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Raising the Bar: Brown and the Transformation of the Southern Judiciary

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RAISING THE BAR: *BROWN* AND THE TRANSFORMATION OF THE SOUTHERN JUDICIARY

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I. INTRODUCTION

When we think of the impact that *Brown v. Board of Education*[1] had on American history, we tend to think of the role that it played in desegregating southern public schools, inspiring the civil rights movement, or inciting massive resistance.[2] And yet, *Brown* had other consequences as well, some of which registered not on the terrain of education or civil rights, or even massive resistance per se, but rather on the structure of the southern political apparatus. This Article will examine the intersection between *Brown* and a central component of that apparatus, the southern judiciary, including both the southern bar and the courts. Two states, South Carolina, a traditionally conservative Deep South state, and North Carolina, a traditionally moderate and progressive state, will be used as examples of how *Brown* catalyzed innovations in political and, in particular, judicial technology.

In discussing these two states, this Article will seek to broaden understandings of *Brown* by looking at the ruling not simply as a fulfillment of America's Constitutional promise to African-Americans, but as a destabilizing influence on the southern legal order. Many white southerners, particularly lawyers, viewed *Brown* not as an isolated case, but rather as the culmination of a series of cases handed down by the Supreme Court during a period of almost two decades. This trend, many southern lawyers believed, began in 1937 when the Supreme Court abandoned its laissez-faire stance toward private industry and endorsed the New Deal, a shift that compromised the autonomy of southern legal and professional elites, both in terms of economics and civil rights. In response, southern attorneys, and in particular leaders of the bar, increased the ethical requirements of legal practice, cleaned up localized and informal judicial mechanisms, and removed oversight of the southern judicial

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1. 347 U.S. 483 (1954).

2. For a recent synopsis of *Brown*'s impact on these factors, see JAMES T. PATTERSON, BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY (2001).

apparatus from the legislature, placing it firmly in the hands of centralized, state supreme courts.

Many of these strategies bore direct implications for African-Americans. Perhaps most notable among them were provisions raising the ethical standards of the practice of law, particularly prohibitions on barratry that sought to undermine lawyers working for the National Association for the Advancement of Colored People (NAACP). Other provisions, namely the centralization of state court systems and the professionalization of the judiciary, attempted in part to improve the image of the law in black eyes, not to mention the operation of the law on black bodies. This marked a strategic concession on the part of southern states, one designed in part to arrest the hemorrhage of state power to the federal government through civil rights actions, even as it reduced the fervor of black calls for justice and social change.

These shifts, from the perspective of statecraft, constituted an effort to control from below a legal system that could not be controlled from above. Unable to influence the United States Supreme Court, southern lawyers sought instead to discipline their own ranks, to improve the quality of their judges, and to eliminate vagaries in the southern judicial process. This not only bolstered the image of the law in the South, but complicated the degree to which the law could be used as a modality for furthering subaltern agendas like civil rights. As the federal judiciary took increasing liberties with state law, southern lawyers took fewer liberties with the way in which they allowed that law to be practiced.

They also placed less faith in the autonomous, and often arbitrary, power of localized, county elites. Throughout much of southern history, state politics had been dominated by rural elites, often headquartered in heavily black plantation counties.[3] These elites resisted change, hampered industrialization, and insisted on maintaining strict levels of localized discipline and control over African-Americans. This was often marked by lapses in attention to the constitutional rights of black people, not to mention abuses of judicial authority in general.

Following *Brown*, attempts to reign in rural counties intensified, in part through attempts to clean up the southern judiciary. Although these shifts bore direct implications for African-Americans, they extended beyond the struggle against integration into questions of industrialization, state autonomy, and the evolution of the southern legal apparatus. It is important to note here that up until the 1960s, the South was largely a region not only of de jure segregation, but also of localized, idiosyncratic judicial mechanisms that, like Jim Crow, represented archaic, Nineteenth Century legal technologies. *Brown*, in addition to sounding the death knell of the color line, intensified southern

3. *See generally* V.O. KEY, JR., SOUTHERN POLITICS (1949).

efforts to modernize these technologies, and in particular to centralize, professionalize, and unify its judicial machinery.

The role of African-Americans in catalyzing this process was a critical one. After all, the vast majority of civil rights cases leading up to *Brown*, which southern lawyers viewed correctly as a threat to their power, were argued by black lawyers. Not surprisingly, southern states attempted to undermine these lawyers, even as they sought to make good on claims that they did not discriminate against African-Americans. This Article will begin its analysis of both North and South Carolina with examples of attempts to undermine black civil rights, using these examples as entry points from which to analyze larger shifts in the southern legal order.

II. PROFESSIONALIZATION IN THE PALMETTO STATE

Three years before the Supreme Court handed down its ruling in *Brown*, South Carolina established a special committee to deal with the possibility of court-ordered desegregation in the state.[4] This committee, inspired by the NAACP's challenge to segregated schools in *Briggs v. Elliott*, was officially named the South Carolina School Committee yet became popularly known as the Gressette Commission after Marion Gressette, the state legislator who chaired it.[5] Gressette, a lawyer and active member of the State Bar Association, employed one of South Carolina's most prominent attorneys, Bar Association President David W. Robinson, to advise him on legal matters.[6] With Robinson's help, Marion Gressette devised myriad strategies of circumventing *Brown* and neutralizing social unrest, many of which revolved around shifting distributions of power within state government. For example, one strategy adopted by the Gressette Commission was the centralization of law enforcement authority around the governor, an idea that Gressette got from Florida.[7] Gressette wrote to David Robinson in January 1957:

> I should like the Staff to consider preparing draft of a bill authorizing the Governor of the State to suspend operation of any public utility whether

4. David W. Robinson, Manuscript, Brown v. Board *Revisited*, at 9, *microformed on* David W. Robinson Papers, Reel 2 (on file with University of South Carolina School of Law, Columbia, South Carolina) [hereinafter DWR Papers].

5. Briggs v. Elliott, 98 F. Supp. 529, 530 (E.D.S.C. 1951), *vacated by* 352 U.S. 350 (1952). For a discussion of *Briggs* and how it formed one of the five cases that eventually became *Brown*, see RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 315-66 (1977).

6. David W. Robinson was asked to act as counsel for the Gressette Committee, officially known as the South Carolina School Committee, in 1955. Memorandum from David W. Robinson, *The South Carolina School Committee (Gressette Committee)* (May 3, 1983), *microformed on* DWR Papers, *supra* note 4, at Reel 1.

7. Letter from L. Marion Gressette, to The Honorable David W. Robinson (Jan. 2, 1957), *microformed on* DWR Papers, *supra* note 4, at Reel 2.

> privately owned or not which would be similar to the law enacted by the General Assembly of the State of Florida. It occurred to me that we should have such a law in South Carolina for use on the part of the Governor in an emergency arising from race or other trouble.[8]

The centralization of state power around the governor proved appealing to Gressette, in part because it created the opportunity for quick responses to local unrest, even as it undermined the autonomy of local elites. Local elites, particularly in heavily black counties like those in South Carolina's eastern low country, tended to be more radically racist than less-racialized counties in the central and western portions of the state.[9] This radicalism made them less concerned with adhering to professional standards of law enforcement, and more prone to putting down black unrest with a heavy hand, thereby drawing unwanted federal attention to the state.[10]

To stem such conflagrations, an all-encompassing provision in the bill authorized the governor "'to take such measures and to do all and every act and thing which he may deem necessary in order to prevent violence or threats of violence to the person or property of citizens of the state.'"[11] Specifically, "[t]he bill would give the governor power to 'order any and all law enforcement officers of the state or any of its subdivisions to do whatever may be deemed necessary to maintain peace and good order.'"[12] Like its antecedent in Florida, the South Carolina emergency powers act aimed to control whites as well as blacks. "The Ku Klux Klan," noted Columbia's foremost newspaper, *The State*, "could be controlled in its meetings by provisions in the bill which would give the governor authority to issue an emergency proclamation 'when in his opinion the facts warrant . . . because of unlawful assemblage, violence or threats of violence, a danger exists.'"[13]

As the Gressette Commission sought to centralize power around the governor to deal with potential unrest, so too did it seek to hamstring the

8. *Id*. The end result of this was the creation of the South Carolina Law Enforcement Division (SLED), a centrally controlled agency that investigated racial incidents and sought to neutralize unrest.

9. In his epic study of southern politics, V.O. Key, Jr. describes the geographic breakdown of racial attitudes in South Carolina, distilling it into a struggle between the Piedmont and the Low Country. *See* KEY, *supra* note 3, at 135-42. This is not to say that racism did not exist in the Piedmont. *See* Timothy B. Tyson, *Dynamite and "The Silent South": A Story from the Second Reconstruction in South Carolina*, *in* JUMPIN' JIM CROW: SOUTHERN POLITICS FROM CIVIL WAR TO CIVIL RIGHTS 275-97 (Jane Daily et al. eds., 2000).

10. For more on the interrelationship between media coverage and police procedure, see Anders Walker, The Ghost of Jim Crow: Law, Culture, and the Subversion of Civil Rights, 1954–1965 (2003) (unpublished Ph.D. dissertation, Yale University) (on file with author).

11. *Broad Powers on Buses Proposed for Governor*, THE STATE (Columbia, S.C.), Mar. 1, 1957 (quoting from the segregation committee bill).

12. *Id*.

13. *Id*.

NAACP's battle in the courts.[14] On January 3, 1957, Marion Gressette announced a joint meeting of the South Carolina School Committee to consider drafts of segregation bills, one of which called "for the investigation by the Attorney General of organizations promoting or inducing litigation."[15] Another called for the criminalization of barratry.[16]

Barratry, an archaic crime dating back to Seventeenth Century England, referred to the fomenting or stirring up of frivolous lawsuits.[17] The NAACP, white southerners like Gressette correctly believed, actively sought to stir up cases around which it could build legal campaigns targeting Jim Crow in the federal courts.[18] By authorizing investigations into the NAACP and charging its attorneys with unethical practices, the Gressette Commission hoped it could neutralize civil rights litigation in the state.

Marion Gressette later described, somewhat disingenuously, his hope that the barratry statute might also prevent violence. "Frequently I have colored people call at my office," claimed Gressette in 1959, "and they are frank in saying that they do not go along with the NAACP and other misguided associations and individuals for integration of the races."[19] According to Gressette, African-Americans in the state were happy with the idea of equalizing black facilities, and did not endorse integration.[20] Instead of supporting civil rights, they were "the victims of a system of intimidation and

14. Robinson noted that in South Carolina:

> The [Gressette] Committee also served as a sounding board for the many persons in South Carolina who desired to take violent and unwarranted recourse against this change in our way of life. The Committee heard everyone who wanted to be heard. It used its influence with considerable success to persuade people of position and of standing to limit their opposition to the school decisions to lawful means. It assisted in the preparation of an interposition resolution in the tradition of Madison and Clay, protesting the soundness of the *Brown* decisions but declaring that the State's opposition would be within not without the law.

Robinson, *supra* note 4, at 11.

15. Letter from L. Marion Gressette, Senator, Calhoun County, to Members of the Committee, Legal Staff and Educational Consultant (Jan. 3, 1957), *microformed on* DWR Papers, *supra* note 4.

16. *Id*.

17. Barratry became the crime of stirring up litigation in the Seventeenth Century. Before that, it referred to the purchase or sale of ecclesiastical preferments. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *134.

18. For accounts of the NAACP's legal strategies, see KLUGER, *supra* note 5, and MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961 (1994).

19. Address of L. Marion Gressette to the State and Local Officers of the Citizens' Councils of South Carolina (June 23, 1959) (on file with University of South Carolina, Modern Political Collection, William D. Workman Papers, Box 20, "Gressette Commission" Folder) [hereinafter Address of L. Marion Gressette].

20. *Id*.

oppression such as even the Dark Ages failed to produce."[21] The ultimate result of this intimidation, caused by groups like the NAACP, was a breakdown in good relations between the races. A positive relationship between black and white, in turn, was instrumental in preventing violence.[22] "This relationship should be encouraged," continued Gressette, "and I am sure you are conscious of its value and will help to promote it so that the State of South Carolina can continue to be free and clear of any racial disturbance."[23]

Barratry provided one strategy of preventing racial disturbances by thwarting the NAACP. "In an effort to alleviate" the intimidation of blacks, Gressette announced that:

> [A]n old law has been brought to the front known as the crime of barratry, which simply means that no person will hereafter be permitted to solicit or incite another to bring, prosecute or maintain an action at law or at equity, in any court having jurisdiction within this State. Putting it another way, no person without or within the State can solicit or prevail upon another person to bring an action in any Court having jurisdiction in the State of South Carolina. This will prevent organizations such as the NAACP from promoting lawsuits and inciting members of the colored race to bring suits for any purpose in the State of South Carolina. Any corporation or unincorporated association found guilty of the crime of barratry shall be forever barred from doing any business or carrying on any activity in this State and shall be subject to a fine of not more than $5,000.00 or imprisonment of not more than two years or both. We think this law will have a wholesome effect on those who would incite and foment trouble among the good colored people of the State of South Carolina. We feel that we owe them this protection and this law will be strictly enforced in order that they may be protected against our common day carpetbaggers and scalawags.[24]

South Carolina was not alone in raising the bar as a means of attacking modern-day carpetbaggers and scalawags. In fact, Georgia, Mississippi, Tennessee, North Carolina and Virginia all enacted strict barratry provisions as a means of eliminating NAACP lawyers in the wake of *Brown*.[25] These provisions, although effective while they lasted, eventually fell under the axe

21. *Id*.

22. *Id*.

23. *Id*.

24. Address of L. Marion Gressette, *supra* note 19, at 9.

25. For a description of these laws, see *Race Relations Law Survey*, 2 RACE REL. L. REP. 881, 892-94 (1957). Mark Tushnet discusses the resurrection of barratry as a means of resisting *Brown*, particularly in Virginia. *See* TUSHNET, *supra* note 18, at 272-82. Susan Carle also discusses the deployment of ethics standards, particularly barratry, against the NAACP. *See* Susan D. Carle, *From* Buchanan *to* Button*: Legal Ethics and the NAACP (Part II)*, 8 U. CHI. L. SCH. ROUNDTABLE 281, 298-307 (2001).

of Supreme Court review in 1963.[26] However, they coincided with more subtle, systemic changes in the southern legal structure that provide clues into the role that *Brown* played in transforming the South's political apparatus. For example, Marion Gressette's resurrection of barratry was not his only attempt to increase the regulation of lawyers in South Carolina. In fact, he joined a larger effort mounted by the Gressette Commission's David W. Robinson and the South Carolina Bar Association to centralize the regulation of lawyers in general. Together with Robinson, Gressette served on the South Carolina Judicial Council, an advisory committee created by the South Carolina Bar that recommended removing the regulation of lawyers from the legislature, placing it directly in the hands of the state supreme court.[27] This bill, effectively insulating the bar from the vagaries of the democratic process, gave the court investigatory powers as well as the authority to enforce increased standards of professional ethics in the state.[28]

The state legislature adopted the Council's recommendations in August 1957 by approving a bill empowering the state supreme court to promulgate "rules and regulations defining and regulating the practice of law, establishing rules of professional conduct for attorneys at law, and establishing practice and procedure for disciplining, suspending, and disbarring attorneys at law."[29] The bill, which removed the regulation of lawyers from the democratic process, also created boards responsible for screening applicants "for admission to the Bar and to conduct investigations into reported violations and hold hearings, under rules to be prescribed by the Supreme Court, in cases involving discipline, disbarment, suspension, or reinstatement of attorneys."[30]

Davis J. Kerr, David W. Robinson's successor as president of the state bar, endorsed the new bills under the rubric of improving the image of lawyers and encouraging respect for the law. The bar, asserted Kerr, "is not looked upon by the general public with the respect and confidence to which it is entitled."[31] Disrespect for the bar, incidentally, was a problem articulated by lawyers across the South as an unfortunate symptom of the Supreme Court's ruling in *Brown.* Even though southern attorneys had no say in the high court's decision, they nevertheless found themselves in the unpleasant situation of being public agents of the judicial system, and therefore beholden to maintaining its image in the public eye, even as the Supreme Court besmirched

26. *See* NAACP v. Button, 371 U.S. 415, 428-29 (1963). For accounts of the rise and fall of barratry as a means of undermining the NAACP, see TUSHNET, *supra* note 18, at 272-82.

27. *Legislature Enacts Statute Authorizing Court to Adopt Practice Laws*, S.C. BAR ASS'N NEWS BULLETIN, Aug. 1957, at 1.

28. *Id.*

29. *Id.*

30. *Id.*

31. *President Kerr Sets Out Principal Aims as Bar Association President*, S.C. BAR ASS'N NEWS BULLETIN, Aug. 1957, at 1.

it. One particularly good example of how this influenced the response of southern bar associations to *Brown* emerged in Virginia in 1956, one year before Kerr endorsed the increased regulations of the bar in South Carolina. During the annual meeting of the Virginia State Bar Association of that year, an argument broke out between lawyers regarding whether they should endorse a resolution proclaiming massive resistance to the Supreme Court.[32] Some, such as Virginia lawyer Alex W. Parker, thought they should.[33] Others, such as Michael D. Wagenheim, the Chair of the Virginia bar's Committee on Resolutions, did not, arguing that the language of the resolution was too severe.[34] The resolution asserted that:

> The Virginia State Bar Association calls for the lawyers of all States . . . to rally the citizens to total resistance by all proper means against these threats to the continued existence of our representative forms of government, and to the exercise of all available means of stemming this tide of usurpation of governmental powers by the present Supreme Court.[35]

The resolution's mention of a tide of usurpation referred to a widespread feeling on the part of southern lawyers that *Brown* was part of a larger trend in Supreme Court jurisprudence encroaching on southern state law that had begun in 1937.[36] Although many lawyers agreed with this theory, to call for overt defiance of the Supreme Court struck many Virginia attorneys as self-defeating. "Your Committee," asserted Wagenheim, "felt that this language, as well-meaning as it might be, might be construed by the laymen, by implication, as an effort on the part of the lawyers to defy the courts and might lead to the undermining of respect for our entire system of judicial administration."[37]

Intent on upholding respect for the judiciary, lawyers in Virginia voted not to proclaim overt rebellion against the Supreme Court, just as lawyers in South Carolina sought to impose increased ethical requirements on themselves. Not that practicing law in South Carolina suddenly became harder than in most states in the Union. On the contrary, the American Bar Association had adopted identical standards in 1908, almost half a century earlier.[38] Indeed,

32. *Minutes of the Third Day of the 1956 Annual Meeting of the Virginia State Bar Association*, *in* VIRGINIA BAR ASSOCIATION PROCEEDINGS 38-39 (1956), *microformed on* Reel 9, BA.V57 (on file with University of Virginia School of Law) [hereinafter *Minutes of the Third Day*].

33. *Id.* at 38.

34. *Id*. at 39-40.

35. *Id*. at 39.

36. *See infra* text accompanying notes 49-60.

37. *Minutes of the Third Day*, *supra* note 32, at 40.

38. Specifically, the South Carolina Supreme Court adopted the 47 Canons of Professional Ethics of the American Bar Association (ABA) that had been adopted by the ABA in 1908.

South Carolina's sudden interest in raising the bar suggests that it was catching up to national trends, rather than blazing new trails. In fact, it suggests that when confronted with social crisis, South Carolina embraced centralization and formalization, moves alien to a state long known for decentralization, localism, collegiality, and informal networks.[39]

South Carolina also embraced a move away from democracy. By taking the regulatory power of lawyers away from the legislature, it insulated the bar from popular control. This was particularly significant for the Palmetto State, in part because it had long been known to exist under what southern historian V.O. Key, Jr. called "legislative government."[40] This term referred to the dominance of the South Carolina legislature over both the governor and the judiciary,[41] a position that was willingly compromised during the aftermath of *Brown*, not only by shifting power out of the legislature and into the courts, but also into the State's executive branch via emergency powers to the governor.

As black equality loomed on the horizon, the role of the state legislature in governing the legal process and, for that matter, the legal profession, declined. In its place rose the state bar association and the state supreme court. The state bar, much like legislative committees in Congress, provided a policy apparatus for the court, thereby enabling lawyers to determine for themselves how the justice system would work and who would work it. The state bar also enabled South Carolina to revamp its judicial apparatus, thereby improving its image in the public eye. This was particularly important after *Brown*, given that the Supreme Court's ruling undermined not just Jim Crow, but the authority of the southern legal system in general, an authority that many African-Americans already held to be dubious at best.

By improving efficiency, increasing professionalism, and raising standards, the South Carolina bar sought to re-establish the authority of the state judiciary. This promised to help African-Americans in so far as it removed many of the vagaries of the judicial process, even as it coincided with attempts to keep NAACP lawyers out of the state. Not simply a strategy of resistance, the South Carolina bar's impact on the judicial apparatus also represented an act of accommodation—a means of buying black support *and* neutralizing black activism. Marion Gressette and David W. Robinson's work on South Carolina's Judicial Council consequently reinforced their work on the South Carolina School Committee, in part by establishing heightened ethical

Canons of Ethics of American Bar Association Adopted for State, S.C. BAR ASS'N NEWS BULLETIN, Sept. 1956, at 4.

39. Perhaps tellingly, on May 1, 1957, Charles W. Moore, a state senator and Spartanburg lawyer, proposed a bill barring out-of-state lawyers from practicing in South Carolina. *Bill Barring Out-of-State Lawyers Offered in Senate*, THE STATE (Columbia, S.C.), May 2, 1957.

40. *See* KEY, *supra* note 3, at 150-55.

41. *See id.* at 152.

standards for lawyers in the state.[42] The Council, established by the state Supreme Court pursuant to a motion by the Executive Committee of the State Bar Association, of which David W. Robinson was president at the time, came into being on July 21, 1956, at the height of massive resistance to *Brown*.[43] Not surprisingly, one of the standards approved by the Council was the limitation on barratry, enacted specifically to curtail the NAACP.[44] Other duties assigned to the Council included:

> "[C]ontinuous study and survey of the administration of justice in this State, and of the organization, procedure, practice, rules and methods of administration and operation of each and all of the Courts of the State, whether of record or not of record, and of each of all the agencies, boards, commissions, bodies and officers having and exercising *quasi*-judicial functions and powers."[45]

Once investigated, the state's courts, and even quasi-judicial executive and legislative bodies, would be subjected to increased regulation and reform.

Marion Gressette justified this increased bid for power by the judiciary at a meeting of state and local officers of the Citizens' Councils of South Carolina, a segregationist organization dedicated to fighting *Brown*.[46] "The attitude of the United States Supreme Court, a long line of decisions which have been accepted as absolutely binding precedents and the abdication by the Congress of power held in trust for the people are contributing to our downfall," Gressette told Council leaders on June 23, 1959.[47] He continued:

> In the face of this trend, South Carolina has made its position clear. We are not defying the "law of the land" we are fighting for a return to the law of the land. They call us reactionaries and racists, but we are neither. The true reactionaries are those who would subject the law to the whim of those who happen to be in power at a given moment.[48]

Gressette's words, a cry to remove law from the vagaries of electoral politics, bolstered his recommendations to remove the control of lawyers from the state legislature. Further, they coincided with his efforts to increase the role of the

42. The establishment of the Council, as well as its membership list, was published in the September 1956 edition of the *South Carolina Bar Association News Bulletin*. *See Judicial Council Established by Supreme Court*, S.C. BAR ASS'N NEWS BULLETIN, Sept. 1956, at 1.

43. *Id.*

44. *See supra* note 25 and accompanying text.

45. *Judicial Council Established by Supreme Court*, *supra* note 42, at 1 (quoting July 21, 1956 South Carolina Supreme Court order creating a Judicial Council for South Carolina).

46. For works discussing the centrality of the Citizens' Councils to massive resistance, see NEIL R. MCMILLEN, THE CITIZENS' COUNCIL: ORGANIZED RESISTANCE TO THE SECOND RECONSTRUCTION, 1954–64 (1971) and NUMEN V. BARTLEY, THE RISE OF MASSIVE RESISTANCE: RACE AND POLITICS IN THE SOUTH DURING THE 1950S (1969).

47. Address of L. Marion Gressette, *supra* note 19, at 2.

48. *Id.*

state bar, a private, non-political organization, in controlling the law. At odds with this mission were not only *Brown*, but a string of decisions by the United States Supreme Court.[49] Herein lurks a critical yet often missed component of the Second Reconstruction. White southerners, in particular white southern lawyers, did not oppose *Brown* simply because it demanded the integration of southern public schools, but because it marked yet another step in a larger encroachment by the Court onto the terrain of state sovereignty. This encroachment did not begin in 1954 with *Brown*, or in 1951 with *Briggs*,[50] but in 1937, with Franklin Delano Roosevelt's New Deal.[51] That was the message Senator and former judge Strom Thurmond of South Carolina delivered to the Virginia State Bar Association in 1955. "As attorneys," Thurmond told the Virginia Bar, "you probably know that in the eighteen years since 1937, thirty-three previously formulated principles of constitutional law have been discarded or overruled by the Supreme Court. In the preceding 137 years of this nation under the Constitution only twenty-nine previously established principles were overruled."[52] Thurmond's mention of 1937 was significant. That year, the Supreme Court abandoned almost three decades of decentralized, laissez-faire jurisprudence to endorse sweeping federal regulations of private industry and the states.[53] This shift, which triggered nothing less than a revolution on the Court, angered many wealthy, white southerners who resented minimum wage laws and the sudden activist, some might say even paternalist, emphasis on enforcing government programs and civil rights.[54]

Consequently, Thurmond was not alone among white southerners in framing *Brown* within the context of the post-1937 jurisprudential shift. In fact, lawyers throughout the South recognized this. Among them were some of the most influential figures in massive resistance, men like Tom P. Brady, the intellectual father of the Citizens' Councils, and James O. Eastland, head of the Judiciary Committee in the United States Senate.[55] In 1954, one year before Thurmond addressed the Virginia Bar, Eastland lamented:

49. *See, e.g.*, United States v. Darby, 312 U.S. 100, 114 (1941) (giving Congress broad power to regulate interstate commerce); Nat'l Labor Relations Bd. v. Fainblatt, 306 U.S. 601, 606 (1939) (power of Congress to regulate is plenary and expansive).

50. Briggs v. Elliott, 98 F. Supp. 529 (E.D.S.C. 1951), *vacated by* 352 U.S. 350 (1952).

51. *See* BARTLEY, *supra* note 46, at 28-30; Judith A. Hagley, *Massive Resistance—the Rhetoric and the Reality*, 27 N.M. L. REV. 167, 196 (1997).

52. *The Constitution and the Supreme Court: The Annual Address by the Honorable Strom Thurmond*, *in* VIRGINIA BAR ASSOCIATION PROCEEDINGS 219 (1955), *microformed on* Reel 9, BA.V57 (on file with University of Virginia School of Law).

53. *See* BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 231-38 (1993).

54. *See id.* at 234-35.

55. *See* BARTLEY, *supra* note 46, at 85-86; *see also id.* at 89. For Brady's role in inspiring the Citizens' Councils, see MCMILLEN, *supra* note 46. For Brady's opinion that *Brown* was the

> [S]ince 1937 the Supreme Court has overruled 33 earlier decisions. This is by the count of one of the Justices. Those decisions were the settled law of the land; decisions on which rights were vested; decisions on which the people of this country had the right to rely. This record is unprecedented in our history. In the 135 years prior to 1937 only 29 cases were overruled, compared to 33 cases in 16 years. Such a record obviously reveals an irresponsible Court. I think it shows an incompetent Court. Such a record shows that the Court legislates, and is constantly grasping additional power.[56]

Eastland's assertion that the Supreme Court had, for seventeen years, been on a bid for increased power was not entirely untrue. In fact, since 1937, that Court *had* followed an increasingly interventionary path. One field in which it did this was African-American civil rights. In 1938, the Court decided *Missouri ex rel. Gaines v. Canada*, a ruling that marked a sea-change in judicial attitudes toward blacks by asserting that African-Americans were entitled to equal education within their own states and could not be required to go to other states to enroll in graduate or professional school.[57] In 1944, the Court followed *Gaines* with a ruling agreeing to strike down the white primary, a mechanism designed to prevent blacks from voting in primary elections.[58] In 1950, the NAACP achieved its greatest victory yet when the Supreme Court ruled that graduate education could no longer be segregated.[59]

By 1954, many white southerners realized that the tide of Supreme Court jurisprudence was washing against them. This became evident in a report written by Alabama's Legislative Reference Service in January of 1954, four months before *Brown* was released. According to the report, five southern states had passed legislation to deal with a negative ruling in *Brown* long before May 17, 1954.[60] South Carolina and Virginia both passed measures to deal with a desegregation ruling in 1952; Georgia, Mississippi, and Alabama passed similar measures in 1953.[61] Contrary to popular belief, *Brown* was no shocker: "Majority opinion," asserted the Alabama commission in January of 1954, "predicts that the Court will repudiate the 'separate but equal' doctrine."[62]

Part of the reason that southern states suspected *Brown* might be coming was that they saw it within the context of other cases, all encroaching on states'

culmination of a trend in jurisprudence that began under Roosevelt, see TOM P. BRADY, BLACK MONDAY (Citizens' Council Press 1955).

56. 100 CONG. REC. 6,7254 (1954) (statement of Sen. Eastland).

57. Missouri *ex rel*. Gaines v. Canada, 305 U.S. 337, 351 (1938).

58. Smith v. Allwright, 321 U.S. 649, 664 (1944).

59. Sweatt v. Painter, 339 U.S. 634, 635-36 (1950).

60. AL. LEG. REF. SERV., THE SCHOOL SEGREGATION PROBLEM 3-5 (January 9, 1954) (report to the Legislative Council of Alabama).

61. *Id.*

62. *Id.* at 4-5.

rights. An example of this emerged in 1956, when ninety-six southern congressmen, an overwhelming majority of the southern Representatives and Senators in Washington, signed a declaration of opposition to the Supreme Court.[63] The document, known popularly as the Southern Manifesto, vowed to use *legal* means to subvert *Brown*, which it framed not as an isolated opinion but as the culmination of "a trend in the federal judiciary undertaking to legislate, in derogation of the authority of Congress."[64] This applied not simply to civil rights cases, but to other cases as well—criminal procedure and labor cases among them. Oft-cited examples included *Griffin v. Illinois*, a case releasing an accused criminal from jail because of the failure to provide him with a transcript of his trial proceedings[65] and *Pennsylvania v. Nelson*, a case nullifying all state laws against treason and sedition,[66] among others. Civil rights cases that did not bode well for the South included *Mitchell v. United States*,[67] *Morgan v. Virginia*,[68] *Bob-Lo Excursion Co. v. Michigan*,[69] *Henderson v. United States*,[70] *Shelley v. Kraemer*,[71] and *Hurd v. Hodge*.[72]

Southern tendencies to view *Brown* as part of a jurisprudential trend help explain attempts to shore up the southern legal system during the Second Reconstruction. Not only were southern lawyers and judges afraid of NAACP lawyers, but they feared a larger move by the federal judiciary to limit their autonomy and reduce their power. By raising the bar to the practice of law, not to mention increasing the qualifications and regulations placed on state judges, the South sought to counter federal encroachment with heightened

63. *Text of Manifesto by 96 Southerners*, THE STATE (Columbia, S.C.), Mar. 12, 1956, *also printed in* 102 CONG. REC. 4,4515-16 (1956) (statement of Rep. Smith).

64. *Id.*

65. Griffin v. Illinois, 351 U.S. 12, 19 (1956).

66. 350 U.S. 497, 510 (1956); *see Constitutional Law: Impeachment—Georgia*, 2 RACE REL. L. REP. 485, 489 (1957).

67. 313 U.S. 80, 97 (1941) (holding that the Interstate Commerce Act of 1887 guaranteed "a fundamental right of equality of treatment" on trains).

68. 328 U.S. 373, 386 (1946) (holding a Virginia statute requiring segregation on motor vehicle carriers unconstitutional).

69. 333 U.S. 28, 40 (1948) (holding the exclusion of African-Americans from an amusement park outside of Detroit unconstitutional).

70. 339 U.S. 816, 825-26 (1950) (holding that segregation on private dining cars violated Section 3(1) of the Interstate Commerce Act).

71. 334 U.S. 1, 23 (1948) (holding racial covenants unconstitutional).

72. 334 U.S. 24, 34-35 (1948) (holding racial covenants unenforceable in federal court). Florida also cited a string of cases on which to base its interposition resolution against *Brown*:

> [T]he Legislature of Florida denies that the Supreme Court of the United States had the right which it asserted in the school cases decided by it on May 17, 1954, the labor union case decided on May 21, 1956, the cases relating to criminal proceedings decided on April 23, 1956, and January 16, 1956, the anti-sedition case decided on April 2, 1956, and the case relating to teacher requirements decided on April 9, 1956.

H.R. Con. Res. 174, 1957 Leg. (Fla. 1957), *reprinted in* 2 RACE REL. L. REP. 707, 708 (1957).

requirements on who could bring cases and on how those cases would be both pled and ultimately decided. Professionalism emerged as a counterpoint to the informal, collegial manner in which judges were selected and cases decided. In addition to bringing power out of the hands of backward-looking agrarian elites, this helped salvage the reputation of the law in the South, even as it made it increasingly difficult for black lawyers to win victories in the courts. In the next section, we will see how this bore implications for the trajectory of the civil rights movement, even as it inspired transformations of the judicial apparatus in progressive, moderate North Carolina.

III. RAISING THE BAR IN THE TARHEEL STATE

On May 17, 1957, exactly three years after the Supreme Court handed down its ruling in *Brown*, North Carolina Governor Luther Hodges introduced a bill in the state legislature outlawing barratry. According to the Raleigh *News & Observer*, the bill "which would stop lawyers and organizations from 'stirring up' litigation, is an invocation of an ancient doctrine to deal with today's most modern problem."[73] That problem was desegregation. The *News & Observer* asserted that:

> Originally the term meant the sale of church and state offices. . . . The interpretation put on the doctrine under the bill introduced yesterday is a somewhat new one, now being considered by most Southern states, in an effort to stop the NAACP from paying for litigation costs of plaintiffs in civil rights suits.[74]

The bill, which disbarred any attorney and de-chartered any corporation "not actually a party to court cases" that tried to "appeal in or pay for legal actions" coincided with a second measure, also designed to cripple the NAACP, requiring corporations "engaged in 'the advancement' of people on the basis of color, race and religion to fil[e] financial information and membership lists" with the secretary of state.[75] As in South Carolina, these measures placed severe roadblocks in the way of African-Americans trying to use the courts as a means of advancing their interests. And yet, Kelly M. Alexander, President of the North Carolina NAACP, warned that the bills would not put an end to the "clamor for equality" in the state.[76] In fact,

73. *Under the Dome*, NEWS & OBSERVER (Raleigh, N.C.), May 17, 1957.

74. *Id*.

75. *'Barratry' Bill is Reported Favorably by House Group*, NEWS & OBSERVER (Raleigh, N.C.), June 1, 1957; Ray Parker, Jr., *NAACP Head Says Bill Won't Stop 'Clamor for Equality'*, NEWS & OBSERVER (Raleigh, N.C.), May 29, 1957.

76. Parker, *supra* note 75. Representative Frank Snepp of Mecklenburg opposed the bills on the grounds that they would only encourage racial strife by inviting recriminations against blacks belonging to the NAACP. Requiring membership lists, contested Snepp, might "set the stage of racial strife" because "Negroes joining the NAACP will lose their jobs." *House Passes Anti-NAACP Measure*, NEWS & OBSERVER (Raleigh, N.C.), June 6, 1957.

asserted Alexander, if the NAACP "were injured" by the laws, then the black struggle would be pressured to articulate itself in new ways, a warning that foreshadowed the movement's turn from the courts to the lunch counters in 1960.[77] According to Alexander, even if the NAACP was damaged, "the Negroes of North Carolina will continue to feel about segregation as they have up to this time[;] . . . the opposition might take a different form, but it would continue as vigorously as before."[78]

Alexander's words, like Cassandra's, fell on deaf ears. Instead, Hodges gambled that, by raising the bar to the practice of law, he would be able to neutralize black activism and quell racial unrest in the state. He also hoped that raising the bar would thwart white extremists. Hodges's Assistant Attorney General, Robert Giles, articulated this when he asserted that the bills were necessary because "organizations 'on both sides' of the race question 'have mushroomed' and 'collected a great deal of money.'"[79] "The bill would apply," affirmed Giles, "to the NAACP, the Ku Klux Klan and to the Patriots, Inc., [an] extreme pro-segregation organization."[80]

The move to neutralize radical groups by raising the ethical bar to the practice of law coincided with a larger statewide emphasis on revamping the judiciary. At the North Carolina Bar Association's annual meeting in 1956, Governor Hodges requested that the Bar establish a special committee to investigate the court system and recommend ways of improving its efficiency.[81] In its defense, Hodges lamented "the extent to which at least some of the general public has lost its respect for the courts of our State as institutions capable of rendering swift and inexpensive justice to the rich and poor alike."[82] Hodges's allusion to the swiftness of the state's justice system referred obliquely to a backlog of cases in North Carolina's courts that had plagued the system for years, even at the local level. His reference to rich and poor marked a more complex problem, one that related in certain profound ways to the state's struggle regarding civil rights.

During the 1950s, North Carolina adjudicated the vast majority of its civil and criminal cases in police courts, or "poor man's courts," operated by locally-elected justices of the peace.[83] These courts were informal, often held

77. Parker, *supra* note 75. For the definitive work on the Greensboro sit-ins, see WILLIAM H. CHAFE, CIVILITIES AND CIVIL RIGHTS: GREENSBORO, NORTH CAROLINA, AND THE BLACK STRUGGLE FOR FREEDOM (1980).

78. Parker, *supra* note 75.

79. *Id.*

80. *Id.*

81. *See Governor Luther Hodges' Address*, BAR NOTES (N.C. Bar Ass'n), July 1956, at 23.

82. *Id.*

83. *See* INSTITUTE OF GOVERNMENT, UNIVERSITY OF NORTH CAROLINA, THE THIRD LOOK: A REVIEW OF THE STUDIES AND RECOMMENDATIONS OF THE N.C. BAR ASSOCIATION

in unconventional settings like storefronts or fairgrounds, and were notorious for being corrupt.[84] Much of this corruption stemmed from the fact that justices of the peace, or JPs as they were popularly known, were paid based on the number of convictions that they secured.[85] This fee system helped transform JP courts into engines of repression that operated disproportionately against the poor, both white and black, thereby compromising the authority of the legal system as a whole.[86] "Many local governing bodies look upon the police courts," asserted Hodges in 1956, "primarily as a source of income rather than a place for the dispensation of justice. Of course, you and all the rest of the State are familiar with the picture presented by our system of Justices of the Peace and the antiquated and much-complained of fee system."[87] The governor continued, emphasizing the importance of improving the efficiency of the court system: "We must continue to improve both the efficiency and speed with which litigation is handled in our Superior Courts if our courts are to regain the place of respect that they once held in the public's esteem."[88]

Hodges's interest in the public's esteem of the courts prefigured his move, one year later, to limit the number of NAACP lawyers in the state. Both initiatives sought to bolster the authority of the state, and in particular the law, at a moment when that authority was under attack. After all, 1956 was the height of massive resistance to *Brown*, a political movement that defied both the Supreme Court and to a certain extent, the law in general, just as it was a year of black, NAACP sponsored challenges to the southern legal order. Hodges's focus on cleaning up the state's criminal system provided one way of shoring up the judicial apparatus without inflaming racial tensions, as did his subversion of the NAACP. Both measures sought to neutralize destabilizing forces, whether they be judicial corruption or civil rights activism.

Hodges's decision to use the state bar association, rather than an executive or legislative committee to investigate the state's judicial apparatus complemented his strategy of managing the integration crisis peacefully. Because it was a private organization, the bar appeared apolitical. And, because it was an organization dedicated to improving the quality and integrity of the law, it provided a modality for advancing political agendas under the guise of doing nothing more than raising standards and increasing efficiency. This was particularly important for Hodges's plan to clean up the police courts. After all, the JP system was a pillar of North Carolina's decentralized power

COMMITTEE ON IMPROVING AND EXPEDITING THE ADMINISTRATION OF JUSTICE IN NORTH CAROLINA 9 (1958) [hereinafter THIRD LOOK].

84. *Id.* at 9.

85. *Id.*

86. *Id.*

87. *Governor Luther Hodges' Address*, *supra* note 81, at 23.

88. *Id.* at 24.

structure, an arrangement favored by rural, often heavily black counties. These counties objected to any form of centralization, fearing that it would shift the nexus of power out of their hands and into the clutches of bureaucratic elites in Raleigh. And yet, Luther Hodges, a businessman and a moderate, had little patience for the often flagrant abuses of judicial authority that characterized the periphery's treatment of the poor, particularly blacks. The state bar provided an ideal modality for policing the administration of justice at the local level by enabling Hodges to veil the centralization of the judiciary, not in terms of reducing peripheral power, but in terms of improving the efficiency and equity of the courts. The bar also provided an ideal modality for raising standards to both the admission and practice of law, a measure that made it an effective weapon against the NAACP and a consequent line of defense against increasingly aggressive black demands for civil rights. Of course, Hodges never overtly identified the bar as a line of defense against social change. Instead, he liked to claim that the judiciary hovered "above politics," like an angel.[89]

Others were not as diplomatic. In fact, in 1957, the president of North Carolina's Bar Association, W.W. Taylor, Jr., openly confirmed the utility of the bar as a modality for thwarting black civil rights. "For a long time," announced Taylor, "most of us, as individuals, have been deeply concerned with the increasing usurpation by the Federal Government of powers traditionally reserved to the states, and, with such usurpation, the inevitable destruction of the constitutional rights of the states and of the individual citizens. Taylor continued, leveling his critique at civil rights, and stated:

> The legislative action culminating in the Civil Rights Bill [of 1957], the executive action at Little Rock, and many startling decisions of the United States Supreme Court in the past few years . . . have brought into clearer focus the drastic changes that are being wrought in our basic governmental structure by all three branches of the Federal Government.
>
> There is, in my opinion, only one force in the entire country that can arrest the present trends of the Federal Government, and that force is the organized bar of this nation.[90]

Taylor's claim that the organized bar provided a line of defense against civil rights illustrates an awareness on his part of the bar's political utility in the struggle against *Brown*. Further, it recontextualizes Luther Hodges's endorsement of the bar as an apolitical apparatus, suggesting instead that it was

89. As Hodges wrote in his memoir, *Businessman in the Statehouse*, "I was especially careful about getting only the finest men for the judiciary. I knew that this branch of the government should be above politics." LUTHER H. HODGES, BUSINESSMAN IN THE STATEHOUSE: SIX YEARS AS GOVERNOR OF NORTH CAROLINA 153 (1962).

90. W.W. Taylor, Jr., *The President's Page*, BAR NOTES (N.C. Bar Ass'n), Nov. 1957, at 13-14.

an *ideal* political device, particularly for shoring up a teetering legal system. As we have seen, the bar's ability to facilitate political reconfigurations from behind the rhetoric of improving efficiency and standards provided an arsenal of possibilities for a governor trying to preserve order and build a barricade against encroachments by the federal government onto state law. Restrictions on barratry constituted one such barricade. The bar's role as an investigatory agency constituted another. In North Carolina, the investigatory powers of the Bar enabled it to play an integral part in the dismantling of the police court system. Although seemingly unrelated to race, this helped the cause of moderation in the state, both by improving the fairness of the law and by removing power from peripheral counties. Peripheral counties, particularly eastern former plantation counties with high black populations, consistently lobbied for overt defiance of the Court, not to mention massive resistance. Metropolitan counties like Mecklenburg, the home of Charlotte, and Orange, the home of Chapel Hill, struggled to promote more subtle strategies—zoning, re-districting, and token integration among them. Luther Hodges, a business moderate more concerned with attracting outside industry than bolstering the power of rural elites, pursued such strategies, disparaging massive resistance in the process.[91]

Consequently, Hodges's decision to use the state bar as a means of centralizing the judiciary, improving the image of the law, and disempowering peripheral elites coincided with his larger response to *Brown*, which sought to maintain a curtain of civility around race relations in the state, avoid unwanted media attention from the outside, and allow administrative elites in Raleigh enough time to reconfigure segregation along facially neutral lines.

To head the Bar Committee on Improving and Expediting the Administration of Justice, as Hodges's committee came to be called, the governor selected J. Spencer Bell, a state senator from, not surprisingly, Charlotte, the seat of Mecklenburg County. Behind Hodges's decision to appoint Bell—and behind him, the bar as a quasi-investigatory arm of the state—lurked a not-so-subtle attempt to wrest control of the judiciary from the legislature that had itself, because of a disproportionate allotment of electoral power written into the state constitution following the Civil War, come under the sway of rural plantation counties. "I would like now to state why we chose the North Carolina Bar Association as the agency which would best serve the purpose we had in mind," announced Hodges. "First, you are not a tax-supported or an official agency of the State; and therefore, in investigating a department of the State, you should not only be free from any political pressure

91. For more on Hodges's moderate brand of resistance, see BARTLEY, *supra* note 46, at 213-20, and TIMOTHY TYSON, RADIO FREE DIXIE: ROBERT F. WILLIAMS AND THE ROOTS OF BLACK POWER 104-08 (1999).

in fact, but also free from any charges of political pressure."[92] That the bar was not politically motivated was, of course, untrue, and yet Hodges realized that, because it was an independent organization dedicated to improving the standards of both the bench and bar, it possessed a certain meta-political aura, not to mention an interest in ridding the legal profession of elected, untrained officials.

A. The Bell Committee Report

The Bell Committee, as Hodges's bar committee came to be known, documented a parade of horribles besmirching North Carolina's judicial system.[93] Justices of the peace, not surprisingly, led the procession. Elected by local constituencies, they operated outside the purview of state appellate courts and yet handled the vast majority of the state's criminal matters.[94] According to the Committee's final report, the JP system was rigged to produce convictions, whether the accused was guilty or not. A summary of the report drafted by University of North Carolina's Institute of Government asserted that:

> From its beginning, [the justice of the peace] system has been haunted with the tragic flaw that compensation to the Justice of the Peace in criminal cases never comes when the person accused is acquitted, and many people feel that this fact tends to weight the scales of justice in favor of conviction and against acquittal, and waters down the force of the criminal law tradition giving to every person charged with crime the benefit of every reasonable doubt.[95]

Such a system begged for federal intervention, even as it legitimated black claims that state law in the South was corrupt. To make matters worse, many JPs did not work full time, but rather operated as "birds on the wing" with no fixed time or place to conduct judicial business.[96] According to the Bar Committee's report:

> [T]he part-time justice of the peace tends to business any time or anywhere and the records show him trying cases in his own back yard, on his front porch, in the rear end of a grocery store over chicken crates, over a meat counter in a butcher shop, in an automobile, over the plow handles, in a printshop, in a garage, in an icehouse, in a fairground ticket booth, and in a funeral parlor.[97]

92. *Governor Luther Hodges' Address*, *supra* note 81, at 24.
93. *See* THIRD LOOK, *supra* note 83, at 9.
94. *See id.* at 6-7.
95. *Id.* at 9.
96. *Id.*
97. *Id.*

William Faulkner could not have devised a more grotesque mechanism for administering criminal justice. According to Spencer Bell, the system engendered "too much disrespect for [the judiciary] to be tolerated."[98]

Consequently, Bell's Committee recommended that fees be fixed, that JPs be brought under the umbrella of the state court system and reconfigured as permanent district courts where their decisions could be appealed, and that they be subjected to an intensive selection process.[99] This marked a profound shift in what was popularly known in North Carolina as "the poor man's court."[100] The recommendations were a far cry from the complete lack of eligibility requirements imposed on JPs in the past.[101] In their place would emerge district courts, from which appeals could be made to the state supreme court.[102] The recommendation promised to effect major change, not least of which by reorganizing and policing the state's fourteen hundred-plus lower courts that had operated for years as independent units without centralized supervision or guidance.[103]

The method of selecting lower court judges was also a major shift.[104] It involved the establishment of judicial screening commissions that would be set up around the state and be held responsible for making nominations to fill judicial vacancies.[105] "The Committee concluded that the administration of justice [was a topic] of statewide import rather than a purely local matter, and that the officers who dispense[d] justice should not be selected on a local basis, or by ordinary political methods."[106] The stated motivation behind these changes was, of course, to improve the caliber of judicial appointments.[107] The effective result, although judicial quality did improve, was to remove the power to appoint judges from local political elites and place it instead into the hands of the state supreme court.[108] In fact, the Bell Committee recommended that the state Supreme Court make all final appointments after reviewing screened applicants:

> The Committee's solution is to have the Chief Justice make the appointments, from nominations submitted by the resident regular Superior Court judge. The Committee feels that this method should result in a more nearly uniform

98. *Three Points Hit Jaypee System*, RALEIGH TIMES, Oct. 22, 1958.

99. Ann Sawyer, *New Pattern For The Crazy Quilt: What Can Bell Report Do For Our Lower Courts?*, CHARLOTTE NEWS, Nov. 25, 1958.

100. *North Carolina's Vote*, GREENSBORO DAILY NEWS, Nov. 6, 1958.

101. *Three Points Hit Jaypee System*, *supra* note 98.

102. Sawyer, *supra* note 99.

103. Pat Reese, *What Changes Proposed?*, FAYETTEVILE OBSERVER, Dec. 14, 1958.

104. *Id.*

105. *The Governor Needs No Screen*, GREENSBORO DAILY NEWS, Dec. 8, 1958.

106. THIRD LOOK, *supra* note 83, at 52.

107. *The Governor Needs No Screen*, *supra* note 105.

108. *Id.*

> quality of local judges over the state, and that appointment by the highest judicial officer of the State will give to the local office a desirable dignity and significance.[109]

"We have been extremely fortunate in North Carolina in having an honest and reasonably able judiciary," announced Spencer Bell in 1958, referring to the Democratic party's de facto one-party rule over the state.[110] He continued: "I believe, in spite of the fact that our judges must run on a partisan party ticket[,] . . . we are fast becoming industrialized and the picture can change. If we had an effective two party system[,] our judges would have to become active party politicians."[111]

Bell's allusion to industrialization referred to the increasing numbers of voters in urban, cosmopolitan counties, like his home county of Mecklenburg. These counties were chafing under the control of rural elites and, like Bell, wanted to withdraw power from the periphery. That judges had been honest and reasonable in the past was irrelevant, a bone thrown by Bell to rural judiciaries who, if anything, had compromised the integrity of the law through lapses in professionalism and ability. And yet, such flattery helped Bell make it seem as if court restructuring would help rural counties by insulating them from the increasing electoral power of metropolitan areas, even if the opposite was in fact true.

Not only did the Bell Committee suggest that the state supreme court make all judicial appointments, but it advised that the court also be empowered to write all procedural rules.[112] This expanded the court's rule-making power from those rules that applied only to itself, to those previously written by the legislature governing trial courts.[113] To augment this increase in the court's power, the judiciary sought to make good on its promise of improving the image of the law, not simply by effecting substantive changes in the structure of North Carolina's court system, but by requiring judges to don robes. Before January 1, 1958, superior court judges were not required to wear the black vestments. "On January 1, 1958," noted Bar President W.W. Taylor, "the Superior Court judges, in accordance with the request originating in a resolution adopted by this Association at its 1956 Convention, donned judicial robes."[114]

The donning of robes, like the centralization of judicial power, sought not simply to improve the efficiency of the judicial apparatus, but the image of the

109. THIRD LOOK, *supra* note 83, at 52.

110. Spencer Bell, Speech to Governor and Chief Justice, at 4 (1958) (on file with North Carolina Division of Archives and History, Raleigh, N.C., Governor's Papers, Luther Hodges Papers, Box 294, "Judicial Committee on Improving Justice" Folder).

111. *Id.*

112. THIRD LOOK, *supra* note 83, at 59.

113. *Id.*

114. W.W. Taylor, *The President's Page*, BAR NOTES (N.C. Bar Ass'n), Feb. 1958, at 20.

law. As in South Carolina, lawyers in North Carolina exhibited an acute concern for the way in which their profession was *viewed* in the wake of *Brown.* Bell announced in 1958:

> There never was a time in the history of the world when the democracies needed to keep their fences mended more than they do today. Respect for the judicial branch of our government is the bed rock necessity if a government of laws and not of men is to prevail.[115]

Bell's penchant for a government of law coincided nicely with his desire to increase the autonomy and power of lawyers. "Reform is coming," announced Bell in 1958: "[T]he question is not whether to reform[,] but [w]ho is going to do the reforming—the Bench and the Bar[,] or the people?"[116] As in South Carolina, fear of the democratic process catalyzed efforts to place the power to regulate lawyers in the hands of the state bar and state supreme court. This coincided with efforts to remove control of the judiciary from rural elites, improve the image of the law in general and, with restrictions on barratry, barricade the gates of justice from blacks, whether they be NAACP lawyers or newly enfranchised voters.

B. Responses to the Bell Committee Report

Upon its release, the Bell Committee Report attracted considerable praise, particularly among lawyers and superior court judges from urban centers and heavily white, western counties. According to Braxton Craven of Morganton, located in the western Piedmont portion of the state, "he had failed to find 'a single rotten brick'" in the proposal, "and favored their passage 'with every "I" dotted and every "t" crossed.'"[117] Judge J. Will Pless, Jr. of neighboring Marion agreed, asserting that appointment "would free judges from political obligations which might hamper their administration of justice."[118] Luther Hodges also agreed. On September 4, 1958, the Governor wrote:

> The North Carolina Bar Association study committee, under the leadership of Senator J. Spencer Bell of Charlotte has worked diligently and devotedly for the past two and one-half years in studying the operation of our courts and in formulating proposals for their improvement. I have said previously that the proposals of this study committee seem to me to be sound in principle and merit our very careful consideration.[119]

Even African-Americans approved of the Bell Report. In fact, according to Dr. John R. Larkins, the one black member of Luther Hodges's Court

115. Bell, *supra* note 110, at 6.

116. *Id.*

117. *Bell Court Plan Gets Support From Judges*, NEWS & OBSERVER (Raleigh, N.C.), Apr. 2, 1959.

118. *Id.*

119. Luther Hodges, *Introduction* to THIRD LOOK, *supra* note 83.

Improvement Committee, "All of the individuals and groups with whom I have discussed the recommendations to improve courts have indicated an interest and expressed a desire to contribute to the improvement of the administration of justice."[120] Of course, Larkins spoke primarily to conservative black organizations, groups that were unlikely to support radical initiatives in the first place. These included the Northeast District Schoolmasters Club and Coastal Plain District of North Carolina Teachers Association, both of whom relied on the existence and perpetuation of separate black schools.[121]

Despite considerable support, not everyone endorsed Bell's recommendations. Many charged that the plan would place too much power in the hands of the state supreme court.[122] This was a matter of particular concern to rural elites in the heavily black, eastern portion of the state who not only dominated the state legislature, but also enjoyed having a lower court system free from centralized oversight and control. According to Judge Henry Stevens of rural Warsaw, in the eastern county of Duplin, "Centralizing the judiciary in Raleigh would be a catastrophe . . . I believe all judges should be elected . . . [I] see no reason for bothering a system that for nearly 100 years has been unimpeachable."[123] Clawson Williams, a thirty-five year veteran of the superior court bench from Sanford, south of Chapel Hill, agreed. "I don't want anyone to ride herd on the judiciary," he announced: "[T]he concentration of tremendous power in the Supreme Court . . . is the beginning of tyranny . . . [T]he people should not be deprived of their right to elect judges."[124]

Perhaps most vocal of the opponents to the Bell plan was a superior court judge named Frank M. Armstrong who charged that the suggestions were tailored to appease the North. Armstrong even asserted at one point "that he and other attorneys and judges were 'sick and tired of people from up North, these law professors and theorists from without, suggesting such changes.'"[125] The allegation was, on its face, absurd. And yet, it revealed the extent to which court reform bled into other tensions, among them the rural-based fear that centralization coincided with northern domination of the South.

As lawyers and judges debated the Bell plan around the state, the 1959 legislative session began, leading immediately to withering fire from rural state legislators. A constitutional study group sponsored by the legislature challenged the Bell Committee's proposal that the state supreme court be

120. *In Negro Campaign Bell Plan Being Boosted*, GREENSBORO REC., Nov. 19, 1958.

121. *Id*.

122. *Bell Fires Back at Critics of Plan to Reform N.C.'s Court Machinery*, WINSTON-SALEM J., Dec. 18, 1958.

123. *Court Bills Are Rapped by 2 Judges*, NEWS & OBSERVER (Raleigh, N.C.), Apr. 25, 1959 (alterations in original).

124. *Id*. (alterations in original).

125. *What Carpetbagger?*, WINSTON-SALEM J., Oct. 31, 1958.

granted rule-making power over the judiciary.[126] The legislature also opposed the appointment of state judges, preferring that they remain elected.[127] Particularly devastating was a move led by John Kerr of rural Warren County to torpedo the plan in the state's House of Representatives. Kerr, with the help of fellow lawmakers, tacked a measure onto the bill that would have required placing a limit on the number of senators in the legislature to one per county, thereby ensuring rural hegemony in the state.[128] This measure, designed to counteract the move to disempower the rural periphery that lay at the heart of court reform, was torpedoed by populous metropolitan counties in the House, thereby sealing the fate of Bell's proposals in 1959.[129]

When the state legislature reconvened in 1961, Bell's plan received a second hearing.[130] Over the complaints of critics like Judge Frank M. Armstrong, who accused Bell's court reforms of "setting up machinery for a 'potential judicial dictatorship,'" the Committee's proposals passed.[131] North Carolina Bar Association President James B. McMillan celebrated the victory. "Passage of the Court Bill is probably the most significant development in the legal profession in our generation," he asserted in a message to the state bar association in May of 1961.[132] Two months later, he alluded specifically to the impact that the bill would have on civil rights through, of all things, its reformation of the police courts. He stated:

> It is in the criminal courts and especially in the courts most inferior in jurisdiction and competence that the Constitution is interpreted daily and that the Bill of Rights is daily honored or abused and that the public at large and the individual voter and client get their every day interpretations of liberty and Constitution as the lawyers and judges see them.[133]

McMillan's message was clear. By cleaning up North Carolina's criminal system, the Bar improved its credibility in the field of civil rights. Without, of course, having to actually make concessions to the civil rights movement, it turned away from the courts and towards the lunch counters and the streets.

126. *See Under the Dome*, NEWS & OBSERVER (Raleigh, N.C.), Apr. 14, 1959.

127. *See Plan to Appoint Judges Opposed*, NEWS & OBSERVER (Raleigh, N.C.), May 1, 1959.

128. Roy Parker, Jr., *Senate Votes for Court Reform, 40–7: One Senator Amendment Is Approved*, NEWS & OBSERVER (Raleigh, N.C.), June 5, 1959.

129. *See* Charles Clay, *House Torpedoes Court Reform*, NEWS & OBSERVER (Raleigh, N.C.), June 17, 1959.

130. *1961 Annual Meeting Report*, BAR NOTES (N.C. Bar Ass'n), July 1961, at 5.

131. *Court Plan Denounced by Judge*, NEWS & OBSERVER (Raleigh, N.C.), May 1, 1961. The final passage of Bell's court reform proposals are discussed in the North Carolina Bar Association's 1961 Annual Meeting Report. *See 1961 Annual Meeting Report*, *supra* note 130, at 5.

132. James McMillan, *President's Message*, BAR NOTES (N.C. Bar Ass'n), May 1961, at 17.

133. *1961 Annual Meeting Report*, *supra* note 130, at 7.

Simon E. Sobeloff, Chief Judge of the Fourth Circuit Court of Appeals, articulated other ways in which the court reforms might benefit North Carolina's position regarding civil rights. "In the past several years," announced the Judge, "in a growing number of cases persons convicted of state offenses have resorted to the federal courts claiming that they had been denied their federal constitutional rights in the state proceedings."[134] This led to a hemorrhage of state power to the federal bench, one that could be stemmed "if state courts were to grant hearings to resolve allegations of denial of constitutional rights."[135] By paying more attention to civil rights claims at the state level, even rights that had little to do with integration, Sobeloff suggested, southern state courts could bolster their autonomy and power, thereby compensating for southern failures to uphold civil rights in other arenas.[136]

Judge Sobeloff's recommendations, not to mention those set forth in Spencer Bell's report, would finally be enacted four years after the court bill passed in 1965, when the state constitution was amended.[137] It was the third time in North Carolina history that the constitution had been re-examined.[138] The first was in 1776, in conjunction with the founding, the second in 1868, following the Civil War and the end of slavery, and the third in 1965, following the Second Reconstruction and *Brown*.[139]

IV. CONCLUSION

Brown catalyzed transformations in the southern judiciary, even as it sounded the death knell of Jim Crow. These transformations occurred in conservative states such as South Carolina and moderate progressive states such as North Carolina. They included measures aimed directly at the NAACP, like restrictions on barratry, as well as more substantive shifts in the configuration of power, away from rural peripheral counties toward the metrapole, and away from the legislature toward state supreme courts.

These reconfigurations provide insight not simply into the rise of resistance to integration in the South, but the survival of the southern state. As southern leaders struggled to deal with *Brown* directly, so too did they seek to bolster the state apparatus, particularly mechanisms within that apparatus that presented the risk of further heightening popular discontent. This discontent included anger, not only at Jim Crow by blacks or *Brown* by whites, but at corrupt, inefficient, unjust criminal courts.

134. Address of Honorable Simon E. Sobeloff, *in 1961 Annual Meeting Report*, *supra* note 130, at 19.

135. *Id*.

136. *See id.*

137. Charles Craven, *State's Courts Undergo Third Reform*, NEWS & OBSERVER (Raleigh, N.C.), May 16, 1965.

138. *See id*.

139. *Id*.

Southern state bar associations acted as key architects in the clean-up of these courts, not to mention transformations in the southern judiciary in general. Bar leaders realized that building integrity and respect for the law provided convenient rationales for centralizing authority and removing power from peripheral elites, both factors that facilitated moderate political strategies of resistance to *Brown.* Able to recommend substantive reconfigurations of power under the rubric of promoting professionalism and respect for the law, the bar provided an ideal modality for removing power from the periphery, increasing the regulation of lawyers, centralizing authority around the state supreme court, and eliminating corruption.

Not all of these changes hurt blacks, nor were they caused solely by *Brown.* On the contrary, the centralization of the judiciary did a great deal to raise the professionalism and uniformity of southern courts—a measure that helped all southerners, black and white. Further, many southern lawyers viewed *Brown* as part of a larger trend of federal encroachment onto states' rights—a trend that inspired southern strategists to circle the wagons by removing power from peripheral elites, cleaning up the administration of justice, and raising the ethical standards of the practice of law. Beginning in the 1930s, it is important to remember, the winds of Supreme Court jurisprudence had shifted increasingly against the South, particularly at the national level. By centralizing judicial authority, increasing the regulation of lawyers, and removing regulatory authority from the legislative branch, southern states created a monopoly around the law, insulating it from the vagaries of the electoral process, improving the quality of judicial opinion-making, and reducing the pool of applicants capable of entering the judicial apparatus. All of these developments might have occurred without desegregation, and indeed did occur without desegregation in states outside of the South. And yet, it is the *way* in which these shifts complemented racial strategies that provides clues into the political nature of state formation in the region. This, at the end of the day, is the lesson to be learned from *Brown's* role in transforming the southern judiciary.