

[101] Elbert Tuttle, Foreword, In Tribute to John Minor Wisdom, 60 Tul. L. Rev. 231, 234 (1985) ("No matter how popular local law may be or how unpopular federal requirements may be, federal courts must expect to bear the primary responsibility for protecting the individual.").

bama District Court Judge Frank Johnson explained the anxiety that accompanied enforcing desegregation orders:

> [T]here were many times, even with [the federal government] in support of me, that I felt alone. I don't care who you are, when something happens and the entire state rises up, through its politicians and its press, and lambasts you and the Klan is making threats, you become apprehensive for your family, sometimes, waiting for something to happen.[102]

With local forces pushing for tokenism and avoidance, the central question asked by legal historians has been: what federal source of authority pushed district court decisions strongest toward meaningful desegregation? Statistical evidence is an important piece of this puzzle, but it does not bridge the gap between the national federal authorities and local school desegregation. Federal district court judges occupied this gap.[103] They were genuine local actors who were also responsible for implementing federal law—both acts of Congress and Supreme Court precedent. Legal historians should, therefore, give greater attention to the role district courts played and how their decisionmaking explains the influence of different sources of federal authority.

B. Creating a Sample Study of School Desegregation Cases

If district courts were central to how desegregation was implemented locally, what do their decisions say about the relative force of national authorities? Analyzing these decisions shows that at the critical moment when district courts upped the ante in the desegregation process—for the first time placing an affirmative burden on school districts to implement new approaches that would be evaluated by the results achieved—they were more likely guided by the Court's decision in *Green* than prior congressional authorities. That district court decisions trended toward desegregation over time is not conclusive; this shift could have been influenced primar-

[102] Frank Sikora, Judge: The Life and Opinions of Alabama's Frank M. Johnson, Jr. 82 (2007).

[103] See, e.g., Charles L. Zelden, From Rights to Resources: The Southern Federal District Courts and the Transformation of Civil Rights in Education, 1968–1974, 32 Akron L. Rev. 471, 479 (1999) (discussing how "often in the face of public distrust and opposition . . . the federal courts . . . stepped in where others chose not to act").

ily by the CRA, *Green*, or some combination of the two. This Note attempts to show that the timing of this shift, the reliance on the Court as a primary authority, and the language used in district court opinions, taken together, suggest that *Green* may have been the pivotal authority driving the sharp increase in desegregation.

1. Restrictive Parameters

Reaching this conclusion requires a systematic review of district court decisions. Among the most problematic aspects of using these decisions as primary material is the volume of data it produces. Accordingly, the first step in the analysis is to establish parameters that fairly restrict the cases to those that are the most relevant. The most relevant and neutral parameters are time frame, location, and subject matter. The time frame of this study begins on July 2, 1964, when the CRA was signed into law by President Johnson, and ends on April 20, 1971, when the Supreme Court issued its decision in *Swann v. Charlotte-Mecklenburg Board of Education*.[104] This period is roughly divided by the Court's decision in *Green*, issued on May 27, 1968. The signing of the CRA serves as an appropriate starting point for this comparison because the Act was the first major nonjudicial federal policy aimed at desegregation, specifically targeting the then dominant freedom-of-choice programs,[105] the same desegregation method at issue in *Green*. *Swann*, issued three years later, is an appropriate end date because it represents a shift in the focus of school desegregation efforts away from freedom-of-choice plans and toward busing.[106] *Swann* was also

[104] 402 U.S. 1 (1971).

[105] See supra Section II.A.

[106] 402 U.S. at 30 ("[T]he remedial techniques used in the District Court's order [including busing] were within that court's power to provide equitable relief; implementation of the decree is well within the capacity of the school authority."); see also Gregory S. Jacobs, Getting Around Brown, Desegregation, Development, and the Columbus Public Schools xv (1998) (analyzing the "sweeping, system-wide busing remedy" implemented in Columbus, Ohio); Frank T. Read, Judicial Evolution of the Law of School Integration Since *Brown v. Board of Education*, 39 Law & Contemp. Probs. 7, 32 (1975) (discussing the "frantic pace" of integration between *Green* and *Swann*). *Swann* "refined" *Green* and upheld busing as a desegregation strategy. Because busing could force integration more quickly, subsequent efforts relied heavily on this approach. See Brian K. Landsberg, Equal Educational Opportunity: The Rehnquist Court Revisits *Green* and *Swann*, 42 Emory L.J. 821, 825–27 (1993) (discussing *Swann*

the first major Supreme Court decision on school desegregation strategies since the election of President Nixon, who sought to reduce the federal role in school desegregation.[107] Using *Swann* as the concluding point also has the advantage of constructing relatively equal intervals around *Green*.

District court cases are also readily limitable by location. These limitations are particularly appropriate where, as here, the controversy itself is partially defined geographically. Because de jure school segregation was limited primarily to the deep South, a study of district court decisions addressing the issue could be fairly restricted to the same states. Accordingly, only cases in the Fifth Circuit—then composed of Texas, Louisiana, Mississippi, Alabama, Florida, and Georgia—were considered. To be sure, this limitation potentially excludes otherwise relevant decisions addressing school desegregation in other parts of the country. However, given the widespread existence of de jure segregation in these states and the number of states involved, the Fifth Circuit should provide enough decisions from a sufficiently wide geographic range to produce a sample that is representative of the entire South.

More importantly, effectively gauging the influence of federal authorities on local decisionmaking requires restricting the cases by area of law. Though limited in their jurisdiction, federal district courts still deal with a wide range of legal disputes. Broadly surveying different cases will have limited value in explaining the force of federal authorities because in each area of law a specific federal authority or source may predominate. Instead, by tracing a series of cases dealing with the same legal issue, patterns or variations in the *choices* of authorities should be visible. This study examines only decisions that directly addressed school desegregation plans. Defining what constitutes a "school desegregation" case requires some background on the cases.

as a reflection of "the [Supreme] Court's growing impatience with the snail's pace of school desegregation").

[107] Halpern, supra note 52, at 85–88 (describing President Nixon's "desire to send a signal to southerners that the administration intended to relieve pressure on them to desegregate"); Wilkinson, supra note 4, at 119 (noting the Nixon administration's "extraordinary step" of asking the Fifth Circuit to extend time limits for Mississippi school districts to submit desegregation plans).

Given the historical context, the issue of school desegregation appears in a broad range of claims. In many cases, however, desegregation was only the impetus for a tangentially related legal controversy. To ensure an examination of similar claims, cases where desegregation was not the issue are excluded from this study. These most often fall into one of three categories. First, cases where the central issue was desegregation generally—and not, specifically, school desegregation—were excluded. For example, efforts to integrate extracurricular activities and high school athletics, while important to the civil rights movement, were tangential to desegregation of schools and therefore excluded from this study.[108] Similarly, holdings related to school construction and facilities investments, while linked to desegregation, were also excluded unless directly addressing a school desegregation plan.[109] Also excluded were holdings addressing relief from nongovernmental interference.[110] Although aimed at interfering with desegregation, suits typically sought injunctive relief against third parties themselves and not the school district. These examples illustrate the challenge of winnowing down cases by issue; this study examined only those district court cases directly addressing school desegregation plans.

Within these parameters, any ruling on school desegregation plans was considered relevant. In some cases this meant several holdings from different points in a single case were included.[111] This

[108] See, e.g., St. Augustine High Sch. v. La. High Sch. Athletic Ass'n, 270 F. Supp. 767, 769–70 (E.D. La. 1967) (considering a "[n]egro" high school's attempt to join a high school athletic organization).

[109] Compare Griggs v. Cook, 272 F. Supp. 163 (N.D. Ga. 1967) (addressing the location of new school building), and Bivins v. Bd. of Pub. Educ. & Orphanage, 284 F. Supp. 888 (M.D. Ga. 1967) (same), with Lee v. Macon County Bd. of Educ., 289 F. Supp. 975, 978 (M.D. Ala. 1968) (holding that converting temporary facilities at black school into permanent classrooms would "tend only to perpetuate the dual school system"). The first two cases were excluded from the analysis, while the third, *Lee*, was included.

[110] See, e.g., United States v. Crenshaw County Unit of the United Klans of Am., 290 F. Supp. 181, 185 (M.D. Ala. 1968); cf. Smith v. St. Tammany Parish Sch. Bd., 316 F. Supp. 1174, 1176–77 (E.D. La. 1970) (finding actions of school officials who directly influenced or attempted to influence student behavior via intimidating practices are covered under the desegregation order).

[111] See, e.g., Stell v. Savannah-Chatham County Bd. of Educ., 255 F. Supp. 88, 90 (S.D. Ga. 1966) (setting out a clear chronology of the case and the primary holdings up to that point in the court's order).

outcome is appropriate because in each decision the court addressed the relevant issue of school desegregation, and each decision was subject to the changing influences of Congress and the Court. This concern also touches on the importance of precedent: judicial decisionmakers decide cases in light of previous holdings. Studying school desegregation beginning in 1964 helps address concerns about the force of precedent because school desegregation was no longer an issue of first impression in the Fifth Circuit.[112] Whether or not a judge was seeing a given case for the first time, he was by this point familiar with desegregation as an issue and prior holdings on the subject. Examining multiple rulings over the life of a single case has the potential to more effectively test the relative influence of federal authorities. Factual circumstances, such as the school's location and racial composition, were typically static in the short run, but—particularly during what some judges referred to as the "Second Reconstruction" of the 1950s and 1960s—the governing authority and legal standards changed significantly. Looking at the evolution of cases over time in response to changing authorities may in fact offer the most compelling view about the relative influence of the Court.

Ultimately, the restrictive parameters on time frame, location, and subject matter aim to create a representative sample of district court decisions, not one that is absolutely inclusive.[113]

2. Methodology

After selecting the sample group, the study examined published decisions on the subject of school desegregation plans issued by

[112] See, e.g., Bd. of Pub. Instruction v. Braxton, 326 F.2d 616, 618 (5th Cir. 1964) (noting "the many decisions of this Court interpreting and giving effect to [*Brown*]").

[113] Because this study is limited to published opinions, it does not include unpublished decisions and settlements. This, however, is unlikely to bias the sample. First, there is no reason to believe a particular result—either limiting or expanding desegregation—would have been systematically linked to unreported decisions or settlement. School districts, typically the defendants, had an incentive to wait for a decision rather than settle, particularly since their plans often received judicial validation. On the other side, plaintiffs seeking to prevent continued operation of a dual school system would be unlikely to accept a plan that did not offer the comprehensive desegregation sought. As plaintiffs were often more likely to get this from courts than the districts themselves, they too would have rarely agreed to settle. Furthermore, given the public attention that surrounded school desegregation, the possibility of significant undocumented settlements is unlikely.

district courts in the Fifth Circuit between the passage of the 1964 CRA and the Supreme Court's 1971 decision in *Swann*. The analysis compared judicial and nonjudicial sources of authority sharing a similar goal: restricting the use of "choice" plans, which were being used by school districts to stifle desegregation efforts. District court decisions were evaluated by their language, their citations to authority, and their holdings. Within each holding the critical issues were: 1) the sources of authority relied on, and 2) the relative weight given to each source.

In application, the first question was whether the authority was cited. This demonstrates the authority was considered relevant in rendering the opinion, even if its influence was limited. With that baseline, the weight and treatment of each authority within the opinion were examined to measure the use of that source: was it controlling, tangentially related, used as a counterpoint, or simply to confer jurisdiction? The concept of controlling authority, as understood generally and as used here, refers to direct reliance on a source in shaping the applicable standards. Tangential reliance refers to the use of an authority in a secondary role, for example to support a minor proposition.[114] Citations to contrary authorities still demonstrate that the judge deciding the cases felt the need to address the authority. Evaluating what source of authority was *most* persuasive means a concern primarily with the first of these uses, though all three were considered.

Measuring the influence of a given source of authority also requires attention to the outcomes produced when relying on a given authority; the manner in which a source shapes the holding is arguably more important than simple reliance on a source. For example, if the court cited to the CRA, HEW, or *Green*, but then applied the authority in a manner that furthered a segregated school system, that authority's ability to drive social change was not demonstrated. The question of outcomes therefore implicates the central concern of which authority had a greater impact in promoting school desegregation.

[114] See, e.g., *Stell*, 255 F. Supp. at 87 (making only one indirect reference to HEW as "the agency now charged by law with enforcement of the desegregation provisions of the Civil Rights Act of 1964"). Another possible example is where the authority—for example, the CRA—is cited only for jurisdictional purposes.

3. Expected Results

Because this analysis was conducted to test the dominant "Rosenberg-Klarman diminution of [*Brown*]" and the influence of the Supreme Court,[115] the expected result was confirmation of the revisionist hypothesis—that legislative and executive authorities had demonstrably superior influence on local decisionmakers. The current consensus predicts that, of the institutional sources of federal authority relied on by district courts—Supreme Court cases, such as *Brown* and *Green*; executive agency sources, chiefly the HEW guidelines; and legislative sources, most significantly the CRA—sources from the legislative branch should dominate.[116] Faith in this prediction was tempered by the inherent challenges of defeating desegregation in the face of local resistance. As a result, it was also expected that no single authority would uniformly dominate decisionmaking and that changes in results and citations to authority would be gradual and halting.

This prediction about the limited influence of courts is grounded in theories of limited judicial effectiveness developed by Rosenberg and others.[117] Under this view, judicial decisions are limited in their ability to generate change because of the structure of the court system and the superior weight of other authorities. First, the decentralized structure of the judiciary and judges' lack of specialized knowledge may significantly constrain courts' ability to create social change.[118] Second, district judges are local actors who often share the biases of their immediate communities;[119] they may

[115] See Garrow, supra note 11, at 724.

[116] See Rosenberg, supra note 6, at 75–81 (arguing that "[t]he lack of political leadership . . . makes it no wonder that the courts contributed little directly to civil rights in the years they acted alone. The only way to overcome such opposition is from a change of heart by electors and by national political leaders"). For references to HEW, citations to both the guidelines and to the Agency itself are considered relevant. See, e.g., United States v. Bd. of Educ., 301 F. Supp. 1024, 1031 (S.D. Ga. 1969) (soliciting recommendations from HEW before issuing a final judgment).

[117] See Rosenberg, supra note 6, at 9–36 (discussing the Constrained Court view); see also Donald Horowitz, The Courts and Social Policy 22–62 (1977) (discussing the "many aspects of adjudication that seem well suited to the determination of particular controversies [but] seem unsuited to the making of general policy"); Henry Friendly, The Gap In Lawmaking, 63 Colum. L. Rev. 787, 791–92 (1963) (discussing the "diminished role of the judge vis-à-vis the legislator as a maker of law").

[118] See Rosenberg, supra note 6, at 17.

[119] See supra Section III.A.

be unlikely to demand immediate "reform [of] existing institutions . . . [, an] essentially non-judicial task," especially where it may involve "ordering massive change in their community."[120] In combination, these two predispositions make meaningful change even less likely. As Klarman argues, delays in desegregation after *Brown* are partially attributable to the lack of meaningful direction given to local federal judges regarding desegregation; without sufficiently specific precedent in a community hostile to such change, many federal district court judges lacked incentive to act.[121] If this model accurately describes the influence of the courts, then resistance and delay should characterize local behavior following major Supreme Court decisions forcing desegregation. This perspective suggests nonjudicial forces, chiefly congressional and executive action, would be *more* likely to generate policy changes and less likely to lead to resistance and delay.[122] This analysis of district court opinions, however, suggests that a more nuanced view of the relative influence of the Supreme Court and legislative action may be needed.

IV. THE VALUE OF DISTRICT COURT EVIDENCE

A. Sample Study Results

Examining this sample of district court decisions suggests current revisionist theories may not accurately predict the comparative influence of the Supreme Court in the desegregation battle. In contrast to the revisionist thesis, the opposite effect is measurable: resistance and delays were *less* likely to occur following the decision in *Green* than they were following passage of the CRA. After the CRA passed, local judges were still hesitant to force powerful desegregation plans, though they were more active than after *Brown*. Yet it was under the mandate of *Green* that district courts pushed strongly against school choice plans and took the largest steps toward forcing integration.

What data are these conclusions based on? Of the hundreds of district court rulings issued in the Fifth Circuit between 1964 and 1971, sixty-six reported opinions directly addressed school deseg-

[120] Rosenberg, supra note 6, at 18.
[121] Klarman, supra note 9, at 355–57.
[122] See supra Section I.A.

regation plans within the study's parameters. Of those, thirty-one were issued before the Court decided *Green*—May 27, 1968—and thirty-five issued after.[123] The opinions suggest that *Green* was more significant in pushing meaningful change than either the CRA or HEW guidelines. *Green* was relied upon a greater proportion of the time, was more closely adhered to by district courts, and was significantly more likely to be cited in decisions explicitly striking down ineffective school choice plans. While alternative explanations could be offered—for example, judicial activism or changes in local opinion—they are unlikely given the institutional constraints on district court judges. District Judge Frank Johnson suggests that faithfulness to the law was foremost on the minds of the judges:

> Scholars have asked me from time to time if, as a Southern judge, I could have made different decisions in those civil rights cases . . . . But my posture in those matters wasn't the social change that loomed, but merely applying the law as it was intended to be applied."[124]

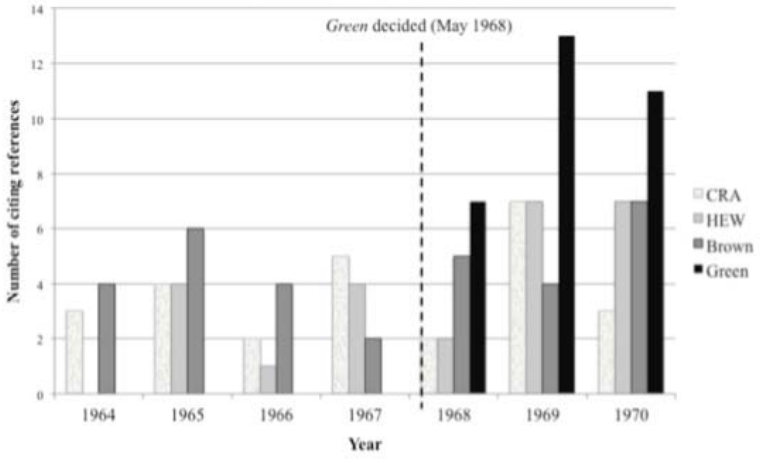
1. Summary and Overall Empirical Observations

The influence of *Green* is first apparent in the numerical results. Of the thirty-one opinions issued before *Green* was decided, *Brown* was cited in seventeen cases—fifty-five percent of the time and more than any other source of authority.[125] The CRA was cited in fifteen cases—less than fifty percent of the time. HEW and the guidelines were referenced in ten cases—approximately thirty-two percent of the time. In most decisions, at least two of these sources were cited, indicating that district courts regularly looked to multiple sources of authority, not necessarily one or the other. A small minority of holdings (five) referenced only one source and a slightly higher number (seven) referenced none at all. In the thirty-six holdings issued after *Green*, thirty-one cited *Green*—over eighty-six of all decisions.[126] *Brown* was cited in fifteen post-*Green* cases—roughly fifty percent of the time. The CRA was cited in

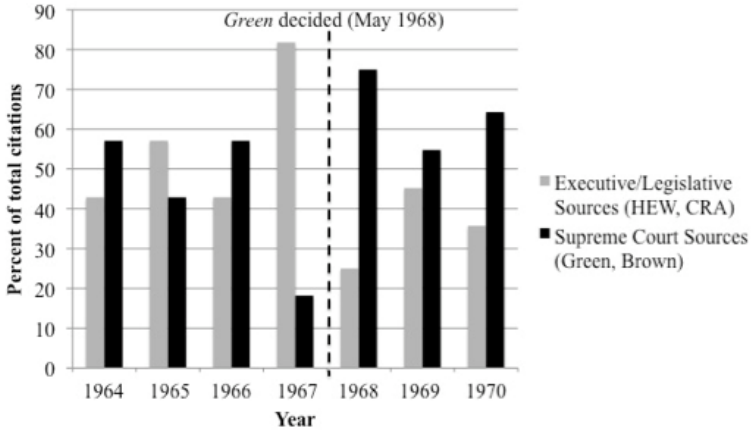
[123] See infra Appendix.
[124] Sikora, supra note 102, at 304.
[125] See infra Appendix (7/6/64–5/14/68).
[126] See infra Appendix (7/19/68–12/30/70).

eleven cases—just over thirty percent of the total. HEW and the guidelines were cited in fifteen of the post-*Green* cases—less than fifty percent of the time. Although fluctuations in citation numbers were expected, the large jump in citations to Supreme Court authority following *Green* suggests that case had a dramatic and immediate impact.

Graph 1: 5th Circuit District Court Citations to Various Authorities in School Desegregation Cases



Graph 2: Relative Proportions of Citations Supreme Court and Executive/Legislative Authority



At a minimum, this data suggests that *Green* was not subject to systematic avoidance, nor was it ignored—propositions sometimes implied by revisionists seeking to explain the Court's minimal impact in civil rights cases.[127] Indeed, though the CRA and HEW were cited a significant portion of the time, the numbers indicate that *Green* had a *preeminent* position as the authority most frequently cited. After it was decided in 1968, *Green* was actually cited a significantly greater percentage of the time than *Brown*, sometimes as the sole Supreme Court case on desegregation.[128] The issuing of a new opinion would be expected to produce some change. But, as discussed below, an analysis of these opinions suggests *Green* did not simply advance judicial doctrine incrementally beyond *Brown*—rather, *Green* may have effectively replaced *Brown* immediately as the guiding authority relied upon by district courts.

Perhaps even more important were the outcomes generated when relying on the various authorities. It is here that the influence of *Green* seems most apparent. Pre-*Green* decisions relying on HEW guidelines and the CRA often left ineffective school desegregation plans intact.[129] When relying on *Green*, however, district courts were more likely to change or dismiss existing freedom-of-choice plans, forcing schools to adopt more effective desegregation schemes.[130]

*2. Pre-*Green *Decisions*

Of the thirty-one post-CRA/pre-*Green* decisions, fourteen directly addressed school districts' use of freedom-of-choice plans. Of these fourteen, four affirmed freedom-of-choice plans even while recognizing the plans' limited effectiveness in producing desegregation.[131] In other words, when relying on the CRA, district courts often continued to permit or promote the use of plans that

[127] See, e.g., Rosenberg, supra note 6, at 15–19.

[128] See, e.g., Augustus v. Sch. Bd., 299 F. Supp. 1069, 1071 (N.D. Fla. 1969); Franklin v. Quitman County Bd. of Educ., 288 F. Supp. 509, 515 (N.D. Miss. 1968).

[129] See infra Subsection IV.A.2.

[130] See infra Subsection IV.A.3.

[131] See Davis v. E. Baton Rouge Parish Sch. Bd., 269 F. Supp. 60, 63–64 (E.D. La. 1967); Hall v. St. Helena Parish Sch. Bd., 268 F. Supp. 923, 926 (E.D. La. 1967); Lee v. Macon County Bd. of Educ., 270 F. Supp. 859, 865–66 (M.D. Ala. 1967); Henderson v. Iberia Parish Sch. Bd., 245 F. Supp. 419, 423 (W.D. La. 1965).

had failed to achieve significant desegregation, despite the CRA's instructions to evaluate plan effectiveness. For example, in *Henderson v. Iberia Parish School Board* the district court invoked the CRA in holding the school district's current plan acceptable despite the fact that "[t]his plan has been in operation in [the district] for the past ten years, and no applications for registration by Negroes in any all white schools have been received . . . ."[132] That district court judges may have been hesitant to push local school districts under the CRA's mandate is unsurprising given the pressures they faced. Judge Wright of Louisiana described his deliberations on issuing a school desegregation order: "I knew I wasn't going to get any help out of the police, state or city . . . . I knew that I was going to be alone, totally and absolutely alone . . . [, and] I was interested in getting this job done without killing people."[133]

Under the CRA and the HEW guidelines, district courts looked primarily to the district's implementation of a choice plan—not to the desegregation accomplished—as evidence of compliance. Consistent with that approach, in multiple post-CRA/pre-*Green* holdings, district courts actually ordered schools to implement freedom-of-choice plans, effectively validating and encouraging school districts' preferred avoidance strategy.[134] In many cases it was simply assumed that, despite the CRA's warnings, school choice plans were the most appropriate method. For example, in *Lee v. Macon County Board of Education*, the district court focused wholly on implementing a choice plan, without discussing the expected outcomes or the authorities supporting such a strategy.[135] Despite the CRA's outcome-focused directives,[136] in only one pre-*Green* decision did a district court order significant change to an ineffective

[132] 245 F. Supp. at 420, 422.

[133] Bass, supra note 90, at 133–34.

[134] See, e.g., *Davis*, 269 F. Supp. at 65–67; United States v. Plaquemines Parish Sch. Bd., 291 F. Supp. 841, 842–44 (E.D. La. 1967); Lee v. Macon County Bd. of Educ., 253 F. Supp. 727, 727–28 (M.D. Ala. 1966); Harris v. Bullock County Bd. of Educ., 253 F. Supp. 276, 276–77 (M.D. Ala. 1966).

[135] 253 F. Supp. at 727–30; see also *Harris*, 253 F. Supp. at 276–78; *Plaquemines Parish Sch. Bd.*, 291 F. Supp. at 846–50 (focusing on the equalization of funding and school facilities—the pre-*Brown* standard for constitutionally permissible segregation—rather than the CRA).

[136] See supra notes 49–56 and accompanying text.

school choice plan.[137] In only one other case did a district court actually order such a plan halted for lack of progress.[138] These outcomes suggest the relatively limited effect of the CRA in forcing change at the district court level.

The text of these district court holdings further shows how the CRA was often relied upon when validating ineffective plans and avoiding more effective desegregation measures. For example, in *Hall v. St. Helena Parish School Board*, the district court directly cited Senator Humphrey's explanation of the CRA to support its decision to uphold an ongoing choice plan that had achieved minimal desegregation. The court looked specifically to the Senator's explanation that under the CRA "[t]he fact that there is a racial imbalance per se is not something which is unconstitutional."[139] Applying this interpretation, the court placed the burden on parents and children to demonstrate deliberate interference with the plan to justify judicial action. Using this standard, the court upheld the plan because "plaintiffs produced absolutely no evidence whatsoever to show that there had been any impediment whatsoever under the existing plan of desegregation to the exercise of a free, unfettered choice of schools by all students . . . ."[140] The court concluded the "plans that work" standard was met because "no complaints have been made."[141] In *Davis v. East Baton Rouge Parish School Board*, the court ordered an expansion of the existing choice plan, claiming a wholly segregated school system operating under a free choice plan would satisfy the CRA:

> Suppose the school desegregation plan already in operation in a given area *is* working to the extent that all students do, in fact, have a free and unfettered choice of the school which he will attend, and suppose the situation arises where it cannot be fairly said that there any longer exists "de jure" segregation but that segregation *does* continue to exist on a neighborhood, de facto,

[137] See Carr v. Montgomery County Bd. of Educ., 289 F. Supp. 647, 652 (M.D. Ala. 1968).
[138] Moses v. Wash. Parish Sch. Bd., 276 F. Supp. 834, 838 (E.D. La. 1967).
[139] Hall v. St. Helena Parish Sch. Bd., 268 F. Supp. 923, 926 (E.D. La. 1967).
[140] Id. at 927.
[141] Id.

> free choice basis. . . . [R]acial balance was never contemplated by Congress when it passed the Civil Rights Act of 1964.[142]

The text of these district court decisions suggests that despite the CRA's claim of targeting ineffective plans, courts accepted and encouraged use of freedom of choice as a desegregation strategy. Even where the CRA was referenced, courts did not feel compelled by Congress to measurably desegregate. Some district courts actually paralleled the CRA and *Brown*, framing both as impotently requiring only a plan for desegregation, not desegregation itself.

District courts were similarly dismissive of the HEW guidelines, which were rarely given significant weight in desegregation opinions, as evidenced by the text of the decisions. Several opinions addressed the guidelines solely for the apparent purpose of highlighting their lack of influence. For example, in *Davis*, the court mentioned the guidelines in only one paragraph and only for the purpose of downplaying the significance of the standards, asking: "Are these questions [about desegregation] to be determined by the method used by the Department of Health, Education and Welfare in applying their *so-called* guidelines . . . ?"[143] Similarly, in *Trahan v. Lafayette Parish School Board* the court chastised the plaintiffs for their heavy reliance the HEW guidelines[144] and downplayed any influence the guidelines might have: "[W]e hold that the discretion vested in the Court in fashioning and enforcing relief in school desegregation cases . . . is not affected by HEW policies and [the CRA] except to the extent that they should be considered in balancing the equities along with all other factors involved."[145] Other decisions implied that HEW lacked the capability to deal with desegregation. The court in *Thomas v. St. Martin Parish School Board*—quoting an earlier holding—asserted that the guidelines could effectively be disregarded, finding that adequate "minimum requirements" already existed outside HEW's efforts and they should "leav[e] the number of grades to be included the

[142] Davis v. E. Baton Rouge Parish Sch. Bd., 269 F. Supp. 60, 62–63 (E.D. La. 1967).

[143] Id. at 62 (emphasis added).

[144] 244 F. Supp. 583, 586 (W.D. La. 1965) (insisting that "an unqualified assertion that the policies announced by HEW must be followed in every instance would violate the letter of the law itself . . .").

[145] Id. at 588.

first [desegregation] year to the discretion of the defendant boards, who, in our judgment, are better equipped to evaluate their respective administrative and school facilities than is the Court, or, with all due respect, HEW . . . ."[146] In sum, prior to *Green*, district courts regularly cited to the CRA or HEW guidelines simply to affirm the continued use of freedom-of-choice plans.

Among the thirty-one pre-*Green* district court decisions were several condoning the use of alternative approaches to school desegregation.[147] These alternative approaches shared freedom-of-choice plans' limited impact and perpetuation of the status quo. That contemporary decisions continued to uphold such ineffective remedies suggests the CRA's results-focused mandate remained unpersuasive to judges addressing challenges to local desegregation plans. Specifically, several courts accepted or promoted the use of aptitude testing, which typically meant racial segregation under the pretense of academic ability. As with freedom-of-choice plans, by promoting these programs, the judges were effectively disregarding the CRA. This is apparent in decisions such as *Stell v. Savannah-Chatham County Board of Education*, where the court affirmed the use of aptitude testing, even though such an approach expressly contravened the opinion of Justice Department officials involved in the case.[148]

The only pro-desegregation measure district courts appeared ready and willing to take pre-*Green* was striking down state legislation or executive action that attempted to directly interfere with school desegregation orders.[149] In sum, throughout the pre-*Green*

[146] Thomas v. St. Martin Parish Sch. Bd., 245 F. Supp. 601, 603 (W.D. La. 1965) (emphasis omitted) (internal citation omitted).

[147] See, e.g., Carr v. Montgomery County Bd. of Educ., 232 F. Supp. 705, 708–10 (M.D. Ala. 1964) (holding the district should use the "Alabama School Placement Law," sorting students via academic "merit"); Harris v. Bullock County Bd. of Educ., 232 F. Supp. 959, 960–63 (M.D. Ala. 1964) (same). The Alabama legislature made clear in passing this law that its primary purpose was to perpetuate segregation in defiance of *Brown*. See Klarman, supra note 9, at 330.

[148] 255 F. Supp. 88, 90, 94–99 (S.D. Ga. 1966); see also *Carr*, 232 F. Supp. at 708–10; *Harris*, 232 F. Supp. at 960–63.

[149] See, e.g., Poindexter v. La. Fin. Assistance Comm'n, 296 F. Supp. 686, 688 (E.D. La. 1968) (invalidating a statutory tuition grant program that had the effect of furthering segregation in schools); Lee v. Macon County Bd. of Educ., 267 F. Supp. 458, 480–92 (M.D. Ala. 1967) (requiring the State Superintendent of Education to take a host of remedial measures to correct institutional practices perpetuating segregation).

decisions, district courts often relegated the CRA and HEW to a secondary role in their decisionmaking. The rare cases that gave HEW or the CRA positive treatment often considered these sources advisory and "[d]istinctly separated from the [central] question of desegregation and the operation of racially nondiscriminatory public school systems under *Brown* . . . ."[150]

*3. Post-*Green *Decisions*

Post-*Green*, sixteen of thirty-five holdings dealt directly with freedom-of-choice plans. Of these, eleven struck down such plans down for failing to desegregate schools and five permitted freedom of choice to continue only if extensive modifications were made.[151] Post-*Green*, in every decision striking down freedom-of-choice plans, *Green* was cited as a controlling authority. In the subset of cases striking down freedom-of-choice plans, there was not a single reference to the CRA or HEW guidelines.[152] This is particularly significant given the HEW guidelines' purpose of directing how freedom-of-choice plans could be used.[153]

The district courts held that *Green* required a critical examination of current programs, finding that although *Green* "did not absolutely abolish freedom of choice," it did compel a thorough "inquiry as to why a freedom of choice plan was or was not working . . . ."[154] In the post-*Green* holdings affirming freedom-of-choice plans, the courts typically provided tailored guidelines on exactly how these programs could operate, often including specific integration milestones and setting dates by which the district was required to meet them.[155] In holdings striking down freedom-of-

[150] Trahan v. Lafayette Parish Sch. Bd., 244 F. Supp. 583, 588 (W.D. La. 1965).

[151] See, e.g., Acree v. County Bd. of Educ., 294 F. Supp. 1034, 1039 (S.D. Ga. 1968) (ordering modification of a freedom-of-choice plan); Moore v. Tangipahoa Parish Sch. Bd., 290 F. Supp. 96, 98–99 (E.D. La. 1968) (requiring that a freedom-of-choice plan "be fully implemented and given a fair chance to work" with slight modification).

[152] See, e.g., *Moore*, 290 F. Supp. 96.

[153] See supra Section II.A.

[154] United States v. Choctaw County Bd. of Educ., 310 F. Supp. 804, 809–10 (S.D. Ala. 1969); see also Conley v. Lake Charles Sch. Bd., 293 F. Supp. 84, 88 (W.D. La. 1968) ("Every plan, *Green* says, must finally check out in tests of practicality, promise and realism.").

[155] See, e.g., United States v. Choctaw County Bd. of Educ., 292 F. Supp. 701, 702, 704 (S.D. Ala. 1968) (requiring—among other things—that "[a] minimum of 10% of

choice plans, courts regularly recommended or ordered more effective desegregation approaches, programs that—in the language of *Green*—"promise[ ] realistically to work, and promise[ ] realistically to work *now*."[156] It was in *Green*—not the CRA or HEW guidelines—that district courts found "the mechanics of what must be done to bring about a unitary [school] system . . . ."[157]

In another measure of *Green*'s impact, district courts shifted from an attitude of deference to school districts to an attitude of skepticism about claims of gradual improvement.[158] In post-*Green* decisions, courts analyzed school districts' racial composition and the actual results that had been achieved under individual desegregation plans. Courts incorporated these statistical results into their findings of fact and evaluations of a desegregation plan's effectiveness.[159]

Green was also cited outside the freedom-of-choice context, suggesting that the Supreme Court's decision pushed local district courts to take a more active role in enforcing the Court's mandate of desegregation. For example, *Green* was cited in a decision preventing school officials from activities antithetical to integrationist ideals, such as flying the confederate flag.[160] Additionally, in *Coffey*

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the Negro school population attend traditional white schools" in the following academic year).

[156] Moore v. Tangipahoa Parish Sch. Bd., 304 F. Supp. 244, 246 (E.D. La. 1969) (quoting *Green*, 391 U.S. at 439); see also United States v. Tatum Indep. Sch. Dist., 306 F. Supp. 285, 288 (E.D. Tex. 1969) ("School boards which, in the past, have operated a state compelled dual system are 'charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated *root* and *branch*.'" (quoting *Green*, 391 U.S. at 437–38)); Hall v. St. Helena Parish Sch. Bd., 303 F. Supp. 1236, 1238 (E.D. La. 1969) (concluding that "the freedom of choice plans presently used in these various school districts [must] be abandoned and a new plan substituted therefor which will meet the standards of *Green* . . .").

[157] Valley v. Rapides Parish Sch. Bd., 313 F. Supp. 1193, 1195 (W.D. La. 1970).

[158] Compare Trahan v. Lafayette Parish Sch. Bd., 244 F. Supp. 583, 588 (W.D. La. 1965) (enforcing gradual modification of a desegregation plan and refusing to "require blind adherence" to HEW guidelines), with United States v. Bd. of Educ., 301 F. Supp. 1024, 1026–30 (S.D. Ga. 1969) (evaluating statistical outcomes of school board's desegregation plan and concluding that the plan failed to comport with *Green*'s "affirmative duty to take whatever steps may be necessary to convert to a unitary system in which discrimination is eliminated").

[159] See, e.g., Allen v. Bd. of Pub. Instruction, 312 F. Supp. 1127, 1138–49 (S.D. Fla. 1970); Acree v. County Bd. of Educ., 294 F. Supp. 1034, 1037–39 (S.D. Ga. 1968).

[160] Smith v. St. Tammany Parish Sch. Bd., 316 F. Supp. 1174, 1176 (E.D. La. 1970).

v. State Educational Finance Commission the district court cited *Green* to support its rejection of the continued use of "tuition grants," which had allowed white students to avoid attending public schools altogether.[161] Though the case did not even mention freedom-of-choice plans, the district court still cited *Green* as the Supreme Court case that made clear the "obligation . . . to secure immediate compliance with the mandate of *Brown*."[162]

District court opinions suggest that the Supreme Court pushed these local actors toward more change-oriented outcomes and, perhaps more importantly, seems to have served as a catalyst in changing the perspective from which district courts approached the issue of desegregation. Before *Green*, district judges largely accepted the approaches used by local authorities, apparently assuming the good faith of these officials and institutions. After *Green*, judges in the same districts appeared far more skeptical of local authorities' willingness to seriously address desegregation. Particularly where school officials continued to rely on freedom-of-choice plans that limited integration, judges—citing *Green*—now evaluated the effectiveness of those plans. These emboldened courts regularly ordered new approaches or gave detailed orders, delineating the outcomes now expected in a given school district.

B. Explanations and Concerns

The nature and timing of the shift in the language and outcomes of district court opinions suggests it was the Supreme Court's intervention that drove the change in behavior. The post-*Green* shift is measured against the impact of the CRA and HEW guidelines, both major federal efforts with the same aims as *Green*.[163] Critical to this comparison is that while *Green* was decided later, the Court declined to move beyond the HEW guidelines in issuing its opinion. In *Green*, the Court was clear that it was only rejecting one specific plan for lack of progress, expressly declining to hold freedom of choice unconstitutional per se.[164] Under both the CRA and *Green*, district courts had the authority to regulate freedom-of-

[161] 296 F. Supp. 1389, 1390–92 (S.D. Miss. 1969).
[162] Id. at 1392.
[163] See generally Hearings, supra note 58.
[164] See *Green*, 391 U.S. at 439–41 (1968).

choice plans and to challenge schools for failing to produce results; yet only after the Court issued its decision in *Green* did local judges move aggressively to restrict or reject this failing strategy.

What alternative explanations exist for the district courts' sudden reliance on Supreme Court authority instead of legislative mandates? First, could it simply be the force of precedent on local courts—was it just that the judiciary had finally spoken on the specific issue and thus drove the change in district court behavior? This is highly unlikely because freedom-of-choice plans and their limitations had been discussed and criticized by the Fifth Circuit before *Green*.[165] The Supreme Court's pronouncement in *Green* appears to have had particular persuasive force that was lacking in previous appellate court decisions. Moreover, the plain wording of a new precedent or law does not necessarily produce strict and immediate adherence by district court judges. These local decisionmakers have significant leeway in their uses of authorities. Different district judges may readily apply the same source in support of dissimilar outcomes, a phenomenon observable in some of the pre-*Green* decisions examined in this study.[166] These variations in applying the same law demonstrate how extralegal influences—such as local norms and personal values—may shape judicial decisionmaking. Given this potential variance, the relative uniformity of post-*Green* results suggests that, in this instance, the Supreme Court had a particularly powerful influence on the behavior of local judges.

[165] See United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 847 (5th Cir. 1966) (noting that "[t]he only school desegregation plan that meets constitutional standards is one that works" (emphasis omitted)). Like *Green*, *Jefferson County*—issued two years earlier—discusses many of the same concerns about freedom of choice.

[166] Local federal judges had the ability to use the very authorities intended to promote desegregation in subversive and counterproductive ways. For example, the broad language of the HEW guidelines was used to support decisions that actually impeded desegregation. The court in *Stell* used HEW's research as a pretext for rejecting a plan with clear racial diversity goals, instead using the HEW material to support implementing an academic "performance" plan. See Stell v. Savannah-Chatham County Bd. of Educ., 255 F. Supp. 88, 99 (S.D. Ga. 1966). The court highlighted the value of this type of plan, despite the fact these plans were widely recognized as a pretext for continued desegregation. See also Klarman, supra note 9, at 355–57 ("[*Brown*'s] indeterminacy invited judges to delay and evade, which they were inclined to do anyway.").

Second, might local attitudes have changed sufficiently to drive the shift in judicial decisionmaking? Public opinion does gradually change over time, but here the timing and speed of this shift is inexplicable without a specific force beyond general public sentiment. It is not simply that this change occurred; it was the rapid nature of this tilt around a specific point in 1968 that emphasizes the force of the Supreme Court. More importantly, the evidence suggests there was no public consensus supporting desegregation or rejecting freedom of choice in 1968. In fact, *Green* was likely quite unpopular in the Fifth Circuit states when it was decided; in a poll taken that same year, almost eighty-five percent of Southerners registered strong objections to sending their children to a school that was "half-black."[167] District court judges would have likely been aware of this sentiment in their communities or felt similarly themselves. By following *Green* and striking down freedom-of-choice plans, it is likely at least some of these judges were ruling against their personal convictions and the prevailing attitudes in their local jurisdictions.

If the Supreme Court was the lynchpin for this change, what made the Court so effective in this case, particularly where the CRA and HEW guidelines failed? In the context of school desegregation, the structural limitations of judicial decisionmaking may actually have strengthened the Court's ability to push for change. This assertion runs counter to the claims of Rosenberg and Klarman, who argue these same limitations diminished the judicial branch's ability to force change.[168] For example, the standing and scope restrictions that limit the court to speaking on the controversy at hand might inhibit its ability to force change.

Yet, these same limitations may provide courts with an advantage when addressing controversial topics. The broad scope of the CRA and HEW guidelines may have in fact obscured their goals and contributed to a lack of clarity about how the federal government's carrot-and-stick approach could force desegregation.[169] In

[167] Christine H. Rossell, The Convergence of Black and White Attitudes on School Desegregation Issues, *in* Redefining Equality 120, 124 (Neal Devins & Davison M. Douglas eds., 1998).

[168] See supra notes 117–22 and accompanying text.

[169] Indeed, some courts specifically invoked the CRA and HEW guidelines in ways that frustrated the overarching goal of desegregation. See, e.g., Lee v. Macon County

contrast, the relatively short, fact-specific decision in *Green* may have helped the Court promote desegregation. In only twelve pages, the holding shifted the burden of desegregation to local school districts, elucidating what lower courts would explain as a duty on schools to achieve "constitutionally required integration."[170] While the CRA aimed for a similar result, its impact may have been obscured by its size and unwieldy implementation through HEW. *Green* asked only, in the words of one district court, "why a freedom of choice plan was or was not working."[171] Unlike the CRA's generalizations, *Green*'s factual emphasis provided a model for how district courts should scrutinize the actual school desegregation outcomes. The *Green* Court relied directly on population statistics and enrollment outcomes to evaluate desegregation, an approach echoed by lower courts that increasingly conducted their own statistical analysis of effectiveness.[172] In effect, the Court had forced district courts to adopt a results-oriented approach that the CRA and HEW had been unable to foster.

In contrast to *Green*, the CRA may have ultimately been limited by its resemblance to *Brown*. Though the latter was far more detailed, both attempted to create sweeping change in one major stroke rather than implementing change gradually. Particularly where change is controversial, incremental efforts have clear advantages. The contentious nature of the fight over school desegregation meant narrowly tailored directives were more likely to produce meaningful change. In the realm of school desegregation, the "constraints" on judicial decisions likely clarified the decision, provided a model for implementation, and strengthened the Court's ability to spur change.

Bd. of Educ., 270 F. Supp. 859, 866 (M.D. Ala. 1967) (overruling HEW's decision to cut off funding and holding the school district was, as a matter of law, in compliance with desegregation order); *Stell*, 255 F. Supp. at 90–92 (finding a court could use the relevant civil rights laws to *dismiss* parties with civil rights claims).

[170] Franklin v. Quitman County Bd. of Educ., 288 F. Supp. 509, 515 (N.D. Miss. 1968).

[171] United States v. Choctaw County Bd. of Educ., 310 F. Supp. 804, 810 (S.D. Ala. 1969).

[172] See, e.g., Ross v. Eckels, 317 F. Supp. 512, 522–23 (S.D. Tex. 1970) (presenting racial statistics achieved under several different desegregation methods); Allen v. Bd. of Pub. Instruction, 312 F. Supp. 1127, 1131, 1139 (S.D. Fla. 1970) (displaying a table with current and projected data on student integration in local high schools).

CONCLUSION

This Note proposes an alternative approach to evaluating the influence of different federal authorities on the local school desegregation process. Revisionist legal historians maintain that the dismal pace of desegregation following *Brown* serves as powerful evidence of the Supreme Court's limited ability to generate social change. The desegregation statistics relied on in making this claim, however, are equivocal at best. When a more accurate framework for comparison is constructed, comparing the relative influence of the CRA and *Green*, these statistics may, in fact, support the opposite conclusion.

Rather than rehash this statistical debate, this Note has suggested how local district court decisions provide a valuable alternative source of evidence that should reenter the historical debate. District court judges offer an important perspective as truly local actors; they were federal officials on the front line of desegregation and members of Southern communities where desegregation was an entrenched practice. Attention to their decisions indicates that the Supreme Court's ruling in *Green* prompted district court judges to turn a more critical eye toward the delay tactics being used to prevent desegregation. Although the Court's decision in *Brown* remains celebrated as the "lodestar" for interpreting civil rights history,[173] contemporary historians should be willing to evaluate new sources that bear on the Court's effectiveness in spurring social change, particularly the decisions of the district judges who were charged with carrying out the Court's mandates.

[173] Mack, supra note 21, at 258.

TABLE 1: Case Summaries

DATE	CASE	OUTCOME
7/6/64	Evers v. Jackson Mun. Separate Sch. Dist., 232 F. Supp. 241 (S.D. Miss.)	Previous injunction preventing district from operating compulsory biracial system made permanent. Court notes it is compelled to reach this decision by Fifth Circuit precedent, though it states preference for other outcome. Urges Supreme Court to reconsider *Brown*.
7/13/64	Lee v. Macon County Bd. of Educ., 231 F. Supp. 743 (M.D. Ala.)	Orders enlargement of school district's desegregation plan. Injunction issued against state officials to prevent interference with desegregation efforts.
7/13/64	Hall v. St. Helena Parish Sch. Bd., 233 F. Supp. 136 (E.D. La.)	Orders district to submit detailed desegregation plan, citing no authority other than Fifth Circuit's directions issued on remand.
7/31/64	Carr v. Montgomery County Bd. of Educ., 232 F. Supp. 705 (M.D. Ala.)	Finds district operates segregated schools, failed to meet duty to desegregate. Orders district to commence desegregation of specific grades through aptitude testing plan.
8/5/64	Harris v. Bullock County Bd. of Educ., 232 F. Supp. 959 (M.D. Ala.)	Finds district operates segregated schools, failed to meet duty to desegregate. Orders district to commence desegregation of specific grades through aptitude testing plan.
4/13/65	Lemon v. Bossier Parish Sch. Bd., 240 F. Supp. 709 (W.D. La.)	Finds district operates segregated schools, failed to meet duty to desegregate. Orders district to submit detailed desegregation plan.
6/23/65	Henderson v. Iberia Parish Sch. Bd., 245 F. Supp. 419 (W.D. La.)	Orders district to submit formal plan for desegregation but affirms validity of freedom-of-choice plans as appropriate method.
7/27/65	Le Beauf v. State Bd. of Educ., 244 F. Supp. 256 (E.D. La.)	No cause of action against state school board; local officials are responsible party. Cites limits on federal funding.

DATE	CASE	OUTCOME
8/13/65	Trahan v. Lafayette Parish Sch. Bd., 244 F. Supp. 583 (W.D. La.)	Affirms current desegregation plan for limited number of grades; rejects request to accelerate. HEW regulations cited as guidelines, but court notes local school districts are in a superior position to design desegregation program. Cites limits on federal funding.
8/24/65	Stell v. Savannah-Chatham County Bd. of Educ., 255 F. Supp. 83 (S.D. Ga.)	Holds current desegregation proposal unconstitutional because it is unfair to students with strong academic skills; orders new proposal. Court will make the determination of fairness. Cites HEW studies to justifying limited black educational achievement.
9/2/65	Thomas v. St. Martin Parish Sch. Bd., 245 F. Supp. 601 (W.D. La.)	Finds the Fifth Circuit's standard—requiring desegregation of at least four grades—more than sufficient to fulfill HEW guidelines. Court finds that local schools are in better position than HEW to implement plan.
10/22/65	Turner v. Goolsby, 255 F. Supp. 724 (S.D. Ga.)	Finds district's support for private schools for white students constitutes impermissible segregation. Orders further expenditure of funds on such programs halted until opportunity for integrated schooling is presented to district's black students. Directs schools to consult HEW guidelines.
1/28/66	United States v. Natchez Special Mun. Separate Sch. Dist., 267 F. Supp. 614 (S.D. Miss.)	Holds current desegregation plan adequate; request to accelerate desegregation denied. Plan is sufficient under terms of Fifth Circuit decisions, and any mid-year change would be too disruptive.
3/11/66	Lee v. Macon County Bd. of Educ., 253 F. Supp. 727 (M.D. Ala.)	Orders all grades in district to desegregate under freedom-of-choice plan starting with the coming fall. Court provides detailed guidelines.
3/11/66	Harris v. Bullock County Bd. of Educ., 253 F. Supp. 276 (M.D. Ala.)	Orders approximately two-thirds of grades in the district to be desegregated under freedom-of-choice plan starting the coming fall, with remaining grades desegregated next year. Court provides detailed guidelines.
3/22/66	Carr v. Montgomery County Bd. of Educ., 253 F. Supp. 306 (M.D. Ala.)	Orders all grades except fifth and sixth desegregated for the coming school year, with the remaining grades desegregated the following year. Court provides detailed desegregation guidelines.

DATE	CASE	OUTCOME
4/1/66	Stell v. Savannah-Chatham County Bd. of Educ., 255 F. Supp. 88 (S.D. Ga.)	Approves school board's new desegregation plan, overruling government objections to aptitude-based schools. Relies on evidence from HEW studies in justifying limited black educational achievement.
7/13/66	Broussard v. Houston Indep. Sch. Dist., 262 F. Supp. 266 (S.D. Tex.)	Approves school board's ongoing freedom-of-choice desegregation efforts and allows building of new facilities, despite concerns about the potential for continued discrimination.
9/23/66	Harris v. Crenshaw County Bd. of Educ., 259 F. Supp. 167 (M.D. Ala.)	Approves school board's freedom-of-choice plan but reduces the grades under that plan from all grades to incremental groupings, approximately half of all grades. Court provides detailed guidelines.
3/22/67	Lee v. Macon County Bd. of Educ., 267 F. Supp. 458 (M.D. Ala.)	Enjoins state education officials from discrimination and requires officials to adopt desegregation plan for the coming school year.
5/8/67	Davis v. E. Baton Rouge Parish Sch. Bd., 269 F. Supp. 60 (E.D. La.)	Orders all grades desegregated under freedom-of-choice plan starting with the coming school year. Highly critical of Fifth Circuit precedent requiring a results-oriented approach to evaluating desegregation plans. Court views CRA as accepting de facto segregation.
5/19/67	Hall v. St. Helena Parish Sch. Bd., 268 F. Supp. 923 (E.D. La.)	Finds current freedom-of-choice plan adequate; ongoing segregation may be lawful choice. Highly critical of Fifth Circuit precedent requiring a results-oriented approach to evaluating desegregation plans. Court views CRA as accepting de facto segregation.
6/27/67	United States v. Plaquemines Parish Sch. Bd., 291 F. Supp. 841 (E.D. La.)	Orders all grades desegregated under freedom-of-choice plan starting the coming school year. Uses Fifth Circuit as controlling authority. Court provides detailed guidelines.
7/11/67	Hill v. Lafourche Parish Sch. Bd., 291 F. Supp. 819 (E.D. La.)	Orders all grades desegregated under freedom-of-choice plan starting with the coming school year. Court provides detailed guidelines.

DATE	CASE	OUTCOME
7/28/67	Lee v. Macon County Bd. of Educ., 270 F. Supp. 859 (M.D. Ala.)	Overrules HEW decision to cut off funds to school district; holds district in compliance and enjoins HEW from future cutoffs.
9/5/67	Williams v. Iberville Parish Sch. Bd., 273 F. Supp. 542 (E.D. La.)	Finds district substantially complied with earlier order to implement freedom-of-choice plan, citing to prior Fifth Circuit opinions.
10/19/67	Moses v. Wash. Parish Sch. Bd., 276 F. Supp. 834 (E.D. La.)	Finds current freedom-of-choice plan has failed and orders implementation of geographic zoning plan, relying primarily on Fifth Circuit guidance.
12/6/67	Redman v. Terrebonne Parish Sch. Bd., 293 F. Supp. 376 (E.D. La.)	Orders all grades desegregated under freedom-of-choice starting with coming school year. Court provides detailed guidelines.
2/24/68	Carr v. Montgomery County Bd. of Educ., 289 F. Supp. 647 (M.D. Ala.)	Finds current freedom-of-choice plan inadequately administered. District board must honor choices and must change school operations to promote desegregation; provides detailed guidelines. Relies primarily on Fifth Circuit precedent.
3/19/68	Poindexter v. La. Fin. Assistance Comm'n, 296 F. Supp. 686 (E.D. La.)	Finds state tuition grant program providing funds to white students attending segregated private schools undermines desegregation. Enjoins officials from administering program funds.
5/14/68	Graves v. Walton County Bd. of Educ., 300 F. Supp. 188 (M.D. Ga.)	Approves geographic desegregation plan proposed by district and drafted by HEW; provides detailed guidelines. Notes that freedom-of-choice plan is acceptable under HEW guidelines.
7/19/68	Lee v. Macon County Bd. of Educ., 289 F. Supp. 975 (M.D. Ala.)	Without a request by either party, orders district to do more to meet duty to desegregate. Orders district not to invest additional funds in black schools.
7/29/68	Franklin v. Quitman County Bd. of Educ., 288 F. Supp. 509 (N.D. Miss.)	Finds long-term school building policy promotes segregation and should be altered to achieve required integration. State commission overseeing facilities construction funds is charged with ensuring desegregation.

DATE	CASE	OUTCOME
8/20/68	Moore v. Tangipahoa Parish Sch. Bd., 290 F. Supp. 96 (E.D. La.)	Finds freedom-of-choice plan failed to end dual school system. Orders modification with detailed instructions in effort to improve results and meet desegregation requirements.
8/28/68	Lee v. Macon County Bd. of Educ., 292 F. Supp. 363 (M.D. Ala.)	Finds freedom-of-choice plan failed to end dual school system. Orders modification with detailed instructions in effort to improve results and meet desegregation requirements.
9/3/68	United States v. Choctaw County Bd. of Educ., 292 F. Supp. 701 (S.D. Ala.)	Finds freedom-of-choice plan failed to end dual school system. Orders modification with detailed instructions in effort to improve results and meet desegregation requirements.
11/14/68	Conley v. Lake Charles Sch. Bd., 293 F. Supp. 84 (W.D. La.)	Finds freedom-of-choice has not fully ended dual system, but is an acceptable approach. Going forward, school districts will be evaluated on the basis of desegregation results.
12/26/68	Acree v. County Bd. of Educ., 294 F. Supp. 1034 (S.D. Ga.)	Orders district to implement geographic attendance zone integration plan. Finds freedom-of-choice failed to end dual system, so district must use rezoning plan at outset of next school year.
1/7/69	Hall v. St. Helena Parish Sch. Bd., 303 F. Supp. 1224 (E.D. La.)	Finds freedom-of-choice has shown limited progress but assumes good faith of district. District must show improvement in desegregation results to meet affirmative duty to end dual system.
1/29/69	Coffey v. State Educ. Fin. Comm'n, 296 F. Supp. 1389 (S.D. Miss.)	Orders state to cease tuition payments to privately-run segregated schools because the program perpetuates the dual school system.
3/25/69	Moore v. Tangipahoa Parish Sch. Bd., 298 F. Supp. 286 (E.D. La.)	Denies school district's motion for extension to comply with plan for unitary operation of schools.
4/21/69	Augustus v. Sch. Bd., 299 F. Supp. 1069 (N.D. Fla.)	Finds district's new geographic attendance zone plan satisfies duty to integrate but orders slight alterations to ensure desegregation occurs.

DATE	CASE	OUTCOME
6/5/69	Conley v. Lake Charles Sch. Bd., 303 F. Supp. 394 (W.D. La.)	Orders all districts to submit new plans to HEW for approval, as prior freedom-of-choice plans are insufficient. Court explains it is compelled to reach this decision on basis of Fifth Circuit order regarding *Green*, even though it feels freedom-of-choice should continue.
6/9/69	Hall v. St. Helena Parish Sch. Bd., 303 F. Supp. 1231 (E.D. La.)	Orders all districts to work with HEW to develop new plans to replace freedom of choice. Court states it is compelled to reach the decision on basis of Fifth Circuit precedent regarding *Green*, even though it feels freedom of choice should continue.
7/2/69	Moses v. Wash. Parish Sch. Bd., 302 F. Supp. 362 (E.D. La.)	Orders district to implement geographic attendance zone plan for integration; provides detailed guidelines. Finds freedom-of-choice plan failed to end dual system, and the school board must act to meet duty with rezoning plan at outset of school year.
7/2/69	Moore v. Tangipahoa Parish Sch. Bd., 304 F. Supp. 244 (E.D. La.)	Orders school district to implement geographic attendance zone plan to integrate schools; provides detailed guidelines. Finds freedom of choice failed to end dual system; district must use rezoning plan at outset of school year.
7/2/69	Smith v. St. Tammany Parish Sch. Bd., 302 F. Supp. 106 (E.D. La.)	Finds student assignment and school redistricting plan adequate, relying primarily on the rationale of *Moore*, decided the same day.
7/9/69	United States v. Bd. of Educ., 301 F. Supp. 1024 (S.D. Ga.)	Orders district to implement geographic attendance zone plan to integrate schools. Finds freedom of choice failed to end dual system, and school boards must act to meet duty with rezoning plan at outset of school year. Court conducts statistical analysis and provides detailed guidelines.
7/11/69	Hall v. St. Helena Parish Sch. Bd., 303 F. Supp. 1236 (E.D. La.)	Finds freedom of choice failed to end dual system and rejects the submitted plans. Orders district to create new plan or lose control of schools.

DATE	CASE	OUTCOME
8/8/69	United States v. Choctaw County Bd. of Educ., 310 F. Supp. 804 (S.D. Ala.)	Finds that plan proposed by HEW should be accepted; district's effective failure to issue a sufficient plan does not change its duty.
8/18/69	Mannings v. Bd. of Pub. Instruction, 306 F. Supp. 497 (M.D. Fla.)	Finds district's new geographic attendance zone plan satisfies duty to integrate but orders alterations made to ensure adequate desegregation.
8/29/69	Pate v. Dade County Sch. Bd., 303 F. Supp. 1068 (S.D. Fla.)	Finds proposed plan unconstitutional due to continued operation of all-black schools; district must create new proposal while interim plan is used.
9/13/69	United States v. Tatum Indep. Sch. Dist., 306 F. Supp. 285 (E.D. Tex.)	Finds freedom of choice failed to end dual system. Orders district to implement single-campus plan to integrate schools.
12/10/69	Pate v. Dade County Sch. Bd., 307 F. Supp. 1288 (S.D. Fla.)	Orders district to formulate new plan in consultation with HEW; outlines general provisions for the plan, highlighting faculty integration.
4/30/70	Allen v. Bd. of Pub. Instruction, 312 F. Supp. 1127 (S.D. Fla.)	Finds district continues to operate dual system; orders implementation of minority-to-majority transfer program. Court provides detailed guidelines.
5/30/70	Ross v. Eckels, 317 F. Supp. 512 (S.D. Tex.)	Finds freedom-of-choice failed to end dual system. Orders equidistant zoning plan implemented because it is most likely to achieve desegregation.
6/4/70	Cisneros v. Corpus Christi Indep. Sch. Dist., 324 F. Supp. 599 (S.D. Tex.)	Finds district continues to operate dual system; orders implementation of minority-to-majority transfer program. Finds geographic plans had only increased segregation, and district had not pursued more effective measures to desegregate.
6/5/70	Valley v. Rapides Parish Sch. Bd., 313 F. Supp. 1193 (W.D. La.)	Orders district to implement geographic attendance zone plan to integrate schools. Finds freedom-of-choice plan failed to end dual system. Studies plan outcomes before rejecting HEW plan in favor of geographic plan.

DATE	CASE	OUTCOME
6/8/70	Gordon v. Jefferson Davis Parish Sch. Bd., 315 F. Supp. 901 (W.D. La.)	Finds district continues to operate dual system; orders implementation of minority-to-majority transfer program.
6/26/70	Pate v. Dade County Sch. Bd., 315 F. Supp. 1161 (S.D. Fla.)	Finds proposed minority-to-majority transfer program acceptable and should be implemented over HEW objections.
7/2/70	Taylor v. Coahoma County Sch. Dist., 330 F. Supp. 174 (N.D. Miss.)	Finds district continues to operate dual system; orders end to transfer and freedom-of-choice plans; requires implementation of geographic zoning plan.
7/16/70	United States v. Tunica County Sch. Dist., 323 F. Supp. 1019 (N.D. Miss.)	Holds that continued payment to teachers who refuse to instruct in desegregated schools violates terms of geographic zoning plan.
7/20/70	Smith v. St. Tammany Parish Sch. Bd., 316 F. Supp. 1174 (E.D. La.)	Finds order to end dual school system entails schools be nondiscriminatory in their operation. Finds flying the confederate flag flying at school violates desegregation order and enjoins officials from continuing the practice.
8/25/70	United States v. Lubbock Independent Sch. Dist., 316 F. Supp. 1310 (N.D. Tex.)	Finds geographic plan generally adequate; orders limited changes in attendance zones and school closings to further eliminate vestiges of discrimination.
8/28/70	Flax v. Potts, 333 F. Supp. 711 (N.D. Tex.)	Finds school's current geographic plan and limited transfer provisions promotes desegregation. Upholds plan and permits construction of new schools, while giving some consideration to desegregation needs.
11/24/70	United States v. Texas, 321 F. Supp. 1043 (E.D. Tex.)	Finds that continued operation of all-black school violates desegregation. Orders development of desegregation plan, possibly via multidistrict consolidation.
12/30/70	Horton v. Lawrence County Bd. of Educ., 320 F. Supp. 790 (N.D. Ala.)	Finds ongoing school consolidation plan has not been implemented so as to eliminate dual system. Orders specific schools combined with limited grades on each campus to force integration. Process of faculty integration is generally acceptable.

TABLE 2: Citations to Authority

DATE	**CASE**	**CRA**	**HEW**	***BROWN***	***GREEN***
7/6/64	Evers v. Jackson Mun. Separate Sch. Dist., 232 F. Supp. 241 (S.D. Miss.)			X*	
7/13/64	Lee v. Macon County Bd. of Educ., 231 F. Supp. 743 (M.D. Ala.)	*J***		X	
7/13/64	Hall v. St. Helena Parish Sch. Bd., 233 F. Supp. 136 (E.D. La.)				
7/31/64	Carr v. Montgomery County Bd. of Educ., 232 F. Supp. 705 (M.D. Ala.)	*J*		X	
8/5/64	Harris v. Bullock County Bd. of Educ., 232 F. Supp. 959 (M.D. Ala.)	*J*		X	
4/13/65	Lemon v. Bossier Parish Sch. Bd., 240 F. Supp. 709 (W.D. La.)	X		X	
6/23/65	Henderson v. Iberia Parish Sch. Bd., 245 F. Supp. 419 (W.D. La.)	X		X	
7/27/65	Le Beauf v. State Bd. of Educ., 244 F. Supp. 256 (E.D. La.)	X		X	
8/13/65	Trahan v. Lafayette Parish Sch. Bd., 244 F. Supp. 583 (W.D. La.)	X	X	X	
8/24/65	Stell v. Savannah-Chatham County Bd. of Educ., 255 F. Supp. 83 (S.D. Ga.)		X	X	

DATE	CASE	CRA	HEW	*BROWN*	*GREEN*
9/2/65	Thomas v. St. Martin Parish Sch. Bd., 245 F. Supp. 601 (W.D. La.)		X	X	
10/22/65	Turner v. Goolsby, 255 F. Supp. 724 (S.D. Ga.)		X		
1/28/66	United States v. Natchez Special Mun. Separate Sch. Dist., 267 F. Supp. 614 (S.D. Miss.)			X	
3/11/66	Lee v. Macon County Bd. of Educ., 253 F. Supp. 727 (M.D. Ala.)				
3/11/66	Harris v. Bullock County Bd. of Educ., 253 F. Supp. 276 (M.D. Ala.)				
3/22/66	Carr v. Montgomery County Bd. of Educ., 253 F. Supp. 306 (M.D. Ala.)				
4/1/66	Stell v. Savannah-Chatham County Bd. of Educ., 255 F. Supp. 88 (S.D. Ga.)		X	X	
7/13/66	Broussard v. Houston Indep. Sch. Dist., 262 F. Supp. 266 (S.D. Tex.)	*J*		X	
9/23/66	Harris v. Crenshaw County Bd. of Educ., 259 F. Supp. 167 (M.D. Ala.)	X		X	

DATE	**CASE**	**CRA**	**HEW**	***BROWN***	***GREEN***
3/22/67	Lee v. Macon County Bd. of Educ., 267 F. Supp. 458 (M.D. Ala.)	X	X	X	
5/8/67	Davis v. E. Baton Rouge Parish Sch. Bd., 269 F. Supp. 60 (E.D. La.)	X	X		
5/19/67	Hall v. St. Helena Parish Sch. Bd., 268 F. Supp. 923 (E.D. La.)	X			
6/27/67	United States v. Plaquemines Parish Sch. Bd., 291 F. Supp. 841 (E.D. La.)				
7/11/67	Hill v. Lafourche Parish Sch. Bd., 291 F. Supp. 819 (E.D. La.)				
7/28/67	Lee v. Macon County Bd. of Educ., 270 F. Supp. 859 (M.D. Ala.)	X	X		
9/5/67	Williams v. Iberville Parish Sch. Bd., 273 F. Supp. 542 (E.D. La.)				
10/19/67	Moses v. Wash. Parish Sch. Bd., 276 F. Supp. 834 (E.D. La.)	X	X	X	
12/6/67	Redman v. Terrebonne Parish Sch. Bd., 293 F. Supp. 376 (E.D. La.)				
2/24/68	Carr v. Montgomery County Bd. of Educ., 289 F. Supp. 647 (M.D. Ala.)			X	

DATE	CASE	CRA	HEW	*BROWN*	*GREEN*
3/19/68	Poindexter v. La. Fin. Assistance Comm'n, 296 F. Supp. 686 (E.D. La.)				
5/14/68	Graves v. Walton County Bd. of Educ., 300 F. Supp. 188 (M.D. Ga.)	*J*	X		
7/19/68	Lee v. Macon County Bd. of Educ., 289 F. Supp. 975 (M.D. Ala.)	X	X	X	X
7/29/68	Franklin v. Quitman County Bd. of Educ., 288 F. Supp. 509 (N.D. Miss.)				X
8/20/68	Moore v. Tangipahoa Parish Sch. Bd., 290 F. Supp. 96 (E.D. La.)			X	X
8/28/68	Lee v. Macon County Bd. of Educ., 292 F. Supp. 363 (M.D. Ala.)				X
9/3/68	United States v. Choctaw County Bd. of Educ., 292 F. Supp. 701 (S.D. Ala.)			X	X
11/14/68	Conley v. Lake Charles Sch. Bd., 293 F. Supp. 84 (W.D. La.)			X	X
12/26/68	Acree v. County Bd. of Educ., 294 F. Supp. 1034 (S.D. Ga.)				X
1/7/69	Hall v. St. Helena Parish Sch. Bd., 303 F. Supp. 1224 (E.D. La.)	X		X	X

DATE	**CASE**	**CRA**	**HEW**	***BROWN***	***GREEN***
1/29/69	Coffey v. State Educ. Fin. Comm'n, 296 F. Supp. 1389 (S.D. Miss.)	X	X	X	X
3/25/69	Moore v. Tangipahoa Parish Sch. Bd., 298 F. Supp. 286 (E.D. La.)				X
4/21/69	Augustus v. Sch. Bd., 299 F. Supp. 1069 (N.D. Fla.)				X
6/5/69	Conley v. Lake Charles Sch. Bd., 303 F. Supp. 394 (W.D. La.)		X		X
6/9/69	Hall v. St. Helena Parish Sch. Bd., 303 F. Supp. 1231 (E.D. La.)	X			X
7/2/69	Moses v. Wash. Parish Sch. Bd., 302 F. Supp. 362 (E.D. La.)				X
7/2/69	Moore v. Tangipahoa Parish Sch. Bd., 304 F. Supp. 244 (E.D. La.)	X		X	X
7/2/69	Smith v. St. Tammany Parish Sch. Bd., 302 F. Supp. 106 (E.D. La.)				
7/9/69	United States v. Bd. of Educ., 301 F. Supp. 1024 (S.D. Ga.)	*J*	X		X
7/11/69	Hall v. St. Helena Parish Sch. Bd., 303 F. Supp. 1236 (E.D. La.)		X		X
8/8/69	United States v. Choctaw County Bd. of Educ., 310 F. Supp. 804 (S.D. Ala.)		X		X

DATE	**CASE**	**CRA**	**HEW**	***BROWN***	***GREEN***
8/18/69	Mannings v. Bd. of Pub. Instruction, 306 F. Supp. 497 (M.D. Fla.)				
8/29/69	Pate v. Dade County Sch. Bd., 303 F. Supp. 1068 (S.D. Fla.)	X	X	X	X
9/13/69	United States v. Tatum Indep. Sch. Dist., 306 F. Supp. 285 (E.D. Tex.)	X	X		X
12/10/69	Pate v. Dade County Sch. Bd., 307 F. Supp. 1288 (S.D. Fla.)				
4/30/70	Allen v. Bd. of Pub. Instruction, 312 F. Supp. 1127 (S.D. Fla.)	*J*	X	X	X
5/30/70	Ross v. Eckels, 317 F. Supp. 512 (S.D. Tex.)			X	X
6/4/70	Cisneros v. Corpus Christi Indep. Sch. Dist., 324 F. Supp. 599 (S.D. Tex.)			X	X
6/5/70	Valley v. Rapides Parish Sch. Bd., 313 F. Supp. 1193 (W.D. La.)	X	X		X
6/8/70	Gordon v. Jefferson Davis Parish Sch. Bd., 315 F. Supp. 901 (W.D. La.)			X	X
6/26/70	Pate v. Dade County Sch. Bd., 315 F. Supp. 1161 (S.D. Fla.)		X		X
7/2/70	Taylor v. Coahoma County Sch. Dist., 330 F. Supp. 174 (N.D. Miss.)		X		X

DATE	CASE	CRA	HEW	*BROWN*	*GREEN*
7/16/70	United States v. Tunica County Sch. Dist., 323 F. Supp. 1019 (N.D. Miss.)				
7/20/70	Smith v. St. Tammany Parish Sch. Bd., 316 F. Supp. 1174 (E.D. La.)				X
8/25/70	United States v. Lubbock Independent Sch. Dist., 316 F. Supp. 1310 (N.D. Tex.)		X	X	X
8/28/70	Flax v. Potts, 333 F. Supp. 711 (N.D. Tex.)		X	X	X
11/24/70	United States v. Texas, 321 F. Supp. 1043 (E.D. Tex.)	X	X	X	X
12/30/70	Horton v. Lawrence County Bd. of Educ., 320 F. Supp. 790 (N.D. Ala.)				

[*] X indicates citation of the indicated authority.

[**] J indicates a source that is cited solely for jurisdictional—as opposed to substantive—purposes. These citations were counted in the tally used in this study.