The Defense of “an Unconscionable Experimentation with Ignorance”

The Legal Battle over Public Education in Prince Edward County, Virginia, 1959-1964

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1 “The Neglected Chapter"

1.1 “The Only County in the Nation"

In 1964, the Justices of the Supreme Court of the United States had before them a case from a “rural, remote, and resolute” county in Virginia, Prince Edward County. ¹ In a brief filed by the National Association for the Advancement of Colored People (NAACP), the civil rights organization that advocated African American rights in the United States, the following passage was found: “Public education is a vital governmental function. In Prince Edward County, there has been an unconscionable experimentation with ignorance.”² This thesis will explore how this “experimentation” was defended in the courts.

The case, Griffin v. County School Board of Prince Edward County, concerned the decision made by the local school board to close all public schools in the county.³ The Prince Edward public schools were shut down in 1959 following a ruling by the Fourth Circuit Court of Appeals in the case Ulysses Allen v. County School Board.⁴ This ruling ordered Prince Edward County to comply with the Supreme Court’s 1954 landmark decision in Brown v. Board of Education which found racial segregation in public schools to be unconstitutional.⁵ Prince Edward County had, in fact, been a defendant in the Brown case.⁶ When faced with a

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¹ Wilkinson 1979, 97.
² Papers of Allan G. Donn, Brief for Petitioners, Cochezse J. Griffin, etc., et al., U.S. Supreme Court, Cochezse J. Griffin, etc, et al. v. County School Board of Prince Edward County, et al. No. 592, 13. Emphasis added. The phrase derives from an opinion by the U.S. District Court for the Eastern District of Louisiana, Baton Rouge Division. In this case the District Court, on August 30, 1961, struck down a Louisiana school closure scheme, initiated to avoid desegregation. The District Court’s opinion contained the sentence “This is not the moment in history for a state to experiment with ignorance.” Sentence found at page 659 in Hall v. St. Helena Parish School Board, 197 F. Supp. 649, (1961) United States District Court for the Eastern District of Louisiana, Baton Rouge Division, Civ. A. No. 1068, parallel citations: LEXIS 5806, accessed from LexisNexis by the American Resource Center in Helsinki, printed on April 22, 2013.
³ Griffin v. County School Board of Prince Edward County, 377 U.S. 218 (1964)
⁴ Ulysses Allen et al. v. County School Board of Prince Edward County, VA, et al. 266 F.2d 507 (4th Cir. 1959).
⁶ The Prince Edward County school board had been a party in Davis v. County School Board of Prince Edward County, VA. 103 F. Supp. 337 (1952), one of four cases consolidated into the Brown case, which takes its name from a case originating in Kansas, Brown v. Board of Education of Topeka, Shawnee County, Kansas, 98 F. Supp. 797 (1951). The two other cases were Briggs v. Elliott, 342 U.S. 350 (1952) from South Carolina and Gebhart v. Belton, 33 Del. Ch. 144, 91 A.2d 137 (1952) from Delaware. A fifth case, Bolling v. Sharpe, 347 U.S. 497 (1954), originated from Washington D.C., but as the District of Columbia is not a state, the case could not be decided on the basis of the Fourteenth Amendment, as the four cases from the states had
court order to desegregate its public schools, the leadership of Prince Edward County chose to abandon its entire public school system.

The public schools were replaced by private schools that continued to operate on a segregated basis. Most white students attended the Prince Edward Academy, a private school accepting solely white students. White Prince Edwardians offered to set up a similar private school for African American children, but this offer was rejected. The NAACP advised black Prince Edwardians to reject the offer, as they felt it would be detrimental to the legal challenge the organization was conducting against the school closures. Subsequently most African American school children in the county, more than 1,700, were bereft of public education. Also a small number of white school children, whose parents could not afford the Academy’s tuitions, did not attend any schools during the closures.7

The determination of white Prince Edwardians to resist school desegregation to the extent of abandoning public education completely eventually garnered the attention of the White House. In a speech to Congress in February, 1963, President Kennedy made the following statement in regards to Prince Edward County:

The Department of Justice has also intervened to seek the opening of public schools in the case of Prince Edward County, Virginia, the only county in the Nation where there are no public schools, and where a bitter effort to thwart court decrees requiring desegregation has caused nearly 1500 out of 1800 school age Negro children to go without any education for more than 3 years.8

The President’s mention of an intervention by the Department of Justice was a reference to the fact that the United States had sided with the NAACP in the

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litigation to reopen the schools. The head of the Justice Department, Attorney General Robert Kennedy, made the following statement about Prince Edward County on March 18, 1963:

We may observe, with as much sadness as irony that outside of Africa, south of the Sahara where education is still a difficult challenge, the only places on earth known not to provide free public education are Communist China, North Vietnam, Sarawak, Singapore, British Honduras—and Prince Edward County, Virginia.

The Kennedy administration also took more concrete steps to help those school children in Prince Edward left without any educational opportunities. In 1963 when the Prince Edward schools had been closed for four years the Kennedy administration assisted in setting up a “quasi-public” provisional school system that provided some relief for those left without education. The federal schools, called “the Free Schools,” were open to all, free of charge. However, they were not funded with tax dollars, but rather with contributions from foundations and private persons. The Free Schools provided education for many Prince Edwardian children from 1963 to 1964, when the Supreme Court ruled in Griffin that the school closures did violate the Constitution. By then the Prince Edward County public schools had been closed for five years.

In spite of the attention the Prince Edward closures attracted in the first half of the 1960’s, Sociologist Christopher Bonastia writes that “Prince Edward County (PEC), Virginia, is the neglected chapter in American civil rights history.” Bonastia goes on to explain that the struggle for public education in Prince Edward County “lacked the essential ingredients of a standard civil rights story.” These ingredients include peaceful direct action protests that were met with violence at the hands of southern segregationists. Such clashes generally

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12 Bonastia 2012, 15, 142-152; Murell 1998, 163, 164; Turner 2001, 317-330; Wilkinson 1979, 99. Following the assassination of President Kennedy, the Johnson administration continued to support the efforts to support the free schools and to file briefs urging the reopening of the public schools.
13 Bonastia 2012, 1.
14 Bonastia 2012, 15.
took place in the Deep South, rather than in a border state like Virginia. The violent suppression of civil rights protests attracted media attention, which in turn brought to light the atrocities of southern Jim Crowism and resistance to the civil rights movement. This played an important role in turning public opinion against southern racial practices and eventually led to important civil rights legislation.\(^{15}\)

The Prince Edward school closures undoubtedly lacked many of these “essential ingredients.” The battle over public schools was fought almost exclusively in the courts, making it a battle bereft of bloodshed, as well as the ensuing media coverage. Yet the Prince Edward school closures’ deviation from the traditional civil rights narrative does not mean that the struggle over public schools in Prince Edward County is of no consequence for the history of the civil rights movement. Although schools were closed in other southern localities for the purpose of avoiding desegregation, the Prince Edward closures were, in the words of Christopher Bonastia, “unparalleled”.\(^{16}\) The Prince Edward school shut down was the only instance when an entire public school system was abandoned. Moreover, the five year period the county operated no schools was by far the longest time public schools were closed.\(^{17}\)

In the context of the legal history of the civil rights movement, the Prince Edward closures are extraordinary. When the Supreme Court struck down the closures and ordered Prince Edward to operate desegregated public schools in 1964, ten years had passed since the Court found that “in the field of public education, the doctrine of ‘separate but equal’ has no place.”\(^{18}\) During these ten years Prince Edward County had successfully avoided to comply with the

\(^{15}\) Bonsatia 2012, 11, 15, 133-134; Klarman 2004, 421-441. “Jim Crow,” often used in the term “Jim Crow laws” or “Jim Crowism” refers to the racist cast system that developed in the South in the years following the end of Reconstruction. The term’s origins is somewhat unclear, but as early as 1832 a minstrel song and dance act was titled “Jim Crow”, and by 1832 the term was used as an adjective. See Chafe 2009, 22; Woodward 1974, 7.

\(^{16}\) Bonastia 2012, 2.

\(^{17}\) Schools were also closed in Little Rock, Arkansas, where Governor Faubus closed all of the city’s four high schools. Nine schools in three different localities in Virginia were closed by Governor Almond. The Little Rock closures lasted from September, 1958 to August 1959, and the Virginia closures from September, 1958 to February, 1959, see Bartley 1995, 240-248.

\(^{18}\) Brown v. Board of Education, 347 U.S. 483 (1954), 495. “Separate but equal” was the doctrine that held that legally required segregation was allowed under the Constitution. It was established by the Supreme Court in Plessy v. Ferguson, 163 U.S. 537 (1896). For more on Plessy, see: Klarman 2004, 16-23; Lively 1992, 90-99; Woodward 1974, 71.
Court’s ruling. This is a remarkable feat, especially when considering the fact that Prince Edward County had been a defendant in the *Brown* case. Legal scholar J. Harvie Wilkinson III writes about Prince Edward County:

Here was a party to the original *Brown* decision, back in Court a decade later, with its private schools segregated and public schools shut down. Here was a county willing to forsake altogether democracy’s noble experiment—universal public education—to defy the *Brown* decision. Here were Negro schoolchildren not better off after *Brown* but much worse. And there was the Supreme Court, indeed the entire federal judiciary, seemingly unable after ten long years to help.  

Wilkinson also identifies the Supreme Court’s ruling in *Griffin v. County School Board of Prince Edward County* as one of two instances prior to 1968 when the Court struck down southern resistance to *Brown*. Both Wilkinson and legal scholar Michael Klarman find the ruling in *Griffin* to be motivated more by frustration with Prince Edward’s defiance, than by legal reasoning. “The object of *Griffin,*” writes Wilkinson, “was to get Prince Edward in line, never mind how.” The fact that Prince Edward effectively defended the school closures for five years indicates that the county had devised a successful strategy to avoid compliance with the Supreme Court’s *Brown* ruling. This premise is further supported by the views of Wilkinson and Klarman that the Court, in its ruling in *Griffin*, resorted to “novel and unpersuasive” reasoning.

Within the context of southern resistance to school desegregation, the Prince Edward school closures can be described as both unique and effective, yet from a historiographical perspective as neglected. This study will cast some much needed light on Prince Edward County’s “unconscionable experimentation with ignorance.” In doing so, the county’s defense of the closures will be explored and evaluated. This will help explain why the schools remained closed for five long years.

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19 Wilkinson 1979, 100.
20 Wilkinson 1979, 78, 88. The other instance was *Cooper v. Aaron*, 358 U.S. 1 (1958), a case concerning the Little Rock school crisis. Wilkinson identifies 1968 as the year when the Supreme Court, in *Green v. County School Board*, 391 U.S. 430 (1968), began taking an active role in implementing desegregation in the South.
22 Wilkinson 1979, 100.
23 Klarman 2004, 341.
1.2 Research Questions

This is a case study focusing on the legal battle over Prince Edward’s public schools. By examining the litigation surrounding the Prince Edward school closures this study will evaluate the legal arguments made to defend and challenge the closures. Moreover, the several court rulings handed down will also be evaluated. This will provide a comprehensive description of a heretofore overlooked episode of resistance to the Supreme Court’s landmark ruling in Brown v. Board of Education. The purpose of this study is to explain how Prince Edward County was able to resist the federal judiciary’s orders to desegregate its public schools for five years by simply abandoning them.

In the Prince Edward cases the federal judiciary had to decide if the school closures were allowed or prohibited under the Constitution. The fact that the schools remained closed for five years, before being ordered by the Supreme Court to reopen, indicates that this was not an easy question for the courts to decide. Moreover, when the Court finally did end the school closures it acted out of frustration, and employed unorthodox methods.

Although no previous studies have explored the litigation in depth, it is observed that the county had discovered an effective method to avoid desegregation. By abandoning public education altogether, the county forced upon the courts’ an entirely novel question, the role of public education in the American system of federalism.24 This study will provide an extensive investigation into the defense of the school closures. The previous findings will be tested. How effective was the county’s arguments that they had the power to close public schools. Moreover, to what degree did this line of argumentation delay the reopening of the schools? Was this the only defense of the school closures offered by the county, or did they employ other tactics?

To answer the research question of this study, how the closures were maintained for five years, it must be ascertained why the Prince Edward school closures proved to be so challenging for the courts. The lengthy and complicated litigation concerning Prince Edward County will be analyzed to determine which issues the courts found relevant. Public education is clearly a fundamental component.

in the proceedings. The Prince Edward school closure cases provide for an interesting opportunity to explore what role public education has in the American system of federalism.\textsuperscript{25} The complete lack of schools in Prince Edward raises the question if public education truly is a state matter, and can be, if the state so choses, completely abandoned. Or is public education protected by the Constitution, and removed from the states’ sphere of power? In this thesis it will be explored how the parties involved in the litigation in their arguments viewed public education, and how the courts ruled on this matter.

As has been shown, Prince Edward County was a unique instance of southern resistance to \textit{Brown}. Likewise, the Supreme Court resorted to unique methods to break that resistance. This leads to another important component of the Prince Edward litigation, the circumstances under which the schools were closed.

Prince Edward County closed its schools for one reason, to avoid compliance with the \textit{Brown} ruling. There can be no doubt on this point. County leaders had publicly declared that schools would be closed if they were ordered to desegregate as early as 1956.\textsuperscript{26} How did the fact that Prince Edward actively was attempting to resist the federal judiciary factor into the litigation?

A year following the \textit{Brown} ruling the Supreme Court handed down a second decision, called \textit{Brown II}, where it was outlined how segregated schools were to be desegregated.\textsuperscript{27} The decision left it to the federal District Courts to implement \textit{Brown} on a case by case basis.\textsuperscript{28} \textit{Brown II} provided little instructions as to how should be achieved, and is perhaps most known for not setting a timeline for when desegregation should be implemented. Instead it was held that segregation in public schools was to be abolished “with all deliberate speed.”\textsuperscript{29} \textit{Brown II} is widely regarded as an attempt to appease the South, giving the southern states as

\textsuperscript{25} Federalism can be described as the system under which the states and the federal government operate. It also pertains to the distribution of powers between the two, see: Friedman 1984, 123-137.

\textsuperscript{26} Bonastia 2012, 64.

\textsuperscript{27} \textit{Brown v. Board of Education}, 349 U.S. 294 (1955)

\textsuperscript{28} The U.S. district courts are the trial courts of the federal judiciary, Bureau of International Information Programs 2004, 37-39.

\textsuperscript{29} \textit{Brown v. Board of Education}, 349 U.S. 294 (1955), 300. The phrase “deliberate speed” originates from an 1893 poem by Francis Thompson titled The Hound of Heaven. The phrase was introduced in American constitutional case law by Justice Oliver Wendell Holmes in 1911. For more on the phrase in American law, see Chen 2007, 581-616.
much leeway as possible in dismantling Jim Crow education. Moreover, by not providing a detailed plan for desegregation, the Court hoped that it could avoid outright defiance of the initial *Brown* ruling.\(^{30}\)

The lower federal courts that were handed the task of desegregating southern schools were largely left to their own devices in how to go about this task. The hopes of the Supreme Court that *Brown II* would appease the South, and initiate a slow but steady process of desegregation would not be fulfilled. The schemes to defy *Brown* were many, as were the lower federal courts’ responses to these schemes. This thesis will examine the Prince Edward scheme, but also how the lower courts, a federal District Court and a federal Court of Appeals, responded to the school closure plan of resistance.

This line of questioning looks at the litigation from the perspective of the school closures as an action taken to resist the federal judiciary. If the Supreme Court’s decisions could be avoided, that Court, and all the federal courts, would be powerless. The question here must be how the courts reacted to the fact that the school closures were done to avoid compliance with a Supreme Court decision. As in the issue of public education, the arguments made by the parties for and against the closures will also be examined.

The Prince Edward school closures raises several interesting questions. In this case study these questions will be explored to answer the question: How did Prince Edward County succeed in avoiding desegregation for five years by closing its schools?

### 1.3 Method and Primary Sources

The method employed here will be a qualitative reading of a source material consisting primarily of legal documents. By utilizing this method, a chronological narrative of the litigation will be presented. The sources will be scrutinized using traditional methods of source criticism. Source criticism will be applied to the legal document, specifically to the legal briefs filed in the cases, to ascertain the connection between the author, or authors, and the party on whose

behalf the brief is filed. What is to be established here, is whose views it is that are represented in the briefs.

The chronological narrative, which will be the basis for presenting the Prince Edward litigation and also the analysis used to answer the research question, will cover every step of the litigation. The sources used here, however, do not include every brief filed in the Prince Edward cases. Consequently, all the arguments presented in the cases cannot be accessed through a primary source. The intertextual nature of litigation, however, means that arguments are often formed as a response to another argument. Moreover, in their opinions, the courts evaluate the arguments before them, even those it finds to be unpersuasive. A comprehensive account of all the points of view presented on the legality of the school closures can thus be provided by examining the source material used in the study. Again, source criticism has to be applied when exploring arguments presented from a source other than the primary source of that argument. Another aspect of the nature of litigation is to win the case, and with that in mind, a brief referencing an argument made by an adversary, might be presented in an unfavorable light. This will be considered in when examining the briefs.

The legal briefs used here comes from the collection “the Papers of Allan G. Donn”, located at Old Dominion University, Virginia. These documents were obtained with the help of the staff at the Special Collections & University Archives at Old Dominion University, who scanned the documents and sent them to the author in digital form. The documents used here are found in the first three folders of the collection, which in total contains 5 folders.\footnote{Old Dominion University, Special Collections & Archives, papers of Allan G. Donn. \url{http://www.lib.odu.edu/specialcollections/manuscripts/donn.htm} accessed on March 14, 2013. The Collection number is cites as MG 106.}

According to the collection’s website, Allan G. Donn is a lawyer who in the late 1960’s and 1970’s was involved in litigation concerning the desegregation of schools in Norfolk, Virginia. In 1964, while still a law school student, Donn witnessed when the Supreme Court heard \textit{Griffin v. County School Board of Prince Edward County}. That same year Donn wrote a research paper titled “The
Prince Edward County School Closing Case”. In 2009 Donn donated the collection to the Desegregation of Virginia Education (DOVE) project.

The source material also includes opinions of the several courts that were involved in the litigation. These courts were: the Virginia Supreme Court of Appeals, the highest court in Virginia. The United States District Court, Eastern District of Virginia, a federal District Court. The U.S. Court of Appeals for the Fourth Circuit, a federal Court of Appeal, also called a federal Circuit Court. The last court to rule in the litigation was the U.S. Supreme Court. In addition to the court rulings directly relating to the Prince Edward cases, reference is made to several other cases, and these cases will also be included here. All court opinions were all accessed online. Also accessed on line was the Report of the Commission on Education to the Governor of Virginia, which is also a primary source.

Lawyers, who were not a party to the case at hand, authored the briefs. As such, it is necessary to apply source criticism to the briefs, to establish whom they represent, and whose views they advocate. The actual parties in the cases were, on the side supporting the closures, the Prince Edward County School Board; the Division Superintendent of Schools Prince Edward County, T.J. McIlwaine; and the Board of Supervisors of Prince Edward County. On the side opposing the closures were the African American school children and their parents, denoted with a name in the court documents, for example Cocheyse J. Griffin. The U.S. Government was represented by the Department of Justice, which was also part of the litigation on the side that opposed the closures in the role of amicus curiae, which is not an actual party to a case.

32 The paper was sent to the author, but was of too poor a quality to read, and is not included in this study.
34 In 1971 the Virginia Supreme Court of Appeals was renamed, currently the Court is called Supreme Court of Virginia. See Supreme Court of Virginia Informational Pamphlet, http://www.courts.state.va.us/courts/scv/scvinfo.pdf accessed on November 1.
35 The U.S. district courts are the trial courts of the federal judiciary, see Bureau of International Information Programs, 2004, 37-39
36 The U.S. courts of appeal, or U.S. circuit courts, are the intermediate appellate courts in the federal judiciary. See: Bureau of International Information Programs, 2004, 33-34
37 Amicus curiae, or “friend of the court”, is a “person, group, or entity that is not a party to the case but nonetheless wishes to provide the court with its perspective on the issue before it.”
The group supporting the school closures, which hereafter will be titled “county officials”, represent the ruling county bodies and officials who were responsible for the school closures. The chief counsel for the county officials was Collins Denny Jr., a partner in the law firm Denny, Valentine, and Davenport. Denny passed away shortly before the case reached the Supreme Court, and was not part of the final stage of the litigation. Denny had also represented the Defenders of State Sovereignty and Individual Liberties, a segregationist organization operating in Virginia. Denny was closely linked to the political elite in Virginia, which strongly supported segregation, and he had been the Assistant Attorney General of Virginia. It is clear that the county governing bodies and officials, and the lawyers defending them had a common interest, to stave off desegregation, and to keep the Prince Edward schools closed. It is therefore unproblematic to group these together.

The African American school children and their parents, who were the party challenging the closures were represented by the NAACP. The civil rights organization had a long history of challenging Jim Crow practices in the courts, and had won several gains even before the great victory in Brown. Its involvement with Prince Edward County began as early as 1951, when it agreed to challenge school segregation in the county. This case eventually became part of the Brown case. In order for the NAACP to challenge discriminatory laws in the courts, they needed plaintiffs that were directly affected by discrimination. The federal judiciary only deals with actual “controversies”, i.e. a real case with

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38 Papers of Allan G. Donn, Brief for Respondents, County School Board of Prince Edward County, Virginia and T. J. McIlwaine, Jr., Division Superintendent of Schools of said County, Supreme Court of the United States, Coheyse J. Griffin, etc., et al., v. County School Board of Prince Edward County, et al., No. 592, 1-2.


real parties, not hypothetical cases.\textsuperscript{42} This meant that the NAACP needed to find real people who felt they were being discriminated against. In the Prince Edward cases, the parents of African American school children agreed to challenge initially the segregated schools, and later the school closures. The interests of the actual party and the NAACP are the same, and this group will be called “the NAACP”.\textsuperscript{43}

The Department of Justice represented the Kennedy, and later the Johnson, administrations, filed \textit{amicus} briefs in two of the cases concerning the school closures. There can be no doubt about the connection between the actual authors of the briefs and administration. As has been shown, both President Kennedy and his brother Attorney General Robert Kennedy had publicly criticized Prince Edward for the closures. Legal scholar Mary Dudziak have utilized \textit{amicus} briefs filed by the United States in the \textit{Brown} litigation to examine how the Truman administration felt segregation had an impact on U.S. foreign policy.\textsuperscript{44} This study will not focus on foreign policy’s effect on the Justice Department’s arguments, but rather a more general analysis will be employed. The \textit{amicus} brief are interesting as they reveal how the executive branch approached issues such as desegregation, public education, and states’ rights within federalism from a constitutional perspective. This group will be called the “Department of Justice,” or the slightly shorter term “Justice Department”.

There is no need to question the connection between authorship and presented interest in the court opinions. Although one might argue that a law clerk could have been involved in authoring an opinion, the view presented were undoubtedly those of the judge, or in the case where several judges were presiding, the majority. The minority opinions will also be included in this study, to illustrate how judges interpreted the law differently.

\textsuperscript{42} U.S. Constitution, Article III, Section 2; see Bureau of International Information Programs 2004, 24; Rakove 2009, 196.
\textsuperscript{43} Bonastia and Turner discuss how the African American community in Prince Edward County perceived the NAACP’s legal strategy to challenge school segregation. Support for the NAACP and their strategy of challenging segregation, instead of demanding equal facilities, was, according to Bonastia, “strong [but] not unanimous.” Bonastia 2012, 39. There is nothing to suggest that the NAACP and the plaintiffs in the litigation could not be grouped together. For more, see: Bonastia 2012, 36-42; Turner 2001, 221-236.
\textsuperscript{44} Dudziak 1988, 61-120. Although \textit{Brown} was decided in 1954 during the Eisenhower administration, the briefs were filed in 1952, when Truman was still president, see Dudziak 1988 footnote 5 on page 62.
1.4 Secondary Sources and Previous Research

Although the Prince Edward County school closures to some extent have eluded scholarly attention, the statement that they are “a neglected chapter” must be taken in the context of the vast amount of studies done on the history of the civil rights movement. The events surrounding Prince Edward County’s public schools were recounted as early as 1965, when journalist Bob Smith published his book *They Closed Their Schools: Prince Edward County, Virginia, 1951-1964.* More recently, and of a more scholarly nature, historian Amy Murrell’s essay “The ‘Impossible’ Prince Edward Case: The Endurance of Resistance in a Southside County, 1959-64” was published in the 1998 anthology *The Moderates’ Dilemma: Massive Resistance to School Desegregation in Virginia* edited by Matthew Lassiter and Andrew Lewis. Kara Miles Turner’s 2001 doctoral dissertation covers African American education in Prince Edward County from 1865 to 1995, a considerable longer period than the five years schools were closed in Prince Edward. Still Turner’s dissertation does go into quite some detail when examining the school closures. The most recent scholarly work used in this study is Cristopher Bonastia’s *Southern Stalemate: Five Years without Public Education in Prince Edward County, Virginia,* published in 2012.

While the Prince Edward school closures have received some, albeit rather limited, scholarly attention, the claim is made here that there is a gap in the historiography relating to the legal battle over Prince Edward’s public schools. The litigation concerning Prince Edward’s public schools is admittedly present in the literature, but it is seldom explored beyond mere description, and a meaningful analysis of the litigation is found wanting.

Smith’s 1965 book on Prince Edward is, according to Turner “the main authority” on events surrounding the Prince Edward school closures. Turner’s praise is not without merit; all works about Prince Edward mentioned here rely on Smith to some extent. *They Closed Their Schools* is a very detailed account of the build-up to as well as, the actual events during the school closures. The narrative,

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45 Smith 1996; Bonastia 2012, 15.
48 Bonastia 2012.
however, is very limited, in that it mostly deals with Prince Edwardian leaders—Turner describes such an approach as “leader-centered”—and with events within the county limits.49 As Bonastia puts it:

This contemporaneous account, admirable for its detailed depiction of county life and politics, offer little in the way of broader analysis or, by definition, historical perspective. Smith pays cursory attention to the ways in which national and state politics affected the crisis in Prince Edward.50

Clearly Smith leaves room for a more detailed study regarding the litigation concerning the school closures, a perspective that to a great extent involves how state and especially national politics affected Prince Edward.

Although more scholarly in nature than Smith’s account of the school closures, Murrell’s “The ‘Impossible’ Prince Edward Case” also focuses on events taking place within Prince Edward’s county borders. Murell’s essay, like all essays in Lassiter’s and Lewis’s anthology, looks at how white moderates in Virginia viewed and dealt with massive resistance, including school closures. Murrell does much to explain how moderate voices were subdued in Prince Edward and why this particular county became the only county in the United States to close its public schools for an extended period of time.51 Even so, the legal battle over the public schools is more or less absent in Murrell’s essay.

Kara Miles Turner’s dissertation “It Is Not at Present a Very Successful School”: Prince Edward County and the Black Educational Struggle, 1865-1995,” is epic in both length and time period covered. As the title suggest, Turner explores African American education in Prince Edward over a period of 130 years. Within this impressive timespan, Turner explores African American agency in regards to their own education. The study focuses on how black Prince Edwardians sought to improve education in their own community, often giving a voice to historical actors, such as women, who had been ignored in previous studies. Turner, however, does not stop at the county border and also pays attention to “the roles of external actors and factors in shaping tactics, goals, and outcomes.”52

49 Turner 2001, 9
50 Bonastia 2012, 15
52 Turner 2001, 16.
Considering that Turner deals with Prince Edward County from a 130 year timeframe, the legal battle over public schools is covered with surprisingly much detail. By using primary sources consisting of court decisions and the NAACP’s papers Turner seams together an informative narrative of the many court cases that led to the Supreme Court’s ruling in *Griffin*. Turner certainly should be commended for creating order out of chaos, by so elegantly creating a coherent account of the complicated jumble of court cases that dealt with school closures, which was of great help in this study.

While Turner provides the only historical narrative of the school closures that in detail cover the litigation, it lacks an analytical element. Turner only deals with the end result of the litigation, i.e. the court decision, and little attention is paid to the legal reasoning the judges used to arrive at their conclusion. Considering Turner’s chosen topic and focus, it is not surprising that she does not go deeper into the litigation; it would be superfluous for her research. For Turner the essential question is that African Americans did challenge the closures in court, to explore the legal reasoning they employed is of little or no consequence to her research question.

The most recent work dealing with the Prince Edward County school closures is Christopher Bonastia’s *Southern Stalemate: Five Years without Public Education in Prince Edward County, Virginia* from 2012. The stated purpose of *Southern Stalemate* is to be a “political history and analysis that seeks to discover why Prince Edward, alone among localities, elected to abandon public education for five years.”

Bonastia approaches the school closings by exploring how different historical actors met the challenges posed by events in Prince Edward County. Of particular interest to this study is Bonastia’s focus on how county segregationists defended the school closures, how African American Prince Edwardians challenged the closures, and how the Kennedy administration reacted to the events in Prince Edward County.

When it comes to Prince Edward segregationists, Bonastia “utilizes Prince Edward as a case study to investigate rhetorical defenses of racial segregation.”

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53 Bonastia 2012, 6.
54 Bonastia 2012, 7.
Bonastia views the rhetorical defense of segregation in Prince Edward as essentially lacking a racial component. Racial arguments are replaced with constitutional arguments invoking a locality’s right to handle local matters, such as public education. Part of the rhetorical defense was also a conservative view on taxation, which held that those providing the most tax revenue also should have the greatest benefits from government spending, an obvious argument against public education. By offering African Americans their own private segregated schools, the blame was shifted from those responsible for the school closures to African American parents who joined the NAACP’s crusade for the abolishment of Jim Crow. One of Bonastia’s main arguments is that many aspects of modern conservatism can be found in Prince Edward County during the school closures. 55

Bonastia’s investigation of those working to reopen the schools compares the legalistic approach championed by the NAACP and direct action tactics. As stated previously the struggle over public schools in Prince Edward was mainly fought in the courts. Opponents of the school closures did engage in some protest during the summer of 1963, a summer described by Bonastia as “a storm of civil rights developments throughout the nation.” 56 The 1963 protest in Prince Edward were by most contemporary accounts peaceful, and local police acted in a restrained fashion. 57 Bonastia attempts to determine how influential these protests were and why direct action protest were used so sparsely in Prince Edward. Legal action is also evaluated as a means to achieve one’s goals. In the case of Prince Edward legal action proved to be the most successful, albeit slow, tactic, while direct action proved to be extremely effective in other localities. Southern Stalemate “assess[es] how and when legal mobilization and direct action – separately and in concert – may lead to tangible benefits.” 58

55 Bonastia 2012, 6-7, 17-19, 186-188.
56 Bonastia 2012, 204. Bonastia list the following events that took place during the summer of 1963: the murder of Medgar Evers; school boycotts and protests in Boston; Bull Connors violent suppression of protesters in Birmingham, Alabama; James Meredith graduating from the University of Mississippi; the March on Washington on August 28; and protest in Danville, Virginia, which were unusual for Virginia in that they saw police violence.
57 Bonastia 2012, 210-212.
58 Bonastia 2012, 9.
The third participant examined in *Southern Stalemate* is the Kennedy administration. Bonastia argues that the Kennedy campaign had cultivated an image of the candidate as a champion for civil rights.\(^{59}\) The President was now caught, the argument continues, between this expectation and the political reality of a politically strong South. He “struggled to find a balance between principle and expediency.”\(^{60}\) The modus operandi of the executive branch became to limit its involvement in instances of highly publicized violence. In these instances the federal involvement had little to do with supporting those wishing to fulfill the promise of “all men are created equal”; they had more to do with upholding law and order when the states failed to do so.\(^{61}\)

Although the school closures in Prince Edward were neither violent nor highly publicized, the executive branch did involve itself in this affair. Bonastia distinguishes two separate forms of federal intervention in Prince Edward. The first strategy employed by the Kennedy administration was a litigative approach. The Department of Justice attempted to join the lawsuit as a co-plaintiff. When this was denied by a federal judge, the Department of Justice applied for, and was granted to join the litigation as *amicus curiae*.\(^ {62}\) The second strategy was the setting up of the Free Schools in 1963. This was a more direct undertaking, but still a fairly moderate response. Bonastia writes: “In joining the NAACP’s side in court, and later creating the Free Schools, the Kennedy administration revealed its concern for Prince Edward blacks, tempered by its reluctance to antagonize powerful Southern politicians.”\(^ {63}\)

Bonastia’s analysis of the executive branch’s involvement in Prince Edward is largely focused on this balancing act. Initially the legal strategy, especially the move to get involved as a co-plaintiff, is seen as quite bold, considering the

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\(^{60}\) Bonastia 2012, 133.

\(^{61}\) Bonastia 2012, 15, 17, 133-134.

\(^{62}\) *Amicus curiae*, or “friend of the court”, is a “person, group, or entity that is not a party to the case but nonetheless wishes to provide the court with its perspective on the issue before it.” SCOTUSblog, Glossary of Legal Terms [http://www.scotusblog.com/reference/educational-resources/glossary-of-legal-terms](http://www.scotusblog.com/reference/educational-resources/glossary-of-legal-terms) accessed on February 5, 2013. See also [http://www.duhaime.org/LegalDictionary/A/AmicusCuriae.aspx](http://www.duhaime.org/LegalDictionary/A/AmicusCuriae.aspx) accessed on February 5, 2013.

\(^{63}\) Bonastia 2012, 17.
refined form of resistance Prince Edward was offering. As time went on and the schools remained closed, however, the legal strategy is deemed inadequate. The establishment of the Free Schools is a far more direct approach, and thus has the potential to be more offensive to southerners. It is the direct approach that receives the lion’s share of Bonastia’s attention, granting that he does provide some very valuable insights into the legislative involvement. 64

The works cited here are those that are of relevance to this study of the Prince Edward school closures, and do not represent the entire body of work that deals with Prince Edward County in the 1950’s and 1960’s. 65 Two works not solely dedicated to the Prince Edward school closures, but still worth mentioning are legal scholar Michael Klarman’s From Jim Crow to Civil Rights: the Supreme Court and the Struggle for Racial Equality and legal scholar J. Harvie Wilkinson’s From Brown to Bakke: the Supreme Court and School Integration. 66

As the titles suggest, both Klarman and Wilkinson deal with the legal aspects of the civil rights struggle in the United States. Although both works have broad subject matters the Griffin case is treated by Klarman as well as Wilkinson. Both scholars offer similar analyses of the Griffin decision, criticizing the Court for acting out of frustration with the Prince Edwardian form of resistance which resulted in a decision based on unsound legal reasoning. 67

While extremely insightful in both providing legal analysis of the decision and placing the Griffin case in its historical context, the broad scope of both From Jim Crow to Civil Rights and From Brown to Bakke does not leave much room for deeper analysis of the Prince Edward litigation.

It would appear that of all the works listed here one aspect of the Prince Edward school closures is lacking, a more than superficial analysis of the legal battle over public schools. This thesis will provide one.

64 Bonastia 2012, 158-160.
65 For more on literature covering the Prince Edward school closures see Bonastia 2012, 15-16; Turner 2001, 8-10.
2 Background

2.1 “Inherently Unequal”

Prince Edward County’s involvement in the legal battle over segregation in public schools goes further back than 1959. In 1951 students at R. R. Moton High School, Prince Edward’s only black high school, went on strike protesting the inferior conditions in their school compared to the county’s white high school, Farmville High School. The students’ complaints were warranted, as R. R. Moton was both overcrowded and underfunded. An attempt by the county to address the problem of overcrowding led to the construction of three temporary buildings, which were of so poor quality that they were more provocative than soothing to the African American community, which came to call these buildings “the tar paper shacks.”

The strike was organized by the students themselves and was led by 16 year old Barbara Johns. The strike, which involved some 450 students, lasted for two weeks, from April 23 to May 7, 1951. The students decided to return to school after the NAACP had agreed to file suit on their behalf. The NAACP did not jump at the opportunity to represent the students, and initially simply gave them the advice to go back to school. In 1950 the civil rights organization had shifted its policy from taking suits seeking to establish equal facilities within a segregated system, to challenging segregation itself. The Prince Edward case was not optimal from the perspective of the NAACP. The students were protesting the inferior quality of their schools, not the fact that the schools were segregated. Furthermore, the NAACP felt that white Prince Edwardians would resist desegregation intensely. The NAACP already had a suit challenging school segregation, and in the words of NAACP attorney Oliver Hill “we didn’t need but one suit to establish the precedent.”

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69 Smith 1996, 37; Turner 146, 212, footnote 1 on page 146.
70 Bonastia 2012, 28; Turner 2001, 221-223, footnote 3 on 222.
Nevertheless, Hill and his fellow NAACP attorneys were so impressed by the students’ resolve and discipline that they agreed to take the case if the students, with their parents’ backing, would agree to challenge segregation, instead of just demanding equal facilities. Both students and parents agreed to the NAACP’s request and the litigation was initiated. Faced with a legal challenge to segregation, county officials attempted to address the initial complaint of inferior facilities by setting in motions plans for the construction of a school equal to the white school. By then, however, it was too late. The NAACP had thrown down the gauntlet, and simply to provide equal facilities would no longer suffice, the legal battle over segregated facilities in public education had begun.72

The Prince Edward case, Davis v. County School Board of Prince Edward County was grouped together with three similar cases challenging school segregation, all going under the name of Brown v. Board of Education.73 In Brown, decided in 1954, the Supreme Court ruled unanimously that “[w]e conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal.”74

What the Supreme Court did in Brown was to use its power of judicial review to interpret a part of the Constitution. Judicial review is the source of the federal judiciary’s power to influence American society. The judiciary is very much unlike the political branches of government, i.e. executives (governors and the President), legislatures (Congress and state legislatures), and also local governing bodies (boards of supervisors, school boards, city councils, etc.). The political branches are granted their power by the electorate, and are largely free to do as they please. They must defend their actions before their constituents in elections, and always run the risk of being voted out of office. The unelected judges of the federal judiciary, appointed for life long terms, operate under different conditions. They do not have to defend their actions to potential voters. However, the judges,

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73 Davis v. County School Board of Prince Edward County, VA. 103 F.Supp. 337 (E.D. VA. 1952). The Brown case takes its name from a case originating in Kansas, Brown v. Board of Education of Topeka, Shawnee County, Kansas, 98 F. Supp. 797 (1951). The plaintiff in this case, Oliver Brown sued on behalf of his 8 year old daughter, Linda, who had to travel by bus to a black school, although she lived within walking distance of a white school. Oliver Brown’s name came to be used when referring to all of the school desegregation cases, see Sitkoff 1989, 20.
in the words of Alexander Hamilton, have “no influence over either the sword or the purse.”

The federal courts’ power does not lie in a power to tax and spend, or to declare war and command troops, but in judicial review. This doctrine was established by the Supreme Court in its 1803 ruling in *Marbury v. Madison*, where it was established that: “It is emphatically the province and duty of the judicial department to say what the law is.” *Marbury* sets up the federal judiciary as the ultimate authority of interpreting what the Constitution actually means. Furthermore, as the Constitution was, and still is, “the supreme Law of the Land,” the Court also found “that a law repugnant to the Constitution is void.” Judicial review is consequently the power of the judiciary to strike down laws, and other government activities, e. g. executive orders, it finds to be in violation of the Constitution.

In *Brown v. Board of Education* the Supreme Court interpreted the Equal Protection Clause of the Fourteenth Amendment to prohibit the enforced segregation of races in public schools. This was contrary to an earlier Supreme Court ruling, *Plessy v. Ferguson* decided in 1896, which held that the Constitution did not prohibit laws that required segregation, as long as the segregated facilities were equal. The new understanding of the Constitution established in *Brown* overturned the precedent set in *Plessy* in regards to segregation in public schools. The laws in 24 states which required or allowed segregation in public schools were therefore declared invalid by the *Brown* ruling.

The Supreme Court’s power of judicial review gives the Court the authority to strike down laws created by both state and federal legislators. Without power

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75 Hamilton 2010, 111.
76 *Marbury v. Madison*, 5 U.S. 1 Cranch 137 (1803), 177.
79 Seventeen states had laws that required segregates public schools, these were all southern states, and four states had laws that allowed segregated schools. Klarman 2004, 304, 311; Woodward 1974, 145. Wilkinson incorrectly lists the number of states allowing or requiring segregation in public schools as seventeen, which was the number of states *requiring* segregated schools, see: Wilkinson 1979, 49.
over either purse or sword, however, the Supreme Court, or the lower federal courts, has no real means of enforcing their rulings. This seldom poses a problem, as the Court’s rulings generally are obeyed. At times, however, the Court has handed down opinions that have been so unpopular that they have been resisted. In these instances the Court has been at the mercy of the other branches of government to enforce their rulings. If the legislative or the executive branch does nothing to support the Court, its decision would become dead letter law, i.e. ineffective.  

For the Justices faced with deciding Brown, the concern of handing down an unenforceable decision was very real. Segregation was deeply entrenched in the South, and any decision challenging Jim Crow was bound to provoke a response. Several of the Justices were hesitant to overturn Plessy, because they feared that the South would resist, and that Congress and the President would not support their decision. The solution was for the Court to strike down segregation in public schools in Brown, but to give the South a great deal of leeway in dismantling its segregated school systems. This became the ruling know as Brown II, handed down in 1955, which held that desegregation would be implemented gradually, with “all deliberate speed.”  

In spite of the Court’s attempt to appease the South with Brown II, desegregation of southern schools would not be an orderly, albeit slow, process. Desegregation was widely resisted, and by 1964 only a very small portion of southern African American school children attended the same schools as white children. The Court alone was unable to enforce its own decision. The South’s opposition to Brown, and to the civil rights movement, which often deteriorated into violence, eventually turned public opinion against Jim Crow. This led to the other branches of the federal government to act, culminating in the Civil Rights Act of 1964. The Civil Rights Act put the power of Congress behind school desegregation,  

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82 Micheal Klarman writes that only one percent of African American school children attended desegregated schools, while Harvie Wilkinson cites the percentage as 2.3, see: Klarman 2004, 362-363; Wilkinson 1979, 65.
and the act, not *Brown*, was responsible for the de facto desegregation of southern schools.\(^{83}\)

In Prince Edward County there would be no violence, but *Brown* was nonetheless resisted vehemently. The battle over segregation in public schools would, from start to finish, be fought in the courts. Kara Miles Turner calls the lengthy legal battle over Prince Edward’s schools “a maze of suits and appeals…”\(^{84}\)

### 2.2 Entering the “Maze of Suits and Appeals”

On May 31, 1955, the Supreme Court handed down its decision in *Brown II*. As a part of the *Brown* case, Prince Edward was directly affected by the decision. A federal District Court would now be charged with the task of carrying out desegregation of the county’s public schools. A few hours after *Brown II* was handed down, the Prince Edward County Board of Supervisors, the county’s governing body, voted to cut all funding to public schools, except those funds that were mandatory under state law. The mandatory funds were not remotely sufficient to operate the county’s public school system, and thus the action would have resulted in a shutdown of all public schools in Prince Edward.\(^{85}\)

Considering that the political leadership of Virginia at this time still was considering how to respond to *Brown*, the actions taken by the Prince Edward County Board of Supervisors seem remarkably radical. Prince Edward’s radicalism stems from the county’s school board being a defendant in *Davis v. County School Board of Prince Edward County*, which in turn was part of the *Brown* case. Although *Brown* had struck down “separate but equal” in all school districts in the Union, desegregation would not happen automatically, but rather one lawsuit at a time. Therefore, desegregation was dependent on the willingness of petitioners to sue and for someone, most likely the NAACP, to manage the litigation. As a defendant in *Brown*, Prince Edward was already involved in a desegregation suit and could therefore expect a federal District Court to charge...

\(^{84}\) Turner 2001, 369.
\(^{85}\) Bonastia 2012, 63; Smith 1996, 102; Turner 2001, 252, footnote 74 on page 252. The funds Virginia law required the county Board of Supervisors to appropriate for public schools amounted to $150,000 while the sum the school board had requested for the operation of public schools was $685,940.
the school board to desegregate, as the Supreme Court had instructed district
courts to do in *Brown II*. In the words of Bob Smith, “[t]he courts and the Board
of Supervisors were evidently on a collision course.”

The collision seemed to draw near when the Supreme Court remanded the *Davis*
case to the federal District Court in Richmond in late June 1955. The district
court was tasked to implement desegregation in Prince Edward County. The
NAACP urged the court to order desegregation at the start of the school term of
September that year, while county representatives asked for a one year
postponement. The collision between Prince Edward and the federal courts,
however, was averted in July, 1955, when the federal District Court in Richmond
ruled in the *Davis* case that “it would not be practical” to desegregate the Prince
Edward public schools before the end of the 1955 fall term. Although the
District Court held that Prince Edward County’s public schools eventually would
have to desegregate, it set no deadline, hence giving Prince Edward
segregationist a respite.

The county Board of Supervisors, no longer under the sword of Damocles in the
form of immediate desegregation, decided to provide all the funds necessary for
the operation of the county’s schools. The funding, however, was to be provided
on a monthly basis. This made it possible to quickly suspend funding of the
public schools if desegregation loomed. The price many white Prince
Edwardians were willing to pay for a continuance of segregation was the
county’s public schools, but not their own children’s education. In June of 1955
the Prince Edward Educational Corporation was founded. This organization’s

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86 Smith 1996, 101; for more on the Board of Supervisors’ decision to halt funding to Prince
For more on the radicalism of Prince Edward County compared to Virginia, see: Muse 1961, 14-15;
Smith 1996, 141. The Board of Supervisors, reacting to pressures applied by white Prince
Edwardians not to fund desegregated schools, had delayed deciding on school funds until the
very last moment according to law. That the ruling in *Brown II* and the last moment for
appropriating school funds coincided are attributed to coincidence, see: Muse 1961, 13; Smith
87 It is important to note that NAACP’s participation in desegregation suits was necessary for
these cases to proceed. The other companion case in *Brown* originating from the South, the
Clarendon County case (South Carolina), *Briggs et al. v. Elliott et al.*, 342 U.S. 350 (1952), was
not actively pursued by the NAACP until 1960, and no desegregation court orders were issued in
this locality, until the NAACP again took up the case, Muse 1961, 12; Turner 2001, 254 footnote
78 on page 254.
88 Gates 1964, 43.
89 Gates 1964, 43; Smith 1996, 125; Turner 2001, 255.
purpose was to raise funds for private, all white, schools. Thus the foundations of Prince Edward County’s strategy to avoid desegregation, in the form of fund cutoffs and private schools, had been established, long before Virginia had determined its response to Brown.90

Having been denied desegregation in 1955 and in the absence of a court mandated deadline, the NAACP, in April of 1956, petitioned the federal District Court in Richmond to desegregate the Prince Edward public schools at the start that school year in September. When the case was argued in federal District Court in November 1956, representatives for Prince Edward County could argue a new reason as to why the county should not desegregate. The General Assembly of Virginia had passed a series of massive resistance legislation only a few months prior to the November arguments in the Prince Edward desegregation case.91 Among these laws was the “Pupil Placement Act” which gave the task of assigning students to the state, instead of the local authorities. The defendants argued that because this act was now in place, the plaintiffs should seek to enter the schools of their choosing through State Pupil Placement Board, which was now in charge of student transfers.92

The federal District Court in Richmond, presided over by Judge Sterling Hutcheson, ruled in the Davis case on January 23, 1957.93 Hutcheson did not take into account the “Pupil Placement Act” in his ruling. Instead he denied setting a deadline for desegregation of Prince Edward’s schools on other grounds. Hutcheson felt that desegregation that was forced upon a community before it was ready for this change would lead to school closures, teacher layoffs, and civil disorder. Hutcheson expressed his concern that racial tension would increase, and that the police in a rural area like Prince Edward would not be able to maintain law and order. This nightmare scenario was not the product of the

91 Virginia’s policy of massive resistance culminated in legislation that was intended to prevent that any desegregation take place in the state. This legislation allowed the Governor to close any school threatened by desegregation orders. For more on massive resistance in Virginia, see: Bartley 1999, 108-117, 131-134; Gates 1964, 28-210; Muse 1961, 1-126.  
93 The Davis case had previously been handled by a federal District Court consisting of three judges, but in July 1956 that court dissolved itself and Hutcheson was appointed as the sole federal District Judge in the case, see: Davis v. County School Board of Prince Edward County., VA. 142 F.Supp. 616 (1956); Muse 1961, 59; Smith 1996, 145; Turner 2001, 256.
judge’s imagination. In his decision he makes reference to a document signed by over 4,000 Prince Edwardians that expressed popular support for school closures to avoid desegregation. Such a petition existed, it had been circulated in May, 1956, and it had 4,184 signatures. Hutcheson believed that Brown II gave him the maneuvering room to refrain from ordering desegregation in the volatile environment that was Prince Edward County.  

Hutcheson’s decision was popular with many Prince Edwardians, even among those who did not agree with the creed of segregation. It is even suggested that many African Americans welcomed the decision. The NAACP, however, were not happy with Hutcheson’s refusal to make any attempts to bring about desegregation, and an appeal was filed to the U.S. Fourth Circuit Court of Appeals. The federal Court of Appeals, or Circuit Court, ruled in the case, now under the name of Eva Allen et al. v. County School Board et al., on November 11, 1957.

The decision contains references to other cases from Virginia localities other than Prince Edward, reflecting the fierce battle that was fought in Old Dominion over the desegregation of public schools and the massive resistance polices adopted by the state. The Circuit Court notes that the Prince Edward School Board had done nothing to desegregate the county’s schools, and that this was not “deliberate speed.” The threat of school closures, or “racial tension” in the county was not a valid reason to avoid realizing desegregation in Prince Edward

95 Muse 1961, 60; Smith 1996, 146.
96 Eva Allen et al. v. County School Board et al. 249 F.2d 462 (1957); the cases from other localities than Prince Edward County in Virginia referred to are: School Board of City of Newport News Virginia v. A Atkins School Board of City, 246 F.2d 325 (1957); School Board of City of Charlottesville, Va. v. Allen, 240 F.2d 59 (1956). There was a fourth locality that also faced a desegregation lawsuit which is not mentioned here, namely Norfolk. See: Turner 2001, 261. For more on other desegregation litigation in Virginia than the Prince Edward County cases see: Gates 1964, 125-128; Turner 2001, 258, footnote 86 on page 258. It should be noted that both Gates and Turner deal with the cases in the federal District Court, a lower court than the federal Court of Appeals. Gates and Turner state that up until April 26, 1956, when the NAACP sued for desegregation in Newport News, Prince Edward County had been the sole defendant in desegregation litigation in Virginia. See also: Muse 1961, 54, 56, 58; Smith 1996, 144.
County. The case was remanded back to Judge Hutcheson’s federal District Court with instructions to set a deadline for desegregation.  

After the Supreme Court refused to hear the *Eva Allen* case on appeal, the NAACP filed a motion in Hutcheson’s District Court asking him to order the desegregation of Prince Edward public schools in September 1958. 98 The county defendants argued that more time was needed, and provided an array of witnesses all of whom attested to the probability of both school closures and violence in Prince Edward, if schools were ordered to desegregate so soon. 99 One of the witnesses, James T. Clark, the Sheriff of Prince Edward County, testified that in his opinion “the local enforcement officers, reinforced by the entire state constabulary or highway patrol, would not be sufficient to maintain order if violence should erupt.” 100

The county defendants requested further postponement, arguing that they needed time to conduct a survey on the situation in the county in order to determine how to solve the problems presented by desegregation. Hutcheson approved of the survey. In *Brown* the Supreme Court had relied on psychological and sociological evidence that proved that segregation was unequal, citing among others Swedish sociologists Gunnar Myrdal. 101 In his ruling, Hutcheson writes that: “[c]onsidering the weight and importance which have been given psychological and sociological factors such an approach would appear to have merit …” 102

Feeling that the Supreme Court in *Brown II* had failed to provide specific instructions as to how desegregation should be implemented, and that the federal Circuit Court had only instructed him set a deadline, Hutcheson went about

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98 Certiorari, the writ used to petition the Supreme Court to hear a case on appeal, was denied in March 1958. Turner 2001, 257. For more on certiorari see “Rules of the Supreme Court of the United States”, Part 3, Rules 10-16, accessed from: [http://www.law.cornell.edu/rules/supct](http://www.law.cornell.edu/rules/supct) on January 18, 2012.
100 *Eva Allen et al. v. County School Board of Prince Edward County, VA., etc., et al.*, 164 F.Supp. 786 (1958), 789.
102 *Eva Allen et al. v. County School Board of Prince Edward County, VA., etc. et al.*, 164 F.Supp. 786 (1958), 793.
sorting out the details by himself. Judge Hutcheson rejected the plaintiffs’ request that desegregation should begin in September 1958, this Hutcheson simply deemed “unrealistic”. However, a deadline had to be set, finding no precedents in case law, the federal judge turns to “precedent available in somewhat comparable situations”. Solon, Hutcheson writes, thought ten years a suitable time for a people to a people to adjust to considerable changes in their customs. Following the death of Abraham Lincoln it took about twelve years most significant disorder to settle. The final example cited is the 18th Amendment, which prohibited the sale of alcohol in the United States. Hutcheson finds that this law was enforced for “twelve or fourteen years.” With these time periods in mind, Hutcheson settled for ten years as a suitable time for Prince Edward to adjust to desegregation, and the deadline was set for 1965, ten years after Brown II. Hutcheson’s ruling was handed down August 4, 1958.

Again, Prince Edward dodged the proverbial bullet of desegregation, a feat the county had been performing since July, 1955, and the county’s public schools remained segregated for the time being. The schools, albeit segregated, also remained open, which was not the case with all schools in Virginia at this time. On September 12, 1958, Warren County High School was the first school in Virginia to be closed by Governor Almond under the massive resistance laws, on that same day Arkansas Governor Faubus ordered all of Little Rock’s four high schools to be closed in response to the Supreme Court’s ruling in Cooper v. Aaron, also decided on that eventful day. During that same month, schools were also closed by Governor Almond in Charlottesville and Norfolk. All in all, Almond closed nine schools in Virginia, and 12,700 pupils were denied access to

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104 Eva Allen et al. v. County School Board of Prince Edward County, VA., etc. et al., 164 F.Supp. 786 (1958), 791-794. For more on Hutcheson’s decision in the Eva Allen case, see: Muse 1961, 60-61; Smith 1996, 152; Turner 2001, 257. The 18th Amendment is mentioned earlier in the decision, attributing the failure of prohibition to the lack of flexibility in the Volstead Act, i.e. the legislation enacted to enforce the 18th Amendment. Hutcheson makes the case that the courts now had greater flexibility in enforcing the segregation mandate, and should use it, see: Turner 2001, footnote 85 on page 257.

105 Cooper v. Aaron, 358 U.S. 1 (1958); Bartley 1999, 274; Klarman 2004, 329; Turner 2001, footnote 93 on page 262; Muse 1961, 68-69; Wilkinson 1979, 92 The Supreme Court wanted to make a ruling in Cooper before the beginning of the 1958 school year and heard arguments on the case on September 11, 1958, and decided the case the next day, September 12, when the judgment was announced. The full opinion was announced on September 29, 1958.
public education. African American schools were not affected as Almond only closed schools that were under court order to desegregate, and no white pupils were seeking access to African American schools. So, while the desegregation battle reached its climax in Virginia, Prince Edward County, due to delay after delay in the courts, went on about business as usual, that is with segregated and fully functional public schools. Soon, however, the tables would turn. 106

The NAACP appealed Hutcheson’s 1965 deadline December 1958. 107 Meanwhile, in the rest of Old Dominion, support for massive resistance, once the threat of closing schools became a reality, started to decline. Public sentiment shifted from a determination to preserve segregated schools at all costs to a willingness to preserve the public schools. This led groups that previously had supported the fight against desegregation, or that had stayed silent on the matter, to mobilize against the state’s policy. One such group was leading Virginia businessmen, who began putting pressure on Governor Almond to abandon massive resistance and reopen the closed schools. Apparently closed schools were perceived as bad for business. 108 Although moderates on the segregation issue steadily gained ground, proponents of massive resistance still held sway in Virginia politics. Governor Almond attempted to preserve his image as a champion for segregation while simultaneously not committing too deeply to a policy that was becoming increasingly unpopular, and was at odds with the federal judiciary. 109 While still publicly denouncing the Brown decision, Almond initiated a test case in September 1958 in the Supreme Court of Appeals of Virginia, Harrison v. Day, to have this court decide the legality of those massive resistance laws that allowed the governor to close public schools. 110

There is some uncertainty as to Governor Almond’s motives in initiating the test case. He might have attempted to delay a ruling in federal court which would have struck down Virginia’s school closure laws. It is common for federal courts to allow state courts to rule on a matter before them, thus allowing an issue to

109 Bartley 1999, 322-323; Muse 1961, 80-84
firstly be tested under the state constitution. Another reason, one that is deemed more likely, is that instead of being a delay strategy, the test case was a form of exit strategy. If segregation was to be struck down, it would be received with less indignation if the decision came from a Virginia court, than from a federal court. Almond could then wash his hands of massive resistance, and send the policy to its death at the hands of the state court, without admitting defeat to the federal judiciary, thus not giving up his states’ rights credentials.111 David J. Mays, a Virginia lawyer who was involved in devising the state’s response to Brown, supports this theory. In his diary he writes that the Harrison case was initiated to get the state’s leading political organization, of which the Governor was a member, “off the hook.”112

On October 27, 1958, the likelihood that a federal court might strike down the school closures initiated by Governor Almond increased, when the school closures in Norfolk were challenged in a federal District Court. The case took the name James v. Almond.113 The case is described by Benjamin Muse, a Virginia journalist critical of massive resistance, as “a rare instance of a momentous litigation involving the question of school segregation in which neither the NAACP nor any Negro had a direct part.”114

The case was indeed initiated by white school children and their parents, and supported by the Norfolk Committee for Public Schools, an organization committed to preserving public education while not taking sides on the segregation issue. James v. Almond was a case that correlated with the shift in

111 Bartley 1999, 323; Muse 1961, 84-85; Turner 2001, 262-263, footnote 94 on pages 262-263. Bartley and Turner only mention the “exit strategy”. Muse mentions both strategies, but deems the “exit strategy” “more important in Almond’s design”, Muse 1961, 85. The strategies did not, of course, exclude one another, however, the filing of the test case did place the school closure legislation at risk of being struck down by the Virginia Supreme Court of Appeals and exposed the rest of the massive resistance legislation to scrutiny by the state court, Muse 1961, 84, see also Turner 2001, footnote 94 on pages 262-263. Muse argues that Almond might have known that the school closure laws eventually would be struck down by federal court, and thus would have been more inclined to devise an acceptable way out of resistance than to attempt to prolong the battle by delaying the proceedings in federal court, Muse 1961, 84-85, see also Leidholt 1997, 104.


public discourse on the issue of public education and race. The matter at hand was no longer if a small number of African Americans should be allowed to attend school with white children, i.e. token desegregation, but rather if the state should be allowed to close schools to avoid desegregation, leaving thousands of white children without a public education. As the governor had closed the schools after a federal court had ordered them to desegregate, any schools that were opened would therefore be desegregated. This was the “rare instance” Muse referred to. White Virginians had been forced into a position where they had to choose between segregation and public schools, and many chose the latter.\footnote{Hershman 1998, 114-115; Lassiter & Lewis 1998, 7; Leidholt 1997, 104; Lewis 1998, 85, 92; Turner 2001, 262-263; Muse 1961, 86, 93-94}

Virginia’s highest court ruled in \textit{Harrison v. Day} on January 19, which incidentally was a state holiday in Virginia.\footnote{The holiday was Lee Jackson Day, see: Leidholt 1997, 114; Muse 1961, 122-123.} The state of Virginia, represented by the state Attorney General Albertis Harrison, made the case that the Virginia constitution did not prohibit the state from closing public schools. Harrison argued that \textit{Brown} had not only invalidated section 140 of the Virginia constitution, which stipulated that white and black school children must attend different schools, but also other sections of the state constitution.\footnote{\textit{Harrison v. Day}, 200 Va. 439, 106 S.E. 2d. 636 (1959), 643, 650.} Harrison argued that \textit{Brown} had also invalidated section 129. This section of the state constitution required the General Assembly to “establish and maintain an efficient system of public free schools throughout the State.”\footnote{\textit{Harrison v. Day}, 200 Va. 439, 106 S.E. 2d. 636 (1959), 643.} Harrison argued that the state constitution implied that \textit{efficient} schools were also \textit{segregated} schools, thus connecting sections 140 and 129 of the Virginia constitution together. When section 140 was invalidated, section 129 was also invalidated, argued Harrison, and the Virginia constitution no longer placed any responsibility in regards to public education on the state. Five of the seven justices of the Virginia Supreme Court of Appeals did not share Harrison’s belief that the state constitution no longer required the state to support a public school system. The state constitution, held the majority of justices, required Virginia to
operate schools, “including those in which the pupils of both races are compelled to be enrolled and taught together, however unfortunate that situation may be.”

While the ruling in effect eviscerated Virginia’s massive resistance legislation, the justices still paid homage to the doctrine of states’ rights. The state court found that it was well within the power of a state to close down its schools. The Virginia constitution, however, did not afford the governor the power to close down a local community’s schools. This was a matter for the community in questions to decide. Under the Virginia constitution local schools were under the control of the local authorities, and any law placing public schools under the authority of the Governor were therefore in violation of the state constitution.

If Governor Almond had hoped for a decision by the state court that would end the school closures in a way that would be acceptable to a most Virginians, surely Harrison v. Day was that decision. The decision contained plenty of fiery rhetoric condemning the Supreme Court and its Brown ruling. Even the method applied in striking down the school closure acts dealt with the matter from a strictly Virginian perspective. Having ruled that the school closure acts violated the Virginia state Constitution, the Supreme Court of Appeals declined to consider whether the acts also were in conflict with the Federal Constitution.

This meant that the schools had to be reopened, not because the massive resistance acts violated the Federal Constitution as interpreted by the Supreme Court, but because they violated Virginia’s own Constitution as interpreted by the Virginia Supreme Court of Appeals.

On the same day as the Virginia Supreme Court of Appeals handed down its ruling in Harrison v. Day, the U.S. District Court in Norfolk also handed down its ruling in James v. Almond. It was a mere coincidence that both rulings were handed down on the same day. The federal District Court had been ready to rule in James v. Almond as early as around Christmas 1958. Still the District Court delayed issuing its ruling until the state court could rule on the school closures.

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120 Harrison v. Day, 200 Va. 439, 106 S.E. 2d. 636 (1959), 648. Section 133 of the Virginia constitution placed local schools under the authority of local school boards. For more on the Virginia school closure laws, see: Leidholt 1997, 8; Muse 1961, 45.
This was a coordinated effort between the two courts. It would appear that the importance of having the state’s own court rule before, or at least simultaneously as, the federal court was not lost on the involved judges.

One can certainly say that the federal District Court that decided *James v. Almond* did not share the Virginia court’s sympathy for states’ rights. Citing the fairly recent Supreme Court ruling in *Cooper v. Aaron* as precedent, the District Court interpreted federal powers broadly. Any ambiguities as to whether a state might try to circumvent the effects of the *Brown* decision “were effectively removed when… the Supreme Court handed down its opinion in *Cooper v. Aaron*.” If state laws conflicted with the Federal Constitution as interpreted by the Supreme Court, the District Court held that “state legislation must yield.” And the District Court found that Virginia legislation indeed did conflict with the Supreme Courts reading of the Constitution in *Brown*.

The District Court did concede that the field of public education chiefly was a state matter. *Brown*, of course, had removed from the states the possibility of providing public education on a segregated basis. Moreover, the District Court found that as long as a state had opted to provide public education for its citizens, “no one public school or grade in Virginia may be closed to avoid the effect of the law of the land as interpreted by the Supreme Court.” The District Court found no constitutional objections, other than a possible conflict with the state constitution, to a state abandoning its public schools altogether. Nevertheless, if a state abandoned its public school system and left public education to the local communities, these communities were bound by the same principle. If a community operated a school system, it could not close a single school whilst others remain in operation. If a state or a local community wished to close its

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123 James Hershman attributes the district court’s delay to the advice of state senator Edward Breeden, while Alexander Leidholt writes that the delay was the result of a discussion between Federal District Judge Walter Hoffman and John Eggleston, the Chief Justice of the Virginia Supreme Court of Appeal. While Hershman’s and Leidholt’s accounts vary, they are not mutually exclusive, and both accounts cite the importance of a coordinated effort in regards to the timing of the rulings in *Harrison v. Day* and *James v. Almond*. Hershman 1998, 115; Leidholt 1997, 112.
schools, it had to close all of its schools. As we shall see, one county took this to heart.

2.3 End of massive resistance in Virginia, the Perrow plan

The January 19 rulings in *Harrison v. Day* and *James v. Almond* made Virginia’s massive resistance policy impermissible under state and federal law. On January 20, the day following the two court rulings striking down the school closures, the Governor gave a speech on radio. In the speech, which one scholar calls “the most overtly racist public remarks by a Virginia governor in over fifty years” Almond pledges to keep on resisting. 128 “I will not yield to that which I know to be wrong and will destroy every rational semblance of public education for thousands of the children of Virginia.” 129

While the speech was welcomed by massive resistance hardliners, like Senator Byrd and his followers, political pressure to abandon massive resistance was increasing. In late January, 1959, a full-page advertisement was published in the *Ledger-Dispatch*, a Norfolk newspaper; the advertisement had been paid for, and signed by, 100 local businessmen. In the advertisement the signers proclaim that “[w]hile we would strongly prefer to have segregated schools… [t]he abandonment of our public school system is, in our opinion, unthinkable…” 130

This reflected an attitude in a growing number of Virginians at the time, to sacrifice the state’s public schools to maintain segregation was too costly. Memberships in organizations dedicated to preserving public schools in Virginia had soared and opposition to massive resistance was becoming more vocal. 131

130 A Public Petition to the Norfolk City Council, accessed from [http://www.lib.odu.edu/specialcollections/schooldesegregation/scripts/item.php?obj_id=0000001912](http://www.lib.odu.edu/specialcollections/schooldesegregation/scripts/item.php?obj_id=0000001912) on January 20, 2012; Bartley 1999, 322; Hershman 1998, 117, endnote 29 on page 220; Leidholdt 1997, 118, endnote 1 on page 158; Muse 1961, 129. The webpage [http://www.lib.odu.edu/specialcollections/schooldesegregation/timeline.htm](http://www.lib.odu.edu/specialcollections/schooldesegregation/timeline.htm) accessed on January 20, 2012, states that the newspaper in which the advertisement was published was the *Virginia Pilot*. Both the webpage on which the document is located and Bartley state that the newspaper was the *Ledger-Dispatch*. Both aforementioned web pages and Muse state that the date the advertisement was published as January 26, 1959, while Bartley states the date as January 25, 1959. Hershman states that the newspaper was the *Norfolk Virginian-Pilot*, and that the date was January 27, Liedholdt states that the newspaper was the *Virginiian-Pilot* and the date 26 January. 131 Bartley 1999, 322; Hershman 1998, 104-119; Muse 1961, 129.
Pressured to keep on fighting from hardliners and to abandon massive resistance from moderates, Almond found himself in a difficult position. He could either side with the hardliners, and entrench himself deeper in resistance, or he could side with the moderates, and end massive resistance. Almond’s January 20 speech strongly indicated that he would keep on resisting the federal judiciary’s orders to desegregate the public schools. A few days after his defiant speech, on January 25, Almond called the Virginia General Assembly to a special session to decide what course Virginia should take following *Harrison v. Day* and *James v. Almond*. The session was scheduled for January 28.\(^{132}\)

Contrary to his promise given in his speech of January 20, Governor Almond did yield, and urged the General Assembly to abandon massive resistance in his address to the state legislature during the special session. Benjamin Muse wrote of the governor’s speech: “the hard-pressed Governor called the legislature and the state back to sanity.”\(^{133}\) Almond proposed several short term measures to comply with the recent court rulings that had struck down the school closures, and a long term plan for how Virginia would respond to desegregation. The short term measures Almond called upon the legislature to adopt were a repeal of the laws that closed schools under court order to desegregate, which had been struck down by the courts. He also called for other changes in Virginia’s legislation.

The tuition grant program that under the massive resistance policy had been intended to deprive public schools under orders to desegregate of funding, while channeling the funds to private segregated schools, was to be revised. The tuition grant program had been found unconstitutional by the courts, and Almond wanted to create a similar program that did not take away funds from the public schools and made no reference to race. This would comply with the court decisions striking down the massive resistance tuition grant program. The Governor also wanted to repeal the state’s compulsory attendance laws. These measures would allow parents not wishing their children to attend public schools with African American pupils to withdraw their children from public schools.


\(^{133}\) Muse 1961, 131-132.
Those choosing not to attend desegregated public schools would still be entitled financial support if they attended private schools.\footnote{Bartley 1997, 324; Bonastia 2012, 93; Ely 1976, 123-124; Hershman 1998, 120; Leidholt 1997, 120; Muse 1961, 134.}

To find a long term solution, Almond proposed that a commission should be established to study the situation and provide suggestions on how to best meet the challenges posed by desegregation. The General Assembly approved all of Almonds proposals, and 40 members of the assembly were appointed to the commission, which was titled “the Commission on Education”. The commission was headed by State Senator Mosby G. Perrow, and is often referred to as the “Perrow Commission.”\footnote{Bartley 1997, 324-325; Ely 1976, 128; Hershman 1998, 120-122; Leidholt 1997, 120; Muse 1961, 134, 161-162.}

The Perrow Commission submitted its report to the Governor on March 31, 1959. The commission’s recommendation, called “the Perrow Plan”, stated its objective as “to avoid integration and preserve our public schools.” The commission recognizes that the only way to maintain segregation following the court rulings that struck down the Virginia school closures was for the state to abandon all schools. The Perrow Plan proposes measures that “permit the preservation of public free schools and implement flexible local autonomy”.\footnote{Report of the Commission on Education to the Governor of Virginia, 1959, 8, accessed from \url{http://www2.vcdh.virginia.edu/civilrightsvdocs/PerrowCommissionReport.pdf} on December 4, 2013.}

The measures proposed in the Perrow Plan were designed to “bring about the greatest possible freedom of choice for each locality and each individual.”\footnote{Report of the Commission on Education to the Governor of Virginia, 1959, 8, accessed from \url{http://www2.vcdh.virginia.edu/civilrightsvdocs/PerrowCommissionReport.pdf} on December 4, 2013. Italics in original text.}

These measures included economic support, called “scholarships” to anyone wishing to attend a nonsectarian private school. Such funds were only available to pupils in schools under orders to desegregate under the massive resistance legislation. Unlike the massive resistance tuition laws, the Perrow Plan made no mention of race or segregation. The plan also suggested that the state support transportation to private schools. It was recommended that the compulsory
attendance laws be restored, but that a locality could avoid implementing them.\textsuperscript{138}

The Perrow Commission also considered several approaches to ensure “that any locality which finds itself in an intolerable position with respect to its public schools should be permitted to turn to other methods of providing educational opportunities for its children.”\textsuperscript{139} The “other methods” were the abandonment of desegregated schools. Here the commission was faced with the challenge of finding a way for local communities to have the option to close desegregated schools, while maintaining state support for schools in other localities. The court rulings that struck down the massive resistance laws made it clear that the state had to operate all public schools or none at all. The commission rejected several schemes to remove Virginia from the field of public education. These schemes involved providing only minimum funds, making public education a completely local matter with no state involvement, or abandoning public education in the state altogether.\textsuperscript{140}

The commission found that the solution already existed in the Virginia constitution. The state constitution only required that the state provide very limited funding for public schools. For the school year of 1957-1958 these funds amounted to 9 million dollars. For that same year, however, the state had spent more than 65 million on public schools. The commission also finds that the state funds exceeding the minimum sum required by the state constitution were granted to localities that generated funds through local taxation for their local public schools.\textsuperscript{141} In regards to local funds for public education, the Perrow Commission states the following: “There is no State or Federal constitutional

requirement that a county, city or town raise or appropriate any money for public schools.”

The commission recommended that the General Assembly adopt some minor changes to the state laws to further enhance a local governing body’s control over local school funds. The Perrow Commission proclaimed that “[u]nder these recommendation no child will be forced to attend a racially mixed school.”

The recommendations of the Perrow Plan met with resistance in the General Assembly during the spring of 1959 from massive resistance hardliners. In the end, the moderates in the legislature won the day, and the Perrow Plan became law. This was now Virginia’s new approach to desegregation. Massive Resistance was over, and had been replaced with the “freedom of choice” scheme. Localities could now choose if they would fund their public schools. If they did, the state would support that public school system. If a community opted to provide no funding for their public schools, the state would only provide the minimum funds required by the state constitution.

Prince Edward County’s “Own Unhappy Way”

The Prince Edward County story, however, is in many respects detached from the larger story of massive resistance. That county proceeded on a basis of complete resistance before any such attitude had been assumed by Virginia. It took steps to close its public schools before school-closing laws were seriously considered by the state; and when, three years later, schools were closed by the state in Warren County, Charlottesville and Norfolk, Prince Edward’s public schools were still in full operation. When at last the peremptory desegregation order came in Prince Edward, the state’s school-closing laws had been invalidated and all closed schools elsewhere had been reopened. Prince Edward County’s public schools were closed in 1959 by action of its own Board of Supervisors… Prince Edward went its own unhappy way.146

This is how Benjamin Muse describes the peculiar case of Prince Edward County in his book Virginia’s Massive Resistance. The “peremptory desegregation order” was handed by the Fourth Circuit Court of Appeals when it ruled in Ulysses Allen et al. v. County School Board of Prince Edward County VA., et al.147

The Ulysses Allen case came before the federal Circuit Court after the NAACP appealed federal District Judge Sterling Hutcheson’s August 4, 1958, ruling in Eva Allen et al. v. County School Board of Prince Edward County, VA., etc et al., which set 1965 as the deadline for desegregation in Prince Edward. In its ruling of May 5, 1959, in Ulysses Allen, the federal Circuit Court took its cue from the Supreme Court’s ruling of September the previous year in Cooper v. Aaron. The Circuit Court condemned the 1965 deadline and county school boards refusal to make any desegregation plans. The Circuit Court found that the situation in Prince Edward required that “this Court to give specific directions as to what must be done.”148 The Circuit Court ordered the district court to accept no more delays from Prince Edward County and that desegregation was to commence in September that same year.149

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147 Ulysses Allen et al. v. County School Board of Prince Edward County VA., et al., 266 F. 2d 507 (1959).
148 Ulysses Allen et al. v. County School Board of Prince Edward County VA., et al., 266 F. 2d 507 (1959), unpagitated. See also Bonastia 2012, 99.
Following the federal Circuit Court’s ruling in *Ulysses Allen*, judge Hutcheson announced his retirement. This prompted the NAACP to delay the litigation until a new judge could be appointed. Although the delay meant that the county was not under direct court order to desegregate, as such an order would have to be handed down by the District Court, Prince Edward County officials nevertheless decided to close down the county’s public schools.  

On June 26, 1959, Prince Edward’s Board of Supervisors adopted a budget with no funds allocated for public schools, cutting the county tax rate accordingly.

Following the county supervisors’ initial threat of school closures in response to *Brown II* in 1955, white Prince Edwardians had founded a private organization, The Prince Edward Educational Corporation, to set up private schools for white students. When the public school system was shut down in the summer of 1959, the organization, now called the Prince Edward School Foundation, sprang into action.  

In the fall of 1959 two events encapsulates the situation in Prince Edward County. The first was the September 10 opening of the white private schools, The Prince Edward Academy, enrolling 93 percent of white students who would have attended public schools.  

The second was the October 5 decision of the county school board to change the locks on all public schools, to which “No Trespassing” signs were attached. Prince Edward County’s “unconscionable experimentation with ignorance” had begun, leaving more than 1,700 Prince Edwardian black school children locked out from the county’s public schools.

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150 If the NAACP had initiated proceedings to desegregate before Hutcheson’s position could be filled, the matter would have moved to state courts, which the NAACP felt were hostile, see: Bonastia 2012, 99; Ely, 1976, 195; Muse 1961, 149; Smith 1996, 193-194; Turner 2001, 266, 369. Turner also mentions that an additional reason for NAACP’s delay was related to difficulties finding plaintiffs, see Turner 2001, 369.


152 Murell 1998, at 134, cites the date of the opening of the private schools in Prince Edward County as September 5, 1959, while Muse 1961, at 150, cites the date as September 10, Muse is referred to in Turner 2001, at 267, footnote, 102, where again the September 10 is mentioned. Encyclopedia Virginia cites the date as September 10, [http://encyclopediavirginia.org/moton_school_strike_and_prince_edward_county_school_closing](http://encyclopediavirginia.org/moton_school_strike_and_prince_edward_county_school_closing) accessed on March 25, 2013.


154 Bonastia 2012, 130; Muse 1961, 152; Murell 1998, 151; Turner 2001, footnote 6 on page 270, 312, 313. 1,475 white children attended the Prince Edward Academy, 1,562 white children had been enrolled in the public schools, Muse 1961, 151. Writing in April 1960, federal District Judge Oren Lewis cites the number of black children deprived of “any formal education” as...
Initially the Prince Edward School Foundation did not accept funds from the state, as they could have under the laws passed following the collapse of statewide massive resistance in Virginia. The Foundation felt accepting state funds might have been detrimental to the school closures if they were challenged in court. The Foundation’s frugality and caution only lasted the first school year, 1959-1960. The following year many Prince Edwardian students attending private schools could apply for, and did receive, state sponsored tuition grants. The county also began subsidizing the private schools with grants and tax credits for donations to the private schools.155 White Prince Edwardian segregationist did not hesitate to use state funds when they attempted to set up private schools for African American students. The Southside School, Inc. was founded late in 1959 by a group of white Prince Edwardians closely connected to the Prince Edward School Foundation.156

Prince Edwardian segregationists felt that it would be beneficial to open private schools for African American children. They were aware that locking 1,700 black school children out from their schools would bring negative press to the county. Moreover, it was thought that it would be safe for the white schools to accept state funds if such funds were used by black private schools. In December 1959 Oliver Hill of the NAACP urged black Prince Edwardians to ignore the offer of their own private school. African American participation in the private school scheme would provide credibility to the effort to circumvent desegregation, and would hurt the NAACP’s legal efforts to reopen public schools on a desegregated basis. The NAACP was also aware that the school closures and the fact that 1,700 black children were bereft of any formal education, in fact was beneficial to the effort to end segregation. In effect, accepting the segregated private schools would be an acceptance of Jim Crow

approximately 1,800. Of the white school children Judge Lewis writes: “Nearly all of the 1,500 white children have been attending private schools, operated by the Prince Edward School Foundation,” see: Eva Allen, et al. v. County School Board of Prince Edward County, etc., et al. Civil Action No. 1333 (1961), 5.

155 Eva Allen, et al. v. County School Board of Prince Edward County, etc., et al. Civil Action No. 1333 (1961), 10-12; Bonastia 2012, 110; Muse 1961, 152-153; Turner 2001, footnote 105 on page 370. 1,327 white students attending the private schools received state and county grants during the 1960-1961 school year, while only five black students received similar grants to attend schools in other Virginia localities, Eva Allen, et al. v. County School Board of Prince Edward County, etc., et al. Civil Action No. 1333 (1961), 11-12; Bonastia 2012, 110.

education, albeit privatized. Of 1700 black school children, only one applied to the Southside schools.\textsuperscript{157}

The NAACP resumed its efforts in the courts in spring of 1960, when they returned to the federal District Court, now presided over by Judge Oren Lewis, who had replaced Judge Sterling Hutcheson. On April 22, 1960, the Prince Edward school board was ordered by Lewis’s federal District Court to desegregate the county’s public schools, thus putting the final nail in the coffin of Judge Hutcheson’s 1965 deadline. By then, however, there were no public schools to desegregate. The \textit{Eva Allen} case was supplemented to reflect the new situation, state officials and the Prince Edward Board of Supervisors were added to the list of defendants, and the complaint that the school closures were unlawful was added to the case.\textsuperscript{158}

3.1 Ruling of the District Court in the \textit{Eva Allen} Case

The addition of the new cause of action, i.e. the school closures, and new defendants further delayed the litigation, and it was not until August 25, 1961, that Judge Lewis’s federal District Court ruled in the \textit{Eva Allen} case. In his ruling, Judge Lewis looks to \textit{Harrison v. Day}, the case that struck down the 1958-1959 school closures in Virginia, for guidance on state law. In \textit{Harrison v. Day} the Virginia high court held that Section 129 of the Virginia constitution “requires the state to maintain an efficient system of public free schools throughout the State.” Lewis finds that “it would appear from this decision” that the Virginia high court had ruled that under state law, schools had to be operated in Prince Edward.\textsuperscript{159}

County and state officials countered this by arguing that the state is not involved in the operation of public schools, but rather that this is solely the responsibility of local communities’ school boards. Furthermore, the defendants argued that other Virginia laws than Section 129 of the state constitution were of relevance.


\textsuperscript{158} The Federal District Court’s April 22 order in not part of the source material used here. The content of that order and information about the supplemental complaint can be found here: \textit{Eva Allen, et al. v. County School Board of Prince Edward County, etc., et al.} Civil Action No. 1333 (1961), 4; Bonastia 2012, 99; Muse 1961, 153-154; Turner 2001, 369.

\textsuperscript{159} \textit{Eva Allen, et al. v. County School Board of Prince Edward County, etc., et al.} Civil Action No. 1333 (1961), 6.
to the school closures and that these laws should also be interpreted. The
NAACP, however, makes the argument that state law is irrelevant, as school
closures are unlawful under the Fourteenth Amendment to the Constitution. Here
reference is made to the other case that struck down the previous school closures
in Virginia, *James v. Almond*. In this case a federal District Court felt it was
“unnecessary” to review Virginia law and held that no school, or grade, could be
closed as long as the state was involved in providing public education, as this
was a violation of the federal Constitution.160

Judge Lewis found the technicalities behind who was responsible for public
education in the county irrelevant. The question that must be answered in the
case, according to Lewis, was: “Can the public schools, heretofore maintained in
Prince Edward County, be closed in order to avoid the racial discrimination
prohibited by the Fourteenth Amendment?”161

Lewis did not, however, want to answer his own question, at least not yet, and
agreed with the defendants that there were other state laws relevant to the case
than the section of the state constitution considered in *Harrison v. Day*. These
laws were still open to interpretation. Citing the Supreme Court’s 1959 ruling in
*Harrison v. NAACP*, Lewis found that federal abstention as established by the
Supreme Court in 1941 in *Railroad Commission v. Pullman* was “the proper
procedure.”162 A “Pullman abstention” is the legal doctrine that a federal court
should abstain from ruling on state law if that law is unclear and open to
interpretation, even if the federal court has jurisdiction in the case. The purpose
of the abstention is to allow the state to clarify the law in question, and possibly
remedy any potential violation of the federal Constitution. ”This now well-
established procedure” the Supreme Court stated in *Harrison v. NAACP*, “is
aimed at the avoidance of unnecessary interference by the federal courts with
proper and validly administered state concerns, a course so essential to the

160 Eva Allen, et al. v. County School Board of Prince Edward County, etc., et al. Civil Action No.
1333 (1961), 6-8.
161 Eva Allen, et al. v. County School Board of Prince Edward County, etc., et al. Civil Action No.
1333 (1961), 8.
162 Eva Allen, et al. v. County School Board of Prince Edward County, etc., et al. Civil Action No.
312 U.S. 496 (1941).
balanced working of our federal system.” Lewis ruled that he would abstain from deciding the legality of the school closures under federal law, until the Supreme Court of Appeals of Virginia has ruled on the matter under state law.

Judge Lewis found little ambiguity in Section 22-115.29 of the Code of Virginia, i.e. the law that provided state tuition grants for students attending private schools. The stated purpose of the grants was to give everyone a choice between private and public education. The grants were “available for pupils of legal school age who are eligible to attend the public schools in the county, city or town in which the parent… is a bona fide resident.” Lewis thus concluded that the existence of a public school system in the locality where the recipient of the grant lives is a requirement for receiving the funds. If no public schools were operated in a locality, Lewis found it “plain and unequivocal” that the state grants would be unavailable to residents there. Needless to say, the state funds that had been used to support the private schools in Prince Edward were invalidated.

On July 18, 1960 the Price Edward County Board of Supervisors adopted ordinances providing county support for the private schools in the form of tuition grants and tax credits on donations to private schools. Judge Lewis did not feel that the county ordinances were “facially unlawful,” but rather that “they become unlawful when used to accomplish an unlawful end, (the perpetuation of segregated schooling in Prince Edward County).”

Lewis arrives at this conclusion by citing precedents established by the Supreme Court in Cooper v. Aaron and the more recent ruling in Gomillion v. Lighfoot, decided in 1960. Cooper had established that Brown was identical to the law

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165 Eva Allen, et al. v. County School Board of Prince Edward County, etc., et al. Civil Action No. 1333 (1961), 16, 17.
of the land, and as such had to be obeyed by the states. The *Gomillion* case concerned an act of the Alabama legislature that gerrymandered the borders of the city of Tuskegee for no other reason than to exclude black voters. Although the drawing of municipal boundaries is a state matter, seemingly placing the Alabama act outside the realm of federal jurisdiction, the Court struck down the act as unconstitutional. The Court found that the act was unconstitutional because it pursued an unconstitutional end, the deprivation of African Americans voting rights guaranteed by the Fifteenth Amendment.\footnote{Eva Allen, et al. *et al.* v. County School Board of Prince Edward County, etc., *et al.* Civil Action No. 1333 (1961), 14-15; *Gomillion v. Lightfoot* 364 U.S. 339 (1960); Klarman 2004, 340. Although *Gomillion* concerns state action, Judge Lewis holds that Prince Edward County is also bound by the precedent, *Eva Allen, et al. v. County School Board of Prince Edward County, etc., *et al.* Civil Action No. 1333 (1961), footnote 1 on page 14.}

On the matter of county support of the private schools, Lewis determines that since the county had abandoned public education altogether, the subsidies provided to the private schools became a means to an unconstitutional end. The purpose of the county subsidies were, according to Lewis, “to aid segregated schooling in Prince Edward County”, which in turn “to say the least, is circumventing a constitutionally protected right.” County officials were ordered by Lewis to halt all county support of private education while the county’s public school system was shut down.\footnote{Eva Allen, et al. *et al.* v. County School Board of Prince Edward County, etc., *et al.* Civil Action No. 1333 (1961), 15-16.}

Thus the first round in the battle over Prince Edward’s public school ended in a draw of sorts. Prince Edward County was not ordered to reopen its public schools, for the time being, but the matter was handed over to the state courts, a victory for the county officials. The NAACP, however, did not leave Lewis’s courtroom empty handed, as the private schools were prohibited from receiving any subsidies in the form of tuition grants or tax breaks from public funds.

Although Judge Lewis abstained, and did not strike down the closures, his opinion represents a stark departure from Judge Hutcheson’s sympathetic handling of Prince Edward County. It is suggested that Hutcheson harbored personal feelings that made him inclined to side with the county.\footnote{Sterling Hutcheson is described as a native of Virginia’s Southside who supported segregation and was closely connected to Senator Byrd. His unwillingness to implement desegregation in Prince Edward is explained with a personal feeling that desegregation was wrong combined with}
sources and literature used in this study reveals nothing about Oren Lewis’s personal feelings, his actions as a federal judge strongly suggest that he was not biased against African Americans. His decision to abstain did delay the proceedings, but his opinions strongly hinted that he would strike down the closures following the adjudication of the case under state law. The decision to abstain, it is argued here, was a formality Lewis had to go through before he could order the schools to reopen.

The evidence for this claim is found in his statement that the fundamental question in the case was whether public schools could “be closed in order to avoid the racial discrimination prohibited by the Fourteenth Amendment?” Lewis did strike down the county’s tuition grants and tax credits although they were “facially unlawful.” Citing Cooper and Gomillion Lewis finds that the subsidies become unconstitutional when they are used for “an unlawful end.” Lewis was therefore prepared to strike down an act that was otherwise permissible, if the purpose was to achieve an unconstitutional end. The school closures were obviously an attempt to avoid desegregation, and for that reason it seems highly likely that Lewis would have struck them down. The only thing that stood in his way was the unresolved state laws. If the case would proceed in a normal fashion, the state courts would rule on the relevant questions, and the case would then return to Lewis. This case would not proceed in a normal fashion.

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a feeling that Prince Edward would resist any such order, including measures aimed at closing their schools, Bonastia 2012, 74; Ely 1976, 194-195; Turner 2001, 256; Murell 1998, 143. Benjamin Muse writes of Hutcheson more as of a moderate, stating that “[h]is personal views on race segregation were not definitely known even to his friends”. Muse argues that Hutcheson’s in his rulings attempted to avoid “issuing an order the immediate effects of which would be patently disastrous.” Muse 1961, 58-59.
4 “The Loose Thinking That Goes On In This Day”

Following the federal District Court’s August 25, 1961, ruling in Eva Allen, et al. v. County School Board of Prince Edward County, etc., et al the NAACP on September 8, 1961, petitioned the Virginia Supreme Court of Appeals to order Prince Edward County reopen their public schools. The case now went under the name of Leslie Francis Griffin et al. v. Board of Supervisors of Prince Edward County. The case concerned whether or not the Board of Supervisors was required to appropriate funds for the School Board for the operation of public schools in Prince Edward. In their brief dated December 1, 1961, the county officials made their counter arguments to the NAACP’s assertion that the closures violated Virginia law.

In their brief, the county officials identifies five distinct questions raised in the Leslie Francis Griffin case. The two first questions concern the lawfulness of the school closures under Virginia law. The first question asks whether state law places any requirement on the county’s Board of Supervisors to levy local taxes and provide funds for the county’s public schools, or if this matter is for the board to decide. The second question asks what the Virginia constitution requires of the General Assembly in regards to public education. Furthermore, in question number five, the brief asks whether a court can order the Board of Supervisors to levy taxes and make these funds available to the public school system. The questions numbered three and four responds to the matter of the legality of the school closures under the federal constitution. Question three concerns if the Constitution requires either the state or the county to levy taxes and provide funds for a public school system. The fourth question asks whether a motive behind a measure places any restrictions on that measure under the Constitution.

173 Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince Edward County, Supreme Court of Appeals of Virginia, Leslie Francis Griffin et al. v. Board of Supervisors of Prince Edward County, Record No. 5390, 151.
174 Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince Edward County, Supreme Court of Appeals of Virginia, Leslie Francis Griffin et al. v. Board of Supervisors of Prince Edward County, Record No. 5390, 8-11.
4.1 Arguments under State Law

The legality of the school closures under state law, of course, was the matter the federal District Court had deferred to the state courts to decide. As expected, the county officials argued for a reading of the Virginia constitution and statutes that placed no requirement of raising and providing funds on either state, or county officials. The county officials argue that nothing in the state constitution regarding public education relates to a county’s Board of Supervisors. Section 129 of the Virginia constitution only requires that Virginia’s General Assembly, i.e. the state legislature, “shall establish and maintain an efficient system of public free schools throughout the State.” Nothing is said in this section about what a county must, or must not do.

Having found that Section 129 has no relevance to the county board, the county officials determine that Section 136 of the state constitution, headlined “Local school taxes” is the relevant section of the state constitution in the question of the county’s obligation, or lack thereof, to provide public education. Employing a battery of arguments ranging from precedents and documents pertaining to Virginia’s constitutional convention of 1901-1902, to the entry for the word “authorized” in Webster’s Twentieth Century Dictionary, the county officials arrive at their reading of Section 136. The law gives the local school board a discretionary power in regards to taxation for public schools. In other words, the local school board has a choice whether to levy a tax or not.

When it comes to the obligations of the General Assembly, the county officials acknowledge that Section 129 seemingly places some burden on the General Assembly in regards to public education. The brief, however, does not concede that the text is clear on the matter, stating that the section “requires careful

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175 Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince Edward County, Supreme Court of Appeals of Virginia, Leslie Francis Griffin et al. v. Board of Supervisors of Prince Edward County, Record No. 5390, 153.
176 Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince Edward County, Supreme Court of Appeals of Virginia, Leslie Francis Griffin et al. v. Board of Supervisors of Prince Edward County, Record No. 5390, 12-13.
177 Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince Edward County, Supreme Court of Appeals of Virginia, Leslie Francis Griffin et al. v. Board of Supervisors of Prince Edward County, Record No. 5390, 16.
178 Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince Edward County, Supreme Court of Appeals of Virginia, Leslie Francis Griffin et al. v. Board of Supervisors of Prince Edward County, Record No. 5390, 12-42.
The county officials hold that the extent to which the state must be involved in public education is open for discussion. The answer, according to the county officials, is that the state is obliged to provide some funding to public education, but that these mandatory funds were limited. The nature of these mandatory funds are defined, according to the county officials, in other sections of the state constitution that explicitly used wording that expressed compulsion; any other funding was at the discretion of the General Assembly. These funds, specified in Section 135 of the Virginia constitution, are very specific, and as they had been paid out to the Prince Edward school board. Evidently these mandatory funds were not enough to support a localities school system. Any state funds above the mandatory funds were only provided to localities that participated in the operation of public schools. Therefore as far as the county officials were concerned, the state of Virginia had fulfilled its obligations under its constitution.

The final question addressed in the brief that related to state law was also the final, i.e. the fifth, question addressed in the brief. This question concerned whether a court could grant the writ that the NAACP had requested of the court to order the county Board of Supervisors to resume funding Prince Edward’s public schools. The writ in question was a writ of mandamus, which courts can issue to order a person, or group of persons such as a county Board of Supervisors, to take, or abstain from taking, a certain action.

Citing several cases from the Supreme Court of Appeals of Virginia and from the legal dictionary *American Jurisprudence*, the brief explores the nature of mandamus. The writ, it is argued, can only be issued by a court to order a government official, or agency, to act if the law governing that official or agency

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179 Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince Edward County. Supreme Court of Appeals of Virginia, *Leslie Francis Griffin et al. v. Board of Supervisors of Prince Edward County*, Record No. 5390, 44.

180 Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince Edward County. Supreme Court of Appeals of Virginia, *Leslie Francis Griffin et al. v. Board of Supervisors of Prince Edward County*, Record No. 5390, 48.

181 Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince Edward County. Supreme Court of Appeals of Virginia, *Leslie Francis Griffin et al. v. Board of Supervisors of Prince Edward County*, Record No. 5390, 42-64.

proscribes a ministerial duty, as opposed to a discretionary duty. In other words, if the law stipulates that a certain duty is to be fulfilled, and it is not, the court can use mandamus to ensure that the duty is fulfilled, as required by law. On the other hand, if the law provides for a discretionary duty, i.e. an optional duty, a court cannot issue a writ of mandamus. The county officials argue that the Virginia constitution empowers the local Boards of Supervisors with a discretionary duty in regards to taxes for public schools. As such, the writ of mandamus cannot be issued to force that the board levy such a tax.\textsuperscript{183}

The county officials find another reason why a court does not have the power to order that a tax be levied for public schools. This argument applies to any court, state or federal. Whether the Virginia constitution requires that the General Assembly provide funds for public schools or not, the county officials argue that the state constitution on this matter is not “self-executing.” In other words, the state constitution does not say how public schools should be operated in Virginia. If the state constitution, contrary to the county officials’ belief, requires that public schools be operated, some other legislative action by the legislature would still be required to implement this requirement.\textsuperscript{184}

The claim that the state constitution is not self-executing in regards to public education is supported by several citations to cases by the Virginia high court and \textit{American Jurisprudence}.\textsuperscript{185} The follow-up question is then what a court of law can do if a legislature has neglected to take the appropriate action to fulfill its constitutional duty.\textsuperscript{186}

Not surprisingly, the county officials find that the answer to this question is that a court can do nothing. A constitutional court can strike down acts of a legislative body it finds to be unconstitutional, but it may not order a legislature to create

\textsuperscript{183}Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince Edward County. Supreme Court of Appeals of Virginia, Leslie Francis Griffin et al. v. Board of Supervisors of Prince Edward County, Record No. 5390, 124-126.

\textsuperscript{184}Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince Edward County. Supreme Court of Appeals of Virginia, Leslie Francis Griffin et al. v. Board of Supervisors of Prince Edward County, Record No. 5390, 126.

\textsuperscript{185}Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince Edward County. Supreme Court of Appeals of Virginia, Leslie Francis Griffin et al. v. Board of Supervisors of Prince Edward County, Record No. 5390, 126-127.

\textsuperscript{186}Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince Edward County. Supreme Court of Appeals of Virginia, Leslie Francis Griffin et al. v. Board of Supervisors of Prince Edward County, Record No. 5390, 128.
law. This becomes even more accentuated when it comes to matters of taxation. “The taxing power” the brief states “is peculiarly and exclusively a legislative power.” Here the county officials attempt to insulate the General Assembly and the Prince Edward Board of Supervisors, which is also said to be a legislative body, from judicial action by evoking “fundamental and underlying principles which characterize our republican system of government.”

The “fundamental and underlying principles” referred to were, of course, the separation of powers. Taxation belonged solely to the legislature, and no court had the power to levy a tax. Citing several opinions from the Virginia high court, the Virginia bill of rights, and American Jurisprudence, and another encyclopedia titled Corpus Juris Secundum, the county officials make their arguments. The perhaps most colorful quote comes the West Virginia Supreme Court, which reasonably was not an authority on either federal questions, or questions under Virginia law. Nevertheless, the neighboring state’s high court’s decision is quoted “as a forceful expression of an ancient doctrine, which is too frequently in these modern days overlooked or not referred to”. The quote refers to the Framers of the federal Constitution, as well as to Locke and Montesquieu, and holds that the separation of powers “may be termed the cornerstone of our system.”

In order to argue that this principle also apply to the federal judiciary, the brief cites a case from the U.S. Court of Appeals for the Sixth Circuit, decided in 1910, which in turn cites five Supreme Court precedents. The brief adds one Supreme

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187 Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince Edward County. Supreme Court of Appeals of Virginia, Leslie Francis Griffin et al. v. Board of Supervisors of Prince Edward County, Record No. 5390, 135.
188 Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince Edward County. Supreme Court of Appeals of Virginia, Leslie Francis Griffin et al. v. Board of Supervisors of Prince Edward County, Record No. 5390, 131, 137.
189 Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince Edward County. Supreme Court of Appeals of Virginia, Leslie Francis Griffin et al. v. Board of Supervisors of Prince Edward County, Record No. 5390, 133.
190 Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince Edward County. Supreme Court of Appeals of Virginia, Leslie Francis Griffin et al. v. Board of Supervisors of Prince Edward County, Record No. 5390, 131-145.
191 Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince Edward County. Supreme Court of Appeals of Virginia, Leslie Francis Griffin et al. v. Board of Supervisors of Prince Edward County, Record No. 5390, 133.
192 Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince Edward County. Supreme Court of Appeals of Virginia, Leslie Francis Griffin et al. v. Board of Supervisors of Prince Edward County, Record No. 5390, 133.
Court precedent, handed down in 1915 to this list. Having made their argument in regards to the legislative nature of taxation and the separation of powers, the county officials conclude this portion of the brief by stating:

It is, therefore, submitted that both under the State and the Federal law the judicial power does not extend to compel a legislative body to levy a tax even under a mandate of the State Constitution if that mandate is not self-executing.\textsuperscript{193}

4.2 Arguments under Federal Law

Having responded to the legal challenge to the school closures under state law, the county officials had argued the question passed on to the state court by Judge Lewis’s District Court. The NAACP had only challenged the closures under state law in their petition to the Virginia Supreme Court of Appeals, and they had not raised any federal questions with that court.\textsuperscript{194} The NAACP only wanted the state court to rule on the case under state law, and then return to the federal District Court for a ruling on the case under the federal Constitution. The county officials, on the other hand, had an incentive to raise questions under federal law in the state court. A ruling on the federal questions by the state court might have closed the door for further proceedings in the District Court. The issue of how federal questions should be raised is state courts following a federal abstention would prove to be an important and reoccurring issue in the legal battle over Prince Edward’s schools. The county officials’ brief therefore argues the case under the federal Constitution.\textsuperscript{195}

\textsuperscript{193} Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince Edward County. Supreme Court of Appeals of Virginia, \textit{Leslie Francis Griffin et al. v. Board of Supervisors of Prince Edward County}, Record No. 5390, 148.

\textsuperscript{194} Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince Edward County. Supreme Court of Appeals of Virginia, \textit{Leslie Francis Griffin et al. v. Board of Supervisors of Prince Edward County}, Record No. 5390, 10-11; \textit{Leslie Francis Griffin et al. v. Board of Supervisors of Prince Edward County}, 203 Va. 321 (1962), 323.

\textsuperscript{195} Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince Edward County. Supreme Court of Appeals of Virginia, \textit{Leslie Francis Griffin et al. v. Board of Supervisors of Prince Edward County}, Record No. 5390, 126. The NAACP’s reasoning to not raise federal questions with the Virginia court is revealed in their brief to the Supreme Court, Papers of Allan G. Donn, Brief for Petitioners, Cocheysse J. Griffin, etc., et al., U.S. Supreme Court, \textit{Cocheysse J. Griffin, etc., et al. v. County School Board of Prince Edward County et al.} No. 592, footnote 1 on page 2, 8-9. At the time of this stage of the litigation in the Prince Edward school closure cases, it was unclear how federal questions should be treated following a federal abstention. The county officials had good reason to believe that the litigation could have been halted in the District Court, if federal questions were ruled on by the state court, something that the NAACP wanted to avoid, for more see: \textit{England v. Medical Examiners}, 375 U.S. 411 (1964).
Apart from the question of taxation as a purely legislative function, which concerned both state and federal courts, the brief raises two federal questions. Each of these questions is examined in separate chapters. The first of these two chapters is titled “THE CONSTITUTION OF THE UNITED STATES DOES NOT REQUIRE THE MAINTENANCE OF PUBLIC SCHOOLS.”

4.2.1 Arguments against Public Education as a Constitutional Requirement

This chapter, numbered chapter IV, begins with an introduction in the form of an initial survey briefly explaining the county officials’ view on the case law governing public education. Citing four Supreme Court cases, one federal District Court case, and a law review article written by law professor Robert McKay, the brief makes the argument that it is a “truism” that nothing in the federal Constitution requires that public education must be provided. With the exception of the case *Gum Long v. Rice* which is only mentioned, these cases are referenced by quoting short passages that mention the constitutional nature of education.

The initial salvo of citations seems to indicate that the county officials’ argument is sound. On closer examination, however, the method of argumentation used here is subject to criticism. A very convincing quote is provided by the Supreme Court’s 1899 ruling in *Cumming v. County Board of Regents.* Here the Court stated that “the education of the people in schools maintained by state taxation is a matter belonging to the respective states.” *Cumming* was a case decided during what Klarman calls “the Plessy era,” a period spanning from 1895 to 1910, during which the Court gave constitutional sanction to Jim Crow laws and

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196 Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince Edward County, Supreme Court of Appeals of Virginia, *Leslie Francis Griffin et al. v. Board of Supervisors of Prince Edward County,* Record No. 5390, 2, 64.

197 Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince Edward County, Supreme Court of Appeals of Virginia, *Leslie Francis Griffin et al. v. Board of Supervisors of Prince Edward County,* Record No. 5390, 64-65; *Cumming v. County Board of Education,* 175 U.S. 528 (1899); *Gong Long v. Rice,* 275 U.S. 78 (1927); *Hamilton v. Regents,* 293 U.S. 245 (1934); *Pierce v. Society of Sisters,* 268 U.S. 510 (1925); *Hall v. St. Helena Parish School Board,* 197 F. Supp. 649, (1961); McKay 1956. A case by the Virginia Supreme Court of Appeals, *Flory v. Smith,* 145 Va. 164 (1926) is also cited. As this is a state court decision it will not be included in the analysis presented here.

198 *Cumming v. County Board of Education,* 175 U.S. 528 (1899).

199 *Cumming v. County Board of Education,* 175 U.S. 528 (1899), 545; Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince Edward County. Supreme Court of Appeals of Virginia, *Leslie Francis Griffin et al. v. Board of Supervisors of Prince Edward County,* Record No. 5390, 64.
practices. In Cumming the Supreme Court ruled on the constitutionality of racial inequality in education, in fact, this was the only case during the Plessy era that dealt with Jim Crow education. In this case the court did not rule on the constitutionality of “separate but equal” education, but rather on “separate and unequal” education. The Court held that a Georgia county’s action closings a black high school, the only one in Georgia, while the white high school remained open, did not violate the constitution.

Considering that the county officials later in their brief accept that “Plessy v. Ferguson... is now only historic interest,” it does seem disingenuous to quote Cumming. If Brown struck down segregated schools, even if they were equal, certainly Cumming had been overturned. On the other hand, although the substance in Cumming had been invalidated, the section quoted might still be relevant. On closer examination of the text in Cumming it is revealed that Justice Harlan, who wrote the opinion, did not stop writing where the county officials stopped quoting, the text goes on to state:

...and any interference on the part of Federal authority with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land. We have here no such case to be determined...

Harlan suggests that there is a condition attached to state sovereignty over education, namely that no constitutional rights have been violated. Although the passage quoted in the brief certainly does suggest that education is a state matter, the state, according to Cumming, still has to abide by constitutional limitations on their power.

The next Supreme Court case cited is Hamilton v. Regents, decided in 1934. Here the brief cites the following passage, “[t]he privilege of attending the University as a student comes not from federal sources but is given by the

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200 Klarman 2004, 8-60.
201 Klarman 9, 27-28, 45.
203 Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince Edward County, Supreme Court of Appeals of Virginia, Leslie Francis Griffin et al. v. Board of Supervisors of Prince Edward County, Record No. 5390, 81.
204 Cumming v. County Board of Education, 175 U.S. 528 (1899), 545.
state. “206 This is a misquotation; the word “privilege” should be surrounded by quotations marks. Although a seemingly small mistake, the quotation marks are not without significance, especially when considered in the context provided by the full opinion. In Hamilton a group of students challenged a law that required that all “able-bodied male students who are citizens of the United States” at the University of California take a course in military science and tactics. 207 The students argued that the law violated their rights under the Fourteenth Amendment to the Constitution. In the quoted passage, the Court is referring to the Privileges and Immunities Clause of the Fourteenth Amendment, which protects certain rights of U.S. citizens from state action. 208 This clause had been very narrowly interpreted by the Supreme Court in the Slaughter-House Cases decided in 1873, where a distinction between citizenship with a state and the national government was found. 209 The clause only protected a very limited set of national rights, and in Hamilton the Court found that the clause did not protect the students from a law requiring that they partake in a military training course at the states university. 210

The problem with the omission of the quotation marks, and perhaps more importantly, the lack of the general context of the case, is that the brief suggests that Hamilton implies that the Constitution is wholly silent on the matter of attendance at university. While this may very well be true, the quoted passage from Hamilton, and indeed the entire case makes no such claim, but rather only concludes that no such right is found in the Privileges and Immunities Clause. It

206 Hamilton v. Regents, 293 U.S. 245 (1934), 261; Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince Edward County, Supreme Court of Appeals of Virginia, Leslie Francis Griffin et al. v. Board of Supervisors of Prince Edward County, Record No. 5390, 64.


208 The U.S. Constitution contains two “Privileges and Immunities” clauses, one found in Amendment XIV, and one found in Article IV. In Hamilton v. Regents the clause referred to was the one found in Amendment XIV. In his article “The Fourteenth Amendment Privileges or Immunities Clause”, J. Harvie Wilkinson III writes: “[t]here is a ‘Privileges or Immunities’ Clause and there is a ‘Privileges and Immunities’ Clause. “ Wilkinson goes on to differentiate between the two by pointing out that the wording used in the former clause is found in Amendment XIV, while the latter is found in Article IV, see: Wilkinson 1989, 43. It is, however, common practice to refer to both clauses as the Privileges and Immunities Clause, see: Hall, Wiecek, Finkelman 1991, 237; Lively 1992, 67-69; Rakove 2009, 258, 260; Wilkinson 1979, 14-15.


is interesting to note that no more than two pages later in the brief, the Privileges and Immunities Clause of the Fourteenth Amendment is discussed in the brief.\textsuperscript{211}

The final Supreme Court case quoted in the introduction to the federal arguments is \textit{Pierce v. Society Sisters}.\textsuperscript{212} The brief correctly depicts \textit{Pierce} as an important case protecting liberty. It is also correctly asserted that the Court here struck down an Oregon law, which banned all private schools and made it a requirement that all school children in the state attend public schools. This \textit{Lochner}-era case belongs to a set of cases that expanded the protection against state action found in the Fourteenth Amendment to cover not just business interest, but also civil liberties.\textsuperscript{213}

In regards to this case the county officials make the argument that since the Supreme Court in \textit{Pierce} prohibited a state from banning private schools; it would be inconsistent to demand that a state operate public schools. This is a curious argumentation. For the Court to find that the Fourteenth Amendments contains protections against state action requiring all school children to attend state schools, and in the process banning all private schools, is a quite different matter than the existence, or absence, of a constitutional requirement in regards to public education. The substance of \textit{Pierce} is that the Fourteenth Amendment protects certain liberties from state action, which makes it a curious case to find

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\textsuperscript{211} \textit{Hamilton v. Regents} also denied the students’ petition by reviewing other clauses in the Fourteenth Amendment, but the case makes no assertions as to constitutionality, or lack thereof, of education. \\
\textsuperscript{213} Hall, Wiecek, Finkelman 1991, 417-418; Provizer 2005, 338. The \textit{Lochner}-era spanned from 1905-1937. During this time the Court adopted a trend of protecting business from government, state and federal, regulation. In order to strike down laws regulating various aspects of business, such as regulation of child labor, minimum wage laws, and laws limiting maximum working hours, the Court found a constitutional right to liberty of contract in the Due Process Clauses of the Fifth and Fourteenth Amendment. The Court used a doctrine called “substantive due process” to create an unwritten right to liberty of contract in the Due Process Clauses. The \textit{Lochner}-era came to an end in 1937, when the Court abandoned protection of liberty of contract in the case \textit{West Coast Hotel Co. v. Parrish}, 300 U.S. 379 (1937) where the Court upheld a state minimum wage law. By then the Court had come into conflict with the F. D. Roosevelt administration, due to string of Court decisions that struck down New Deal programs. President Roosevelt attempted to “pack” the Court by adding several new Justices, which would have made up a new majority on the Court. Faced with a hostile president that enjoyed great popularity, the Court backed down. The era takes its name from the 1905 Court ruling in \textit{Lochner v. New York}, 198 U.S. 45 (1905). For more on the \textit{Lochner}-era, see: Friedman 1984, 186-188; Klarmann 2004, 23, 81; Lively, 95-96; McCloskey 2005, 97, 100-108; Swenson 2005, 440-441; Peterson 2005, 206. For more on the end of the \textit{Lochner}-era, see: McCloskey 2005, 117-118; Jenkins 2003, 96. For more on the Court and the New Deal and the court-packing plan, see: Friedman1984, 188-189; Jenkins 2003, 94-97; McCloskey 2005, 110-113, 117-120.
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in a brief arguing for broad state powers, albeit the power to not provide public education. Nevertheless, the county officials find in *Pierce* a protection for private education, which they feel weakens any argument for a right to public education.\(^{214}\)

The brief also mentions, but does not quote, the 1927 Supreme Court case *Gong Lum v. Rice*.\(^{215}\) This case was according to legal scholars Hall, Wiecek, and Finkleman “the last major Supreme Court decision to uphold segregated schools.”\(^{216}\) The case involves a Mississippi Chinese American who wanted his daughter to attend a white public school. Citing both *Plessy* and *Cumming* the Court upheld the Mississippi authorities’ right to assign students as they wish. Surely this case had lost all relevance following the *Brown* decision.

One final quote is provided in the introduction to chapter IV of the brief to drive home the point of the argument that the absence of a constitutional requirement on education is, indeed, a “truism”.\(^{217}\) The quoted passage is a sentence from the article *With All Deliberate Speed* written by Professor Robert McKay and published in the New York University Law Review in 1956. “It can scarcely be doubted” writes McKay, “that the United States Constitution does not require that a state afford any education to its children.”\(^{218}\) It would appear that Professor McKay supports the claim made by the county officials. On the other hand, when the sentence is placed in its proper context, it can scarcely be doubted that Professor McKay’s view on the matter is not limited to one sentence, as the paragraph goes on to state:

> Accordingly, those states which have repealed their requirements that the state furnish education would argue preliminary that they have thus avoided the impact of the decision in the School Segregation Cases. And so they have—if there is a complete relinquishment of state support for public education. However, no state has done that.

\(^{214}\) Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince Edward County, Supreme Court of Appeals of Virginia, *Leslie Francis Griffin et al. v. Board of Supervisors of Prince Edward County*, Record No. 5390, 65.

\(^{215}\) *Gong Lum v. Rice* 175 U.S. 78 (1927).

\(^{216}\) Hall, Wiecek, Finkleman 1991, 447.

\(^{217}\) Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince Edward County, Supreme Court of Appeals of Virginia, *Leslie Francis Griffin et al. v. Board of Supervisors of Prince Edward County*, Record No. 5390, 65.

\(^{218}\) Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince Edward County, Supreme Court of Appeals of Virginia, *Leslie Francis Griffin et al. v. Board of Supervisors of Prince Edward County*, Record No. 5390, 65. Originally in, McKay 1956, 1043.
Public support for education in the spring of 1956 continues pursuant to statutory provisions in every county of every state. The question, then, is whether a discontinuance of public support for one school district or for one college or for any single unit of a school system would be valid. The answer would appear to be negative.\(^{219}\)

McKay’s line of reasoning is therefore not that a state has complete discretion when it comes to public education. Rather, McKay maintains that if a state chooses to provide public education, it must do so evenly all over the state, or abandon its support for public education altogether.\(^{220}\)

The authors of the brief can certainly be accused of cherry picking quotes and taking passages out of context. Yet it should be remembered that the purpose of this section of the brief is to argue for an absence of a constitutional requirement in regards to public education. In spite of the poor quotation practices employed by the county officials, it is indeed a truism that the text of the Constitution does not mention a right to education. Furthermore, the Supreme Court would not hand down a ruling that explicitly settled this matter until 1973, when they in *San Antonio Independent School District v. Rodriguez* ruled that education was, indeed, not a fundamental right protected by the Constitution.\(^{221}\)

The question at hand here was thus constitutional virgin land, and the authors of the brief simply cited those few references to education they could find. In the final court case cited in this section of the brief, the county officials highlight the absence of case law dealing with the constitutionality of education.

Following the listing of quotes and citations supporting the argument that there exists a constitutional principle specifying that education is not guaranteed by the law of the land; the county officials make this somewhat scornful statement:

\(^{219}\) McKay 1956, 1043.
\(^{220}\) In his article, McKay does pay special attention to Virginia’s Gray plan, which was very similar to the Perrow plan, which made the Prince Edward school closures possible under Virginia law. Compared to other southern states’ school closing schemes, which relied on direct state action in the closing of public schools under orders to desegregate, McKay calls the Gray plan “a much more complicated plan… which raises somewhat different questions”. What makes the Gray plan different, according to McKay, is that the plan does not rely on state action, but rather allows local communities to make the decide if public schools should be operated or not. McKay still finds several constitutional problems with the Gray plan. It is interesting to note that McKay, writing in 1956 predicts that Prince Edward County would close its public schools, if state law provided for this course of action, see McKay 1956, 1042-1049.
Yet in the loose thinking that goes on in this day, there are those who suggest that under the Constitution of the United States a child has a right to demand of a State that it furnish him education in a free public school.\textsuperscript{222}

The brief goes on to state that the U.S. District Court for the Eastern District of Louisiana had invited arguments on the constitutionality of education from the parties, as well as from “the several Attorney Generals [sic]”\textsuperscript{223} in the case \textit{Hall v. St. Helena Parish School Board}.\textsuperscript{224} When the district court, in late August of 1961, ruled in the case, it did not, however, rule on this matter, which is duly noted in the brief.\textsuperscript{225}

Having laid out their claim that the Constitution contains nothing to suggest a requirement that the states provide public education, the county officials conclude the introduction by stating that if such a requirement were to exist, it would be found in the Fourteenth Amendment to the Constitution.\textsuperscript{226} The county officials proceed with a detailed examination of the Fourteenth Amendment.\textsuperscript{227}

The Fourteenth Amendment would indeed be where a potential constitutional right to education would be located. The amendment was adopted in 1868.

\textsuperscript{222} Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince Edward County, Supreme Court of Appeals of Virginia, \textit{Leslie Francis Griffin et al. v. Board of Supervisors of Prince Edward County}, Record No. 5390, 65.

\textsuperscript{223} Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince Edward County, Supreme Court of Appeals of Virginia, \textit{Leslie Francis Griffin et al. v. Board of Supervisors of Prince Edward County}, Record No. 5390, 65. The reference to “the several Attorney Generals” refers to the Louisiana attorney general, Jack Gremillion; several assistant and special assistant attorneys general of Louisiana; the district attorney for St. Helena Parish, Louisiana; a deputy attorney general of Georgia; and two deputy attorneys general of Alabama. The United States presented arguments in the case as amicus curiae, represented by an U.S. attorney and a representative for U.S. Department of Justice. List of officials involved in the case and referred to as “the several attorney generals [sic],” see: \textit{Hall v. St. Helena Parish School Board}, 197 F. Supp. 649 (1961), 650.


\textsuperscript{225} Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince Edward County. Supreme Court of Appeals of Virginia, \textit{Leslie Francis Griffin et al. v. Board of Supervisors of Prince Edward County}, Record No. 5390, 65; \textit{Hall v. St. Helena Parish School Board}, 197 F. Supp. 649, (1961). In \textit{Hall} the federal district court struck down a Louisiana scheme that allowed for schools under desegregation orders to be closed, and then to resume operating, on a segregated basis, as private schools, see Ibid. 651, 653-655. The district court struck down the Louisiana law, stating that: “This is not the moment in history for a state to experiment with ignorance. When it does, it must expect close scrutiny of the experiment.” Ibid. 659.

\textsuperscript{226} Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince Edward County, Supreme Court of Appeals of Virginia, \textit{Leslie Francis Griffin et al. v. Board of Supervisors of Prince Edward County}, Record No. 5390, 65.

\textsuperscript{227} Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince Edward County. Supreme Court of Appeals of Virginia, \textit{Leslie Francis Griffin et al. v. Board of Supervisors of Prince Edward County}, Record No. 5390, 66.
following the Civil War to protect the rights of newly freed slaves from the actions of southern state legislatures. As such, the amendment contains language that suggests significant restrictions on state action aimed at limiting the rights of individual citizens. It should be noted that prior to the adoption of the amendment, most of the protections against government action found in the Constitution only applied to the federal government, and not the states. Over time the Supreme Court’s interpretation of the Fourteenth Amendment has placed significant restrictions on the states, including the prohibition on segregated schools found in the Brown ruling.228

Of the five sections of the Fourteenth Amendment, only the first is examined in the county officials’ brief. This choice is by no means taking anything out of context, as section one by far is the most important of the five sections. Section one is divided into three clauses, which all are examined by the county officials separately.229

The first of these provisions examined is the aforementioned Privileges and Immunities Clause.230 Here the brief correctly asserts that the Supreme Court in the Slaughter-House Cases interpreted the Privileges and Immunities Clause very narrowly. Similarly to many other provisions of the Constitution, the text in the first section of the Fourteenth Amendment is open to interpretation, and its actual meaning has been shaped, and is still being shaped, by a long line of Supreme Court decisions. The first time the Supreme Court interpreted the Fourteenth Amendment was in 1873, when they handed down their ruling in the Slaughter-House Cases.231

228 Beeman 2010, 77; Foner 2002, 251-261; Friedman 1984, 186, 192; McCloskey 2005, 76-78; Rakov 2009, 258-262. See also Barron v. Baltimore, 32 U.S. 7 Peters 243 (1833), a pre-Civil War case, where the Supreme Court ruled that the Bill of Rights only applied to the federal government, not the states.

229 U.S. Constitution, Amendment XIV, Section 1 contains clauses that have been interpreted by the Supreme Court to protect the rights of individual citizens from state action, for example by incorporating most of the Bill of Rights into the Fourteenth Amendment, i.e. expanding the protections found in the first eight amendments to include protection from state action, see: Beeman 2010, 75-78; Friedman 1984, 186-193; McCloskey 2005, 76-78, 163; Rakove 2009, 258-269.

230 “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States”.

The issue at hand in the *Slaughter-House Cases* was a statute passed by the Louisiana legislature which required that all slaughtering in the city of New Orleans take place within the premises of one company, in effect creating a monopoly in regards to the facilities used by butchers in the city. The creation of the monopoly, the state argued, was well within the limits of the state’s police powers. The police power allows a state to enact regulations to promote the welfare of the people, in the case of the slaughter-houses, by enacting a health regulation. The butchers, however, argued that the recently adopted Fourteenth Amendment protected citizens from state action that violated their rights. The monopoly, the butchers argued, violated, among other things, the privileges and immunities guaranteed to them by the Fourteenth Amendment.232

In a 5-4 decision, the Supreme Court rejected the butchers’ claim and upheld the Louisiana statute. The court majority’s reading of the amendment found that there exists two types of citizenships; one of the United States, and one of the “the State wherein they [the citizens] reside.” The Court held that the privileges and immunities protected by the Fourteenth Amendment referred to rights granted under the national citizenship. It was these rights that no state could violate, whereas any rights falling within the domain of state citizenship enjoyed no federal protection.233

In the *Slaughter-House Cases*, the Supreme Court found that the rights granted under a national citizenship, and protected by the amendment, were very limited in scope. While the Court declined to provide a detailed definition of the privileges and immunities covered by the amendment, it did mention some examples. Among the rights mentioned was the “right to use the navigable waters of the United States”, “the right of free access to its seaports”, and the” the privilege of the writ of habeas corpus”. Of the rights listed in the Bill of

Rights, only the portion of the First Amendment guaranteeing the “right to peaceably assemble and petition for redress of grievances” is mentioned. 234

The Court thus determined that citizenship in the United States is twofold; one is a citizen of the national government, and of the state where one is residing. Moreover, the Fourteenth Amendment was read as only protecting rights belonging to that of the national citizenship, which in turn was deemed as only protecting a very limited set of rights. Rights which the Court titled “fundamental” were held to “[lie] within the constitutional and legislative power of the States, and without that of the Federal government.”235 This interpretation of the Fourteenth Amendment, in effect, made the Privileges and Immunities Clause ineffective. As it provided a constitutional protection against state action for only a limited set of rights, states were free to infringe on most rights if they so choose. The Slaughter-House Cases, in the words of legal scholar Donald Lively, “so eviscerated the meaning of the privileges and immunities clause that it remains an insignificant factor in Fourteenth Amendment jurisprudence.”236

In their brief, the county officials correctly notes that the Slaughter-House Cases had set a precedent that limited the rights protected by the Privileges and Immunities Clause to such a degree, that it in essence had become inconsequential in constitutional law. Furthermore, the county officials, again quite correctly, asserts that the precedent set in the Slaughter-House Cases in regards to the Privileges and Immunities Clause had not been overturned, and as such still was valid.237

Having concluded that the Privileges and Immunities Clause provided no constitutional protection for public education, the brief moves on to the Equal

234 The Slaughter-House Cases, 83 U.S. 36, 16 Wall. (1872), 78-80. Other rights are mentioned in the decision, but these are similar in nature. For more on the Court’s view on the “privileges and immunities” protected in the Fourteenth Amendment, see: Lively 1992, 69-70; McCloskey 2005, 79; Wilkinson 1979, 14.

235 The Slaughter-House Cases, 83 U.S. 36, 16 Wall. (1872), 76-77.


237 Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince Edward County, Supreme Court of Appeals of Virginia, Leslie Francis Griffin et al. v. Board of Supervisors of Prince Edward County, Record No. 5390, 66-67.
Protection Clause. Here the county officials were faced with a far more potent clause than the Privileges and Immunities Clause. Admittedly the Court had interpreted the Equal Protection Clause to allow segregation under the “separate but equal” doctrine established in *Plessy v. Ferguson* in 1896. Unlike the precedent set in the *Slaughter-House Cases*, however, the Court had come to reconsider its earlier interpretations of the Equal Protection Clause. It was on this clause the Court had relied on when it struck down school segregation in *Brown v. Board of Education*. In *Brown* the Court found that “[s]eparate educational facilities are inherently unequal” and that the African American school children were “deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.”

The Equal Protection Clause clearly demands a certain degree of equality from state action. The county officials reconciled the Prince Edward school closures with the Equal Protection Clause by arguing that the state of Virginia was not operating public schools, but left this matter to local communities. Although the state was involved in the funding of public schools, these funds were made available to all communities uniformly, and on the same condition, namely that that locality operate public schools. Therefore, Virginia law treated Prince Edward County in the same way it treated all other localities in the state, and “the requirements of the Equal Protection clause are met.”

With apparent confidence that the Virginia laws were in accordance with the Equal Protection Clause, the brief cites the Supreme Court’s ruling of 1886 in *Yick Wo v. Hopkins*. In *Yick Wo* the Court had struck down a San Francisco city ordinance that regulated the city’s laundries. The ordinance itself was not discriminatory; it only required that laundries operated in wooden buildings, i.e. the vast majority of laundries, obtain a permit from the city. What the Court

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238 "No State shall… deny to any person within its jurisdiction the equal protection of the laws.”
242 Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince Edward County. Supreme Court of Appeals of Virginia, *Leslie Francis Griffin et al. v. Board of Supervisors of Prince Edward County*, Record No. 5390, 67-68.
found to be unconstitutional was the way the regulation was administered. While all white applicants received the permit, all Chinese applicants were denied. This, said the Court, was a violation of the Equal Protection Clause, as the law was used for discriminatory purposes.\footnote{Yick Wo v. Hopkins, 118 U.S. 356 (1886); Hall, Wiecek, Finkleman 1991, 261, 263-264; Klarman 2004, 35-36, 41-42.}

By referring to \textit{Yick Wo} the county officials seem to suggest that the Virginia laws in question, and their administration, met the standards of the Equal Protection Clause. Yet clearly public education in Virginia was not provided on an equal basis, children residing in Prince Edward received none, while those residing anywhere else in Old Dominion had access to public schools. The county officials confront this fact by arguing that the Equal Protection Clause permits discrepancies in the laws of various localities within a state.

To support this claim, the brief cites two Supreme Court decisions. In the first case cited, \textit{Hayes v. Missouri}, decided in 1887, the Court upheld a Missouri law that approved different standards in jury selection in cities with 100,000 or more inhabitants.\footnote{Hayes v. Missouri, 120 U.S. 68 (1887).} The second Supreme Court case cited was the more recent \textit{Salsburg v. Maryland}, handed down in 1954. Here the Court reviewed a Maryland law that concerned evidence gathered unlawfully in “certain gambling misdemeanors”. The rule in Maryland at the time stated that evidence obtained illegally was not admissible in a court of law. The law under review in \textit{Salsburg}, however, stated that one county, Anne Arundel County, was exempt from this rule. The Court found no violation of the Equal Protection Clause, stating that “[t]erritorial uniformity is not a constitutional requisite.”\footnote{Salsburg v. Maryland, 346 U.S. 545 (1954), 552.} The previous sentence is quoted and highlighted with italics in the county officials’ brief.\footnote{Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince Edward County. Supreme Court of Appeals of Virginia, Leslie Francis Griffin et al. v. Board of Supervisors of Prince Edward County, Record No. 5390, 69-70.}

Having made the argument that the Equal Protection Clause does provide for some variations within a jurisdiction, the county officials admit that school closures, as a direct result of state action, was not permissible under the clause. “We do not contend”, writes the county officials, “that a State might operate
public schools in one locality... and at the same time furnish no schools for children in another locality.\textsuperscript{248}

The brief goes on to acknowledge two cases handed down by federal District Courts where school closures, or legislation allowing school closures, were struck down. The first case cited was \textit{Hall v. St. Helena Parish School Board} decided in 1961. In this case a district court struck down Louisiana legislation which allowed public schools under orders to desegregate to be closed and replaced by private schools. The second case was \textit{James v. Almond}, where the 1959 school closures in Virginia were held to be unconstitutional. In both cases, however, the closures were the result of state action. Moreover, only schools ordered to desegregate were targeted by the legislation at hand in the cases. The county officials maintain that the laws involved in the Prince Edward closures “has nothing to do with race. These provisions are uniform and equal for the State as a whole.”\textsuperscript{249} The argument is also made that there is no violation of equal protection within the county, as all schools were closed, not just those ordered to desegregate.\textsuperscript{250}

Finally the brief asserts that the Equal Protection Clause does not guarantee a right to public schools. \textit{James v. Almond} is cited, where the district court held that Virginia was not obliged to provide public education, only that if it was provided, it had to be on an equal basis. Although the district court that ruled in \textit{Hall v. St. Helena Parish School Board} had not dealt with the constitutionality of public education, the county officials did find that the issue is mentioned, albeit not in the opinion. In a footnote in the U.S. Justice Department’s \textit{amicus} brief, it is stated that “the equal protection clause does not compel public schools...” The

\textsuperscript{248} Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince Edward County. Supreme Court of Appeals of Virginia, \textit{Leslie Francis Griffin et al. v. Board of Supervisors of Prince Edward County}, Record No. 5390, 70-71.
\textsuperscript{249} Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince Edward County. Supreme Court of Appeals of Virginia, \textit{Leslie Francis Griffin et al. v. Board of Supervisors of Prince Edward County}, Record No. 5390, 73.
\textsuperscript{250} Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince Edward County. Supreme Court of Appeals of Virginia, \textit{Leslie Francis Griffin et al. v. Board of Supervisors of Prince Edward County}, Record No. 5390, 70-72.
county officials take this as evidence that “it appears to be perfectly clear that the equal protection clause does not compel the operations of public schools”. 251

Having laid out their arguments for the lack of a constitutional right to education in both the Privileges and Immunities Clause and the Equal Protection Clause the county officials move on to the Due Process Clause of the Fourteenth Amendment. 252 This clause would indeed be the most likely provision of the Fourteenth Amendment where a right to education would be found. The importance of the Due Process Clause is recognized by the county officials, who state that “[c]onideration can never accurately be given to the Fourteenth Amendment or any of its clauses without remembering the language [of the Due Process Clause]”. 253

The reason the county officials felt that the Due Process Clause was of such importance was “the ever growing and ever changing nature of our concept of due process of law.” More precisely, the county officials were concerned with “the manner in which the concept of substantive due process has crept into our law”. 254

According to the principle of substantive due process, the Due Process Clauses of the Fifth and Fourteenth Amendments can be read to guarantee more than a process when a government, state or federal, deprives a person of “life, liberty, or property”. The principle that the Due Process Clauses guarantees a process, which is called procedural due process, does not restrict governments from depriving certain rights, as long as a process, such as a trial, is provided. Substantive due process, on the other hand, holds that certain fundamental rights are protected by the Constitution regardless of the procedures provided preceding

251 Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince Edward County, Supreme Court of Appeals of Virginia, Leslie Francis Griffin et al. v. Board of Supervisors of Prince Edward County, Record No. 5390, 73-74.
252 “nor shall any State deprive any person of life, liberty, or property, without due process of law”. Amendment V also contains a Due Process Clause, which applies to the federal government.
253 Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince Edward County, Supreme Court of Appeals of Virginia, Leslie Francis Griffin et al. v. Board of Supervisors of Prince Edward County, Record No. 5390, 74.
254 Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince Edward County, Supreme Court of Appeals of Virginia, Leslie Francis Griffin et al. v. Board of Supervisors of Prince Edward County, Record No. 5390, 74.
the deprivation of these rights. What these fundamental rights protected from
government action were, were left at the Supreme Court’s discretion.\textsuperscript{255}

The obvious concern of the county officials was that the Court would find public
education to be a constitutional right according to the concept of substantive due
process. In their brief, the county officials do not criticize substantive due
process directly. They even note that the rights protected by the clause shift over
time, citing the Supreme Court’s ruling in \textit{Wolf v. Colorado}.\textsuperscript{256} The county
officials instead take the position that although substantive due process may
indeed be used to find new rights protected from state action, it can only limit
state action, but not “impose on the State a mandatory requirement that it take
some affirmative action.”\textsuperscript{257}

Here the brief turns to \textit{Meyer v. Nebraska}, a case where the Supreme Court in
1923 used substantive due process to strike down a Nebraska law prohibiting the
teaching of any other language than English to children in both public and
private schools.\textsuperscript{258} The Court found that the Nebraska law violated the liberty
protected in the Due Process Clause. In \textit{Meyer} the Supreme Court found that the
word “liberty” protected, among other rights, a right “to acquire useful
knowledge”. The brief makes note of this, agreeing that a state may not take
actions that prohibits this right. This limitation on state action, however, does not
impose on a state a duty to furnish education.\textsuperscript{259}

\textit{Brown v. Board of Education} did not strike down school segregation under the
Due Process Clause, but rather found the practice to be unconstitutional under
the Equal Protection Clause. There is, however, a connection between school
segregation and the Due Process Clause, which the county officials discuss in

\textsuperscript{255} Chemerinsky 1998-1999, 1501-1534; Rakove2009, 260, 262; Swenson 2005, 440-441;
\textsuperscript{256} Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince
Edward County, Supreme Court of Appeals of Virginia, \textit{Leslie Francis Griffin et al. v. Board of
Supervisors of Prince Edward County}, Record No. 5390, 75; \textit{Wolf v. Colorado}, 338 U.S. 25
(1949).
\textsuperscript{257} Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince
Edward County, Supreme Court of Appeals of Virginia, \textit{Leslie Francis Griffin et al. v. Board of
Supervisors of Prince Edward County}, Record No. 5390, 75
\textsuperscript{258} Meyer v. Nebraska, 262 U.S. 390 (1923).
\textsuperscript{259} Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince
Edward County, Supreme Court of Appeals of Virginia, \textit{Leslie Francis Griffin et al. v. Board of
Supervisors of Prince Edward County}, Record No. 5390, 75-76.
their brief. *Bolling v. Sharpe*, a companion case to *Brown*, also dealt with school segregation, but in the District of Columbia, and not in the states. As the Fourteenth Amendment only applies to the states, and not the federal government, it could not be used to strike down segregation in Washington D.C. In *Bolling v. Sharpe* the Court struck down segregation in the nation’s capital by relying on the Fifth Amendment, which applies to the federal government. While the Fifth Amendment lacks an Equal Protection Clause, it does contain a Due Process Clause. The Court found that while the Equal Protection and the Due Process clauses were not “interchangeable phrases”, both could be interpreted as invalidating school segregation. The Court found that segregated schools violated the right to liberty found in the Due Process Clause.\(^{260}\)

The Supreme Court “completed the circuit”, according to the county officials, of striking down school segregation under the Due Process Clause in *Cooper v. Aaron*.\(^{261}\) In the Little Rock case, the Court found that state support for segregated schools violated both the Equal Protection and Due Process Clause of the Fourteenth Amendment. Shaping their argument to conform to the Supreme Court’s view that school segregation violated the liberty guaranteed in the Due Process Clause, the county officials write:

> It may have become, and for the moment appears to have become, a part of the “liberty” of people that they be not precluded from racial intermixture in schools; but that does not mean that the States must furnish schools.\(^{262}\)

The brief recognized that the *Brown* decision placed great importance on education, holding that it “is perhaps the most important function of state and local governments.”\(^{263}\) Yet, the choice to provide education lay with the states

\(^{260}\) Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince Edward County. Supreme Court of Appeals of Virginia, *Leslie Francis Griffin et al. v. Board of Supervisors of Prince Edward County*, Record No. 5390, 76; *Bolling v. Sharpe*, 347 U.S. 497 (1954). Part of the rationale for striking down segregation in the District of Columbia under the Fifth Amendment was that since the practice had been invalidated in the states, it would be “unthinkable” to allow it in the national capital. This is noted in the brief.

\(^{261}\) Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince Edward County. Supreme Court of Appeals of Virginia, *Leslie Francis Griffin et al. v. Board of Supervisors of Prince Edward County*, Record No. 5390, 76.

\(^{262}\) Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince Edward County, Supreme Court of Appeals of Virginia, *Leslie Francis Griffin et al. v. Board of Supervisors of Prince Edward County*, Record No. 5390, 76.

\(^{263}\) Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince Edward County. Supreme Court of Appeals of Virginia, *Leslie Francis Griffin et al. v. Board of Supervisors of Prince Edward County*, Record No. 5390, 76.
and not the Supreme Court. The brief notes that lower federal courts, both district and circuit, have held that although a locality may not segregate public swimming pools or parks, no locality is required to operate such recreational facilities.\textsuperscript{264}

The brief continues its examination of the “liberty” protected in the Fourteenth Amendment in the following subchapter of chapter IV, titled “Virginia’s System Fosters the ‘Liberty’ Protected by the Fourteenth Amendment”. If the county officials up to this point had been on the defensive, arguing for an absence of a constitutional right to education, they here move to the offense. The purpose of this subchapter is to argue that the Prince Edward school closures were not only permissible under the Constitution, they were protected by it. The logic presented here is that the school closures, and the Virginia laws that made them possible, were protected by two constitutional principles. Both of these principles were found in the liberty protected by the Fifth and Fourteenth Amendments.\textsuperscript{265}

4.2.2 Arguments for a Due Process Right to Attend Segregated Schools

The first right was the right of a parent to “to have their children educated in the manner and under the conditions that they desire”.\textsuperscript{266} Citing both Meyer v. Nebraska and Pierce v. Society Sisters, the brief correctly argues that the Supreme Court had ruled that the Fourteenth Amendment does provide a parent protection from state action. Furthermore, the brief also cites Farrington v. Tokushige where the Court in 1927 held that this protection also applies to the federal government through the Due Process Clause of the Fifth Amendment.\textsuperscript{267}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{264} Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince Edward County. Supreme Court of Appeals of Virginia, Leslie Francis Griffin et al. v. Board of Supervisors of Prince Edward County, Record No. 5390, 76; Brown v. Board of Education, 347 U.S. 483, 493.
\item \textsuperscript{266} Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince Edward County. Supreme Court of Appeals of Virginia, Leslie Francis Griffin et al. v. Board of Supervisors of Prince Edward County, Record No. 5390, 78-79.
\item \textsuperscript{267} Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince Edward County. Supreme Court of Appeals of Virginia, Leslie Francis Griffin et al. v. Board of Supervisors of Prince Edward County, Record No. 5390, 78-80.
\end{itemize}
\end{footnotesize}
The county officials attempt to draw a parallel between the situation in Prince Edward County, and the one that existed in Oregon in Pierce v. Society Sisters. The Oregon law struck down in Pierce required that all children attend public schools, and it is viewed as a form of social engineering by force. The county officials attempt to equate the Oregon law struck down in Pierce v. Society Sisters with desegregation. The brief reminds the reader that the Oregon law, which is referred to as a “proposed regimentation” and an “effort to supplant the parent with the state” was struck down by the Court as a violation of a parent’s liberty. In this section of the brief, the county officials do not mention the school closures. Instead it would appear they are attacking desegregation altogether as an infringement on parents’ rights. A parent, writes the county officials, “is not compelled to sit by and watch his child become the victim of ‘progressive’ education and other fetishes of which he disapproves.”

The county officials invoke a parent’s right to send his child to whatever school he chooses, to defend the system of private schools operated in Prince Edward. The constitutionality of the school closures in not discussed at all. Here the Fourteenth Amendment is interpreted as protecting parents’ rights, which the cited cases clearly indicate that it does. As the Fourteenth Amendment only applies to state action, and no such action threatened the private schools in Prince Edward, quite the opposite, the county officials cite Farrington v. Tokushige to emphasize that a parent’s right also applies to the federal government. As no act of Congress or any action taken by the executive branch was threatening the Prince Edward private schools, it appears that the county officials were arguing that the federal judiciary was bound to respect the liberty of parents to send their children to segregated schools. Segregation is portrayed as an exercise of liberty, while desegregation is likened to reformist tyranny, unconstitutionally imposed by liberals on the people, white people, of Prince Edward County.

U.S. 284 (1927), 299. In Farrington v. Tokushige, 273 U.S. 284 (1927), the Supreme Court struck down an act which regulated foreign language schools on Hawaii. Since Hawaii was not a state at the time, it was under the jurisdiction of the federal government and hence the Fifth and not the Fourteenth Amendment applied.

268 Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince Edward County, Supreme Court of Appeals of Virginia, Leslie Francis Griffin et al. v. Board of Supervisors of Prince Edward County, Record No. 5390, 79-80.
The second right invoked by the county officials was the “right to choose associates and associations.” This right, argued the county officials, protected against compulsion to “associate with those whose association is objectionable”. Again the county officials attempt to find a constitutional right that would protect against forced desegregation. Similarly to the rights of parents’, a right of association was to be found in the liberty protected by the Due Process Clauses. 269

To support their claim that a right of association is protected by the Constitution the brief cites several Supreme Court decisions that discuss this right. The first two citations are Justice Harlan’s dissents in Plessy v. Ferguson and Berea College v. Kentucky, decided in 1908. 270 In these dissents Justice Harlan does indeed argue for a personal liberty to associate with whom one chooses. The reason why Harlan argues for this right is because he finds that it prohibits the states from imposing segregation. In Berea College the Court had sustained a Kentucky law that forbade private schools from integrating their students. 271 It was against this decision, and the one in Plessy, that Harlan was dissenting. Clearly aware of the fact that they only approved of the means Justice Harlan used to argue for a specific end, the unconstitutionality of segregation, the county officials write: “Whether or not we agree with the view he took of the issue [segregation], the last of us must agree with certain of his reasoning—his ringing defense of the freedom of association...” 272

Having admitted that Plessy “is now only of historic interest” the brief then turns to more recent cases dealing with the freedom of association. 273 The county officials argue that freedom of association is an “outgrowth” of the First Amendment right to peaceably assemble. Beginning with United States v. Carolene Products Co., the county officials cite a string of cases relating to the

269 Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince Edward County, Supreme Court of Appeals of Virginia, Leslie Francis Griffin et al. v. Board of Supervisors of Prince Edward County, Record No. 5390, 81.
272 Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince Edward County, Supreme Court of Appeals of Virginia, Leslie Francis Griffin et al. v. Board of Supervisors of Prince Edward County, Record No. 5390, 81.
273 Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince Edward County, Supreme Court of Appeals of Virginia, Leslie Francis Griffin et al. v. Board of Supervisors of Prince Edward County, Record No. 5390, 81.
incorporation of the First Amendment into the Due Process Clause of the Fourteenth Amendment. In their 1938 ruling in *Carolene Products Co.*, the Court had established the doctrine of Preferred Freedoms. This doctrine states that certain rights are to enjoy heightened constitutional protection when interpreting the Fourteenth Amendment. That is to say, the *Carolene Products Co.* ruling specified which types of rights were to receive heightened consideration when determining what rights were protected in the language found in the Fourteenth Amendment.\(^{274}\)

As the First Amendment is among the rights highlighted in *Carolene Products Co.*, it is logical for the county officials to cite this case. As with their citation of Justice Harlan’s dissent in *Plessy*, however, the county officials reveal some uncertainty when citing *Carolene Products Co.*

> We have never been able to subscribe to the doctrine that the freedoms assured by the First Amendment are “preferred” and of greater dignity than others, but that doctrine of “preferred freedoms” first enunciated by Mr. Justice Stone in a footnote in his opinion in *United States v. Carolene Products Co.*… has become established doctrine of the Court since then.\(^{275}\)

The brief does not go further as to the reasons why the county officials object to the Preferred Freedoms doctrine. From the perspective of federalism, the Preferred Freedoms doctrine did suggest that state laws more readily would be struck down by the federal judiciary if they infringed upon the rights mentioned in *Carolene Products Co.* Furthermore, the doctrine also held that laws targeting “religious…national…or racial minorities” were to be examined more strictly.\(^{276}\)

Why the county officials felt it necessary to express their dislike of the doctrine

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\(^{274}\) Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince Edward County. Supreme Court of Appeals of Virginia, Leslie Francis Griffin et al. v. Board of Supervisors of Prince Edward County, Record No. 5390, 83; United States v. Carolene Products Co., 304 U.S. 144 (1938), footnote 4; Alcorn in Schulz 2005, 482-483; Hall, Wieck, Finkleman 1991, 492-493. The *Carolene Products Co.* case dealt with a federal law that regulated interstate commerce, The Filled Milk Act of 1923. The Court upheld the law, finding that economic regulations that had a “rational basis” would not be struck down, as the Court had done using Substantive Due Process during the *Lochner* era. In a footnote, Footnote 4, the Court held that certain rights, however, were to receive higher constitutional protection. These rights were those specifically mentioned in the Constitution, those that were relevant to the political process, and right of “discrete and insular minorities” who were in danger of being targeted by a majority using the political process to discriminate against a minority.

\(^{275}\) Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince Edward County. Supreme Court of Appeals of Virginia, Leslie Francis Griffin et al. v. Board of Supervisors of Prince Edward County, Record No. 5390, 83.

is not revealed in the source material. Perhaps they felt it was appropriate as they were arguing before a state court, possibly sharing the same sentiments.

The brief goes on to cite three cases that incorporated rights found in the First Amendment to apply to the states through the Fourteenth Amendment. Incorporation is a doctrine that applies the Bill of Rights to the states through the Due Process Clause of the Fourteenth Amendment. Initially the Bill of Rights applied only to the federal government, but following the adoption of the Fourteenth, the Supreme Court has, on a case by case basis, interpreted the rights protected in the Due Process Clause to include most of the rights mentioned in the Bill of Rights.

Turning to the specific right of freedom of association, the brief turns to two cases they feel sets a precedent for the incorporation of this particular right, which is not outright mentioned in the First Amendment. The first of these cases is *McLaurin v. Oklahoma State Regents*. *McLaurin* was one of the pre-*Brown* cases that dealt with segregation in higher education. In their 1950 decision the Court held that the University of Oklahoma’s practice of segregating its sole African American student, George McLaurin, from the white students. McLaurin had access to all of the university’s services, he could attend classes, visit the library and eat in the cafeteria, but he was always required to be placed at a separate table or desk segregated from his fellow white students. The Court held that while McLaurin seemingly was provided with the same services as the white students, the fact that he was segregated was in itself unequal. The Court thus set the standard for equality within “separate but equal” extremely high when it came to higher education.

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The county officials cite, and quote, this case because they feel that the Supreme Court in their ruling “gave voice to the doctrine of freedom of association.”281 To argue their position, the county officials quote a paragraph from the decision where the Court writes that while students may choose to shun another student, a state may not “prohibit the intellectual commingling of students”.282 Although the quoted passage arguably might be understood to imply a right to association, McLaurin struck down segregation at the University of Oklahoma on equal protection grounds, and not because it found a right to associate in the Due Process Clause. McLaurin did therefore not incorporate a First Amendment right of association, making the county official’s citation of the case somewhat curious.283

Following the McLaurin citation the county officials cites the case that established a right to freedom of association and incorporates it into the “liberties” protected by the Fourteenth Amendment’s Due Process Clause. This case was NAACP v. Alabama, decided in 1958.284 Here the Court struck down a state law that would have required the NAACP to reveal all its members in the state. A similar law had been enacted in Virginia, but a lower federal court had struck it down in 1958.285 The brief makes only a short reference to NAACP v. Alabama, and quotes the passage that hold that freedom of association is part of the rights protected by the Fourteenth Amendment.286

In this section of the brief, the county officials attempted to shield Prince Edward’s effort to maintain segregation through school closures and private schools by arguing that the county’s actions were protected under several Fourteenth Amendment rights. By drawing on constitutional developments in the

281 Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince Edward County. Supreme Court of Appeals of Virginia, Leslie Francis Griffin et al. v. Board of Supervisors of Prince Edward County, Record No. 5390, 84.
282 McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950), 261-261; Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince Edward County. Supreme Court of Appeals of Virginia, Leslie Francis Griffin et al. v. Board of Supervisors of Prince Edward County, Record No. 5390, 84.
286 Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince Edward County. Supreme Court of Appeals of Virginia, Leslie Francis Griffin et al. v. Board of Supervisors of Prince Edward County, Record No. 5390, 84-85.
field of civil rights, the county officials attempted to turn the tables, as it were, on the NAACP and others opposed to Jim Crow. White Prince Edwardians, argued the county officials, were also protected by the Due Process Clause, and part of their liberty was to be able to send their children to segregated schools. They were also free to associate, or choose not to associate, with whom they wanted, for example by attending segregated schools.

The county officials fail to explain how the school closures fit into their argumentation, but instead argue for a right to attend segregated schools. With the omission of the school closures, the situation in Prince Edward County is presented as one where parents and school child have a choice in what schools to attend. As this was clearly not the case, even if all-black private schools were operated, the county would not offer a choice; only the sole option of attending a segregated school existed. Instead of arguing for how the law should be applied to the circumstances that existed in Prince Edward, the county officials presents a lengthy argumentation about rights protected under the Fourteenth Amendment. If the county officials wanted to argue for a right to attend private schools, it would seem a reference to Pierce v. Society Sisters, where the Court held that a right to attend private schools is protected from state action, would have sufficed.

In the subchapter titled “Virginia’s System Fosters the ‘Liberty’ Protected by the Fourteenth Amendment” the county officials use previous Supreme Court decisions to find constitutional protections for segregated schools. This section of the brief reads more like a general defense for segregation than a legal argument specifically dealing with the situation in Prince Edward County. Desegregation is portrayed as being imposed by “reformers,” whose views are at odds with the liberties guaranteed by the Constitution. Those in favor of segregation, on the other hand, are depicted as victims of some unspecified tyranny that wants to impose uniformity in American schools, and by doing so removing several sacred rights associated with an individual choice. While the words “socialism” or “communism” do not appear, it would appear the county officials are drawing parallels between these ideologies and the forces working against segregation.

The county officials return to the question of public schools in constitutional law in the third subchapter of chapter IV, titled:
The Supreme Court of the United States Has Not Decided that Public Schools Must Be Operated; It Has Simply Decided that if Such Schools Are Maintained They Must Be Available to All on Equal Terms.287

Unsurprisingly this subchapter argues that Brown v. Board of Education did not mandate public schools. The county officials maintain that Brown only mandated that education has to be provided equally “where the state has undertaken to provide it.”288 The operation of public education in a state is thus a condition for the application of the desegregation decree. The brief then turns to Cooper v. Aaron, where the Court refers to Brown when it states that “enforced racial segregation” violates the Equal Protection Clause of the Fourteenth Amendment. Again the suggestion is made that the only thing the Court has held is that a state action cannot require segregation.289

To further their argument, four lower federal court decisions are cited. In these opinions the lower courts offer their interpretation of the Brown ruling. Predictably these opinions all hold that Brown only imposed a ban on state activity requiring segregated schools. The Brown decision did not create a constitutional right to education, nor did it create a right to attend a desegregated school, only that no state action could be taken to enforce segregation.290

Following the chapter on the constitutionality of public education, or rather lack thereof, the county officials turn to the question of legislative motive, in chapter V titled:

287 Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince Edward County. Supreme Court of Appeals of Virginia, Leslie Francis Griffin et al. v. Board of Supervisors of Prince Edward County, Record No. 5390, 85.
288 Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince Edward County. Supreme Court of Appeals of Virginia, Leslie Francis Griffin et al. v. Board of Supervisors of Prince Edward County, Record No. 5390, 86; Brown v. Board of Education, 347 U.S. 483 (1954), 493. Italics in original text.
289 Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince Edward County. Supreme Court of Appeals of Virginia, Leslie Francis Griffin et al. v. Board of Supervisors of Prince Edward County, Record No. 5390, 86. Italics in original text; Cooper v. Aaron, 358 U.S. 1 (1958), 5.
290 Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince Edward County. Supreme Court of Appeals of Virginia, Leslie Francis Griffin et al. v. Board of Supervisors of Prince Edward County, Record No. 5390, 86. Italics in original text; Cooper v. Aaron, 358 U.S. 1 (1958), 5; Briggs v. Elliott, 132 F.Supp. 776 (1955), 777-778; Byrd v. Sexton, 277 F.2d 418 (8th Cir. 1960), 425; Avery v. Wichita Falls Independent School District, 241 F.2d 230 (5th Cir. 1957), 233; Boson v. Rippy, 285 F.2d 43 (5th Cir. 1960), [unpaginated].
WHEN CONSIDERING THE CONSTITUTIONALITY OF LEGISLATION, THE MOTIVE OR PURPOSE OF THE LEGISLATIVE BODY IS IMMATERIAL AND IS NOT TO BE CONSIDERED BY THE COURTS.\textsuperscript{291}

4.2.3 Arguments against the Consideration of Legislative Motive by a Court

Because of what Judge Lewis had written in his opinion in the \textit{Eva Allen} case, the county officials felt this was an important question. Judge Lewis had asked: “Can the public schools, heretofore maintained in Prince Edward County, be closed \textit{in order to avoid the racial discrimination prohibited by the 14th Amendment}?”\textsuperscript{292} The question at hand is thus if the motive behind the school closures was to evade the desegregation of public schools as mandated by the \textit{Brown} ruling? As this was clearly the case in Prince Edward County, the county officials felt threatened by this line of reasoning. If motive was taken into account, it would undermine the county officials’ strategy to avoid desegregating their schools. Prince Edward County had gone to great lengths to implement the school closures on an equal basis by closing all schools and by offering African American school children the same grants for private schools as those that were available to white children.

If motive became part of the equation, however, all efforts to provide equality within their scheme to maintain segregated schools would be for naught. Unlike the question of the constitutionality of public schools, the NAACP had raised the question of legislative motive in their brief. The county officials were of the opinion that a court could not take into consideration the motive behind a government action. Even if Prince Edward had closed its schools to avoid compliance with a desegregation order handed down by a federal court, this.\textsuperscript{293}

Having stated their opposition to considering legislative motive as a factor when determining the constitutionality of a law, the county officials proceed to provide

\textsuperscript{291} \textit{Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince Edward County. Supreme Court of Appeals of Virginia, Leslie Francis Griffin et al. v. Board of Supervisors of Prince Edward County. Record No. 5390, 95.}
\textsuperscript{292} \textit{Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince Edward County. Supreme Court of Appeals of Virginia, Leslie Francis Griffin et al. v. Board of Supervisors of Prince Edward County. Record No. 5390, 95. Italics added in brief, originally found in \textit{Eva Allen, et al. v. County School Board of Prince Edward County, etc., et al. Civil Action No. 1333 (1961), 8}.}
\textsuperscript{293} \textit{Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince Edward County. Supreme Court of Appeals of Virginia, Leslie Francis Griffin et al. v. Board of Supervisors of Prince Edward County. Record No. 5390, 96.}
a 28-page account of the history of legislative motive in constitutional law. When it comes to Virginia state law the county officials briefly concludes that legislative motive is not to be taken into account. Three state cases are cited to support this claim.\(^{294}\) When it comes to the interpretation of federal law, however, the county officials admit that the Supreme Court has been inconsistent in its rulings.\(^{295}\) Looking at how the Supreme Court has dealt with this issue, the county officials argue that the standing precedent strongly favors the exclusion of legislative motive from constitutional interpretation.\(^{296}\)

The county officials felt that it was the lower federal courts that recently had “unearthed this legal heresy that an act otherwise constitutional may be rendered unconstitutional by what is deemed by the court to be an improper legislative motive or purpose.”\(^{297}\) Two decisions by two different federal District Courts are cited in the brief. The first case was \textit{NAACP v. Patty}, a case concerning Virginia laws that restricted the operations of the NAACP in the state.\(^{298}\) The second case was \textit{Bush v. Orleans Parish School Board}, which dealt with Louisiana’s attempts to resist desegregation.\(^{299}\)

It is no coincidence that both of the two cited cases deal with ways southern states attempted to resist desegregation, either directly as in \textit{Bush}, or by attempting to suppress the NAACP’s ability to operate as in \textit{Patty}. The county

\(^{294}\) Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince Edward County, Supreme Court of Appeals of Virginia, \textit{Leslie Francis Griffin et al. v. Board of Supervisors of Prince Edward County}, Record No. 5390, 96.

\(^{295}\) Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince Edward County, Supreme Court of Appeals of Virginia, \textit{Leslie Francis Griffin et al. v. Board of Supervisors of Prince Edward County}, Record No. 5390, 96.

\(^{296}\) Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince Edward County, Supreme Court of Appeals of Virginia, \textit{Leslie Francis Griffin et al. v. Board of Supervisors of Prince Edward County}, Record No. 5390, 96. Michael Klarman support this claim, writing “…in 1960, the weight of authority still rejected judicial inquiries into legislative motives.” Klarman 2004, 340. For more on legislative motive, see Shaman 2001, 143-167.

\(^{297}\) Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince Edward County, Supreme Court of Appeals of Virginia, \textit{Leslie Francis Griffin et al. v. Board of Supervisors of Prince Edward County}, Record No. 5390, 96. Michael Klarman support this claim, writing “…in 1960, the weight of authority still rejected judicial inquiries into legislative motives.” Klarman 2004, 340. For more on legislative motive, see Shaman 2001, 143-167.


\(^{299}\) Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince Edward County, Supreme Court of Appeals of Virginia, \textit{Leslie Francis Griffin et al. v. Board of Supervisors of Prince Edward County}, Record No. 5390, 103; \textit{Bush v. Orleans Parish School Board}, 188 F.Supp. 916 (1960).
officials argue that the lower courts in the federal judiciary had been encouraged
to consider legislative motive by the Supreme Court’s desegregation rulings.
While the Supreme Court in general did not endorse that legislative motive be
taken into account, the lower courts had adopted this idea as a “weapon to force
upon the people a racial intermingling.” This is likely a reference to Brown II,
where the Supreme Court tasked the federal District Courts with implementing
desegregation, without proper guidelines as to how this was to be achieved.

According to the county officials the lower federal courts had misunderstood the
Supreme Court’s rulings on the permissibility of taking legislative motive into
account, although they admit that there existed some ambiguity in the case law
governing this matter. In their brief, the county officials proceed by giving a
lengthy account of Supreme Court rulings touching upon legislative motive. The
account spans 19 pages, and in it the county officials cite no less than 31
Supreme Court rulings, and two books. The argument is concluded with the
statement, that if federal courts are allowed to take legislative motive into
account “then State legislation lies prostrate before the Federal Courts.” By
this the county officials mean that the courts should only focus on the law itself,
or its actual implementation. For them to consider the motive behind the
legislation would give them the power to arbitrarily find an illicit motive and
strike down state legislation.

In the conclusion of their brief, the county officials maintain that although
legislative motive should not be considered “it is not to be thought that there is
any unworthy purpose or motive behind the legislation of Virginia and Prince

300 Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince
Edward County. Supreme Court of Appeals of Virginia, Leslie Francis Griffin et al. v. Board of
Supervisors of Prince Edward County, Record No. 5390, 97.
301 Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince
Edward County. Supreme Court of Appeals of Virginia, Leslie Francis Griffin et al. v. Board of
Supervisors of Prince Edward County, Record No. 5390, 105-124.
302 Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince
Edward County. Supreme Court of Appeals of Virginia, Leslie Francis Griffin et al. v. Board of
Supervisors of Prince Edward County, Record No. 5390, 124.
303 Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince
Edward County. Supreme Court of Appeals of Virginia, Leslie Francis Griffin et al. v. Board of
Supervisors of Prince Edward County, Record No. 5390, 124.
Edward County.” The county officials maintain that all the actions taken by the state and the county were done in a completely colorblind fashion, treating all the school children in the county with equality. This summarizes the county officials’ strategy to avoid desegregation. The abandonment of public education did not discriminate against African Americans as the closures also affected the white children. It was true that a segregated private school had been established to replace the segregated public schools, but the county had offered to create a similar school for African Americans.

The county officials had thus created a barrier of plausible nondiscrimination between themselves and anyone who argued that the closures violated the Supreme Court’s ban on discrimination in the field of public education. This barrier was further strengthened by the detachment of any state involvement by decentralizing the public school systems in Virginia. This protected the scheme from the argument that the state was involved in circumventing Brown by making public education a local matter. As long as all schools in one county were closed, there would be no denial of equal protection. The two things that the county officials feared could penetrate this barrier was a constitutional right to education, or for the courts to consider the motives behind the legislation. The county officials had spared no ink to dismiss these notions, even though the litigation at this stage only involved questions under state law. The first test for this barrier would be in the Virginia Supreme Court of Appeals.

\[304\] Papers of Allan G. Donn, Brief and Appendix for Respondent, Board of Supervisors of Prince Edward County, Supreme Court of Appeals of Virginia, Leslie Francis Griffin et al. v. Board of Supervisors of Prince Edward County, Record No. 5390, 150.
“A Case of Great Importance to Public Education in the United States”

The Virginia Supreme Court of Appeals handed down their ruling in Leslie Francis Griffin et al. v. Board of Supervisors of Prince Edward County on March 5, 1962. The state court found that the NAACP had raised any federal questions, and only ruled on the legality of the closures under Virginia law. On this matter the court sided wholeheartedly with the county officials. The state, i.e. the General Assembly of Virginia, was not responsible for public schools in Virginia. The state laws in question did “authorize” the county to levy taxes to support public schools. Taking its cue from the county officials’ brief, the court cites the entry of the word “authorized” in Webster’s Dictionary. The court found that the power granted to the local community was discretionary, and as such gave them a choice in the matter. As the county had a discretionary power, it was not neglecting to implement a duty assigned to it by law, merely choosing one of the options the law afforded it. The NAACP had asked that the state court issue a writ of mandamus to force the county to reopen its schools. This writ, found the court, could only be issued if a duty had been neglected.\(^{305}\)

The state court decided that it was not their responsibility to determine if the school closures were “proper, wise, or desirable.” The only question before them was if they could order the schools reopened by issuing a writ of mandamus. This, the court held, they could not, and the closures were found to be permissible under Virginia law.\(^{306}\)

The NAACP now returned to Judge Owen Lewis’s federal District Court for relief. The litigation again went under the case name Eva Allen et al. v. County School Board of Prince Edward County, etc., et al.\(^{307}\) In his ruling, issued on July 25, 1962; Judge Lewis took quite the opposite position than the Virginia Supreme Court of Appeals had taken. Lewis rejected the county officials’ request


\(^{306}\) Leslie Francis Griffin et al. v. Board of Supervisors of Prince Edward County, 203 Va. 321, 124 S.E. 2d. 227 (1962), 329

\(^{307}\) Eva Allen et al. v. County School Board of Prince Edward County, etc., et al., 207 F.Supp. 349 (1962), Civil Action No. 1333.
that the District Court either dismiss the case or once more abstain from handing down a ruling. The county officials had requested this on the grounds that the NAACP had not raised federal questions with the state court. Lewis did not want to delay the litigation any further. “To further abstain is to further delay — and further delay in the formal education of 1,700 children would create an irreparable loss.”

Having decided to make a ruling in the case, Lewis moved on to examine the nature of public education in Virginia. The federal judge was unconvinced by the argument that the state is removed from the operations of school systems in the local communities. Lewis finds that while local school boards are charged with “establishing, maintaining, and operating” local schools, this is done with the state’s support. In Lewis’s view, this implies a level of state involvement.

Lewis acknowledges that the high court of Virginia, in the *Griffin* case, had found that Prince Edward County is allowed to decide whether they levy taxes for, and operate, public schools or not. This finding, however, was done under state law, and the legality of the closures under federal law was still unresolved. Lewis consequently tests the constitutionality of the school closures under the federal Constitution. Having already stated that he finds that Virginia to some extent is involved with public education in the state, Lewis elaborates his thoughts on the decentralized school system. The federal judge is unconvinced that the distribution of responsibility for public schools from the state to a county would protect the closures from constitutional requirements. Any action that is prohibited by the Constitution for a state to take does not become permissible merely because a county takes it. The Constitution,

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308 The county officials argued that the District Court should not rule in the case on the grounds that federal questions had not been raised in the Virginia Supreme Court of Appeals. Judge Lewis rejected the county officials request on the grounds that they should have filed a request, or a counter suit, with the state court, asking it to rule on federal questions, instead of merely making federal arguments in their brief. *Eva Allen et al. v. County School Board of Prince Edward County, etc., et al.*, 207 F.Supp. 349 (1962) Civil Action No. 1333, [unpaginated]; Bonastia 2012, 137.


310 *Eva Allen et al. v. County School Board of Prince Edward County, etc., et al.*, 207 F.Supp. 349 (1962) Civil Action No. 1333, [unpaginated].
according to Lewis, “recognizes no governing units except the federal government and the states.”

To support his finding, the federal judge relies on a case handed down by the federal District Court for the Eastern District of Louisiana; *Hall v. St. Helena Parish School Board* decided the previous year. In *Hall* the District Court for the Eastern District of Louisiana struck down a Louisiana local option plan. This scheme allowed a locality to abandon its public school system, and replace it with private schools. Unlike the Virginia local option, or freedom of choice, plan, the Louisiana plan simply converted all public schools into private schools. The private schools would be “operated in the same way, in the same buildings, with the same furnishings, with the same money, and under the same supervision as the public schools.” Judge Lewis quotes the Louisiana District Court’s finding in *Hall* that: "'When a parish wants to lock its school doors, the state must turn the key. If the rule were otherwise, the great guarantee of the equal protection clause would be meaningless.'"

Having established that the closures were state action, Lewis evokes *James v. Almond*. In this case Governor Almond’s 1958 school closures had been struck down by a federal District Court as unconstitutional. As long as the state was involved in business of public education, the District Court held in *James v. Almond*, single public schools could not be closed to avoid desegregation.

Having connected the Prince Edward closures with Governor Almond’s closures, Judge Lewis found the former unconstitutional, for the same reason as the latter had been struck down in *James v. Almond*. Prince Edward could not close its schools to avoid *Brown* while other schools in Virginia remain open with the support of the state.

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311 Eva Allen et al. v. County School Board of Prince Edward County, etc., et al., 207 F.Supp. 349 (1962) Civil Action No. 1333, [unpaginated].
315 Eva Allen et al. v. County School Board of Prince Edward County, etc., et al., 207 F.Supp. 349 (1962) Civil Action No. 1333, [unpaginated].
Judge Lewis thus rejected the county officials’ defense of the school closures that relied on a detachment of public education from state activity. Also present in the opinion is legislative motive. The closures were struck down as state action intended to “to avoid the requirements of the Brown decision.” This matter is not elaborated in further detail. Instead the decision relies on the theory that a state has to provide public education equally throughout its jurisdiction.

Lewis held that the Prince Edward schools were to be reopened and desegregated according to his earlier decision of April 22, 1960. The county officials were directed to open their public schools on a desegregated basis by September 7, 1962. Lewis, however, did not issue a formal order, but stated that he would do so if the county officials failed to comply by the stated date.

Before Lewis’s September deadline had expired, the county officials, on August 31, 1962, filed suit in the Circuit Court of the City of Richmond, a Virginia trial court. The state court was asked to make a declaratory judgment in regards to the legality of the school closures under state law. Although the high court of Virginia had already ruled on this matter, the county officials felt the Virginia Supreme Court of Appeals had not reviewed all questions relating to the school closures.

The county officials objected to the fact that the NAACP had neglected to raise any federal questions with the Virginia Supreme Court of Appeals. The source material used here does not reveal on what grounds the county officials felt

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316 Eva Allen et al. v. County School Board of Prince Edward County, etc., et al., 207 F.Supp. 349 (1962) Civil Action No. 1333, [unpaginated].
317 Eva Allen et al. v. County School Board of Prince Edward County, etc., et al., 207 F.Supp. 349 (1962) Civil Action No. 1333, [unpaginated].
318 A declaratory judgment is when a court issues an opinion on the rights or status of the parties involved in a controversy. Although legally binding, a declaratory judgment will not result in any relief, such as damages, injunctions, etc. for any of the involved parties, see Roberts 2005, 119-120; http://legal-dictionary.thefreedictionary.com/declaratory+judgment accessed on December 14, 2013.
319 Papers of Allan G. Donn, Brief for Respondents, County School Board of Prince Edward County, Virginia, and T. J. McIlwaine, Jr., Division Superintendent of Schools of said County, Supreme Court of the United States, Cocheysse J. Griffin, etc., et al., v. County School Board of Prince Edward County, et al., No. 592, 7, 9; Papers of Allan G. Donn, Brief on Behalf of County School Board of Prince Edward County and T. J. McIlwaine, Division Superintendent of Schools of said County, Appellees and Cross-Appellants, United States Court of Appeals for the Fourth Circuit, Cocheysse E. Griffin, etc., et al. v. County School Board of Prince Edward County, Virginia, et al., No. 8837, 19; Griffin v. Board of Supervisors of Prince Edward County, 322 F.2d 332 (4th Cir. 1963), endnote 3 on page 348.
federal questions should have been raised in the state court. Here it is argued that they were exploiting the uncertain nature of how federal questions should be treated in an instance of federal abstention. In *Government Employees v. Windsor* the Supreme Court ruled in 1957 that when a federal court abstains in order for state law to be ruled upon by a state court, that state court has to be “asked to interpret the statute in light of the constitutional objections presented to the [federal] District Court.” In other words, the state court must be informed of the federal questions raised in the federal court, as this might have an impact on how the state court reviews the state laws in question.

In *Windsor*, the Supreme Court did not specify how a state court should be notified of any federal questions raised in federal court. The *Windsor* ruling was interpreted by some to mean that the federal questions had to be raised before the state court. This view, however, involved the risk of having the state court rule on the federal issues raised. If a state court ruled on a federal issue, according to the principle of *res judicata* that ruling would be binding. The federal court that initially abstained and allowed the state court to rule on matters of state law would no longer be permitted to hear the federal questions involved in the case.

In their undated brief to the Supreme Court, it is revealed that the NAACP wished to have the federal District Court rule on the federal questions. Therefore they had not wanted to risk having the state court resolve these matters, and consequently had not raised any federal questions with the state courts.

When the county officials filed the suit with the state court, the litigation was divided into two paths. The school closures were now involved in suits before the state courts, and the federal courts. The county officials wanted to keep the

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321 Papers of Allan G. Donn, Brief for Petitioners, Cocheys J. Griffin, etc., et al, Supreme Court of the United States, *Cocheys J. Griffin, etc., et al., v. County School Board of Prince Edward County, et al.*, No. 592, 2, 9, footnote 1 on page 2. In their brief the NAACP reference the Supreme Court’s ruling in *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964), where it was held that federal questions did not have to be raised in state courts, it sufficed to inform the state court of any federal questions involved. It should be noted that *England* was handed down in 1964, following most of the litigation concerning the Prince Edward school closures. For more on federal questions in an instance of federal abstention, see: *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964); *Government Employees v. Windsor*, 353 U.S. 364 (1957). For more on *res judicata*, see [http://legal-dictionary.thefreedictionary.com/Doctrine+of+res+judicata](http://legal-dictionary.thefreedictionary.com/Doctrine+of+res+judicata) accessed on December 22, 2013; Justice Douglas’s concurring opinion in *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964), 425-430.
matter in the state courts, while the NAACP wished to have the issue before the federal courts. Although the reason for this is not revealed in the source material, it seems highly likely that the county officials wanted to delay the litigation by having it moved back to the state courts once more. The NAACP, on the other hand, wanted to have Judge Lewis issue an order to have the schools reopened and desegregated as fast as possible, and had no desire to return to the Virginia courts.

On September 7, 1962, the county officials had taken no measures to reopen the public schools of Prince Edward County. In hearings before Judge Lewis held on September 7 and October 3, the county officials asked the federal District Court to abstain until the Virginia state courts could rule on the matter under state law, now raised as the separate suit before the Circuit Court of the City of Richmond. The NAACP asked that Lewis issue an order opening the county’s schools. 322

Judge Lewis handed down an opinion on October 10, 1962. He rejected the county officials’ request that he abstain. Once more he found that the Prince Edward public schools could not be closed to avoid desegregation, while all other public schools in Virginia remained operational. Lewis did not, however, issue an order to have the county officials comply with his decision. This time Judge Lewis postponed issuing an order because the case was to be appealed to the higher federal courts. Lewis wanted to wait and allow the federal Circuit Court and the U.S. Supreme Court to review the matter of the school closures. On November 6, 1962, the NAACP filed an appeal to the United States Court of

322 Papers of Allan G. Donn, Brief for Petitioners, Cocheysse J. Griffin, etc., et al, Supreme Court of the United States, Cocheysse J. Griffin, etc., et al., v. County School Board of Prince Edward County, et al., No. 592, 9; Papers of Allan G. Donn, Brief on Behalf of County School Board of Prince Edward County and T. J. McIlwaine, Division Superintendent of Schools of said County, Appellees and Cross-Appellants, United States Court of Appeals for the Fourth Circuit, Cocheysse E. Griffin, etc., et al v. County School Board of Prince Edward County, Virginia, et al., No. 8837, 19-20. Kara Miles Turner states that the county officials argued before Judge Lewis that they could not reopen the county’s public schools on a desegregated basis as the county school board had no power to decide which schools children were to attend. This was a matter for the state Pupil Placement Board. This, according to Turner, was the excuse the county officials offered Judge Lewis as to why they had neglected to prepare a plan for the reopening and desegregation of the Prince Edward public schools by September 7, 1962, deadline, the source material used here does not reflect this view, see Turner 2001, 371-372.
Appeals for the Fourth Circuit, a federal court above the District Courts, and below the U.S. Supreme Court.323

The school closure case now made its way in both the Virginia state courts and the federal courts. First to hand down a ruling was the Circuit Court of the City of Richmond, a Virginia court. On April 10, 1963, the Richmond court ruled in the case initiated by the county officials, going under the name County School Board of Prince Edward County, Virginia, et al. v. Leslie Francis Griffin, Sr., et al. 324 The county officials had named the school children, and their parents, who were suing to reopen the schools as defendants. In addition, the Virginia State Board of Education and Woodrow W. Wilkerson, the Superintendent of Public Instruction, a state official, were also named as defendants. The state board and the state official were named as defendants as the county officials wanted the state courts to adjudicate the “rights, duties, powers and authority of the [state and county officials] under these school laws and the Constitution of Virginia.” 325 The Richmond court ruled in favor of the county officials. Neither

323 Papers of Allan G. Donn, Brief for Petitioners, Cocheyse J. Griffin, etc., et al, Supreme Court of the United States, Cocheys J. Griffin, etc., et al., v. County School Board of Prince Edward County, et al, No. 592, 9-10; Papers of Allan G. Donn, Brief for Respondents, County School Board of Prince Edward County, Virginia, and T. J. McIlwaine, Jr., Division Superintendent of Schools of Said County, Supreme Court of the United States, Cocheys J. Griffin, etc., et al., v. County School Board of Prince Edward County, et al, No. 592, 9; Papers of Allan G. Donn, Brief on Behalf of County School Board of Prince Edward County and T. J. McIlwaine, Division Superintendent of Schools of said County, Appellees and Cross-Appellants, United States Court of Appeals for the Fourth Circuit, Cocheys E. Griffin, etc., et al. v. County School Board of Prince Edward County, Virginia, et al., No. 8837, 20-21; Turner 2001, 373. For more on the structure of the federal judiciary, see Swartz in Schulz 2005, 155-158.

324 In turner 2001 the case is called Board of Supervisors of Prince Edward County, et al. v. Leslie Francis Griffin, Sr. et al and the date it was decided is stated as 21 March 1963, see: Turner 2001, footnote 112 on page 372. This does not correspond with the source material. In the county officials petition to appeal this case to the Virginia Supreme Court of Appeals, and in that court’s opinion, the case is called County School Board of Prince Edward County, Virginia, et al. v. Leslie Francis Griffin, Sr., et al. Moreover, the date this case was decided by the Richmond court is stated as April 10, 1963. Both documents make no mention of the Board of Supervisors being a party to this case, see: Papers of Allan G. Donn, Petition for Appeal, County School Board of Prince Edward County, Virginia and T. J. McIlwaine, Division Superintendent of Schools of Prince Edward County, Virginia, Supreme Court of Appeals of Virginia, County School Board of Prince Edward County, Virginia and T. J. McIlwaine, Division Superintendent of Schools of Prince Edward County, Virginia v. Leslie Francis Griffin, Sr., et al., [no record number cited] 1-3; Opinion of the Virginia Supreme Court of Appeals, Rendered December 2, 1963, County School Board of Prince Edward County, Virginia, et al. v. Leslie Francis Griffin, Sr., et al, as appendix to Papers of Allan G. Donn, Memorandum for the United States as Amicus Curiae, Archibald Cox, Burke Marshall, Harold Greene, Alan Marer, United States Supreme Court, Cocheys J. Griffin, et al. v. County School Board of Prince Edward County, et al., No. 592, 8, 12.

325 Papers of Allan G. Donn, Petition for Appeal, County School Board of Prince Edward County, Virginia and T. J. McIlwaine, Division Superintendent of Schools of Prince Edward County,
the Virginia Constitution, state law, nor the Fourteenth Amendment placed any responsibility on the county officials, or any state official, to provide for public education in Prince Edward County, although public schools were operated elsewhere in the state. Moreover, state scholarship grants for children attending private schools in Prince Edward were permissible even though public schools in the county were closed. The only portion of the opinion that was adverse to the county officials was the finding of the Richmond court that the county could not use state funds for the maintenance of buildings formerly used as public schools.326

The county officials appealed the decision of the Circuit Court of the City of Richmond to the Supreme Court of Appeals of Virginia. Before the Virginia high court could rule in County School Board of Prince Edward County, et al. v. Leslie Francis Griffin, Sr. et al., the United States Court of Appeals for the Fourth Circuit handed down its decision in the case appealed from Judge Lewis’s District Court, now going under the name Cochyse J. Griffin, et al. v. Board of Supervisors of Prince Edward County, et al.327

5.1 The Unites States' Amicus Brief

In December, 1962, Assistant Attorney General Burke Marshall filed an amicus curiae brief on behalf of the United States Department of Justice. Although this was the first time the Department of Justice filed a brief in the litigation, it was not their first encounter with the Prince Edward school closure cases. In April, 1961, the Justice Department had requested that it be allowed to join the litigation as a co-plaintiff alongside the NAACP. The Justice Department had motivated this request by arguing that the U.S. Government had an interest in the case. The closures were an obstruction of federal power, argued the Justice Department, as federal court orders to desegregate were not being implemented.

Virginia, Supreme Court of Appeals of Virginia, County School Board of Prince Edward County, Virginia and T. J. McIlwaine, Division Superintendent of Schools of Prince Edward County, Virginia v. Leslie Francis Griffin, Sr., et al., [no record number cited], 3. 326 Papers of Allan G. Donn, Petition for Appeal, County School Board of Prince Edward County, Virginia and T. J. McIlwaine, Division Superintendent of Schools of Prince Edward County, Virginia, Supreme Court of Appeals of Virginia, County School Board of Prince Edward County, Virginia and T. J. McIlwaine, Division Superintendent of Schools of Prince Edward County, Virginia v. Leslie Francis Griffin, Sr., et al., [no record number cited], 3-5; Turner 2001, 372. 327 Cochyse J. Griffin, et al. v. Board of Supervisors of Prince Edward County, et al. 322 F.2d 332 (4th Cir. 1963).
In their request, the Department of Justice advocated the novel approach that Virginia should be ordered by the federal courts to halt all state support for public schools in the state, for as long as the schools in Prince Edward remained closed.\textsuperscript{328}

At that time, April 1961, the Prince Edward litigation was before Judge Lewis’s District Court. On June 14, 1961, that court denied the Justice Department’s request to join the litigation as a co-plaintiff. Lewis stated that he at that stage perceived no obstruction of federal court orders on the part of the county officials. Therefore, there existed no grounds for the U.S. Government to become a party in the litigation. Christopher Bonastia writes that contemporary observers of the school closure cases considered that there might have been another reason behind the District Court’s rejection of the Justice Department’s request. The notion that Virginia should be forced into a position where it either reopen Prince Edward’s schools, or abandon all support for public education, might have been too radical for Judge Lewis. Bonastia also points to sources within the Justice Department that admitted that this bold strategy to force a reopening of the county’s schools was a mistake.\textsuperscript{329}

As the case moved up to the federal Circuit Court on appeal from Lewis’s District Court, the Justice Department requested to join the litigation as \textit{amicus curiae} and the Circuit Court granted this request in late December, 1962.\textsuperscript{330} The Justice Department’s \textit{amicus} brief in the \textit{Cocheyse J. Griffin} case begins with a statement that the case is “of great importance to public education in the United States.” The Justice Department also notes that Prince Edward had been part of the \textit{Brown} case, yet no measures whatsoever had been taken to desegregate the county’s schools. What is more, Prince Edward County had become the sole county in the United States not providing public education. The Justice Department quotes the District Court in \textit{Hall v. St Helena Parrish}, “‘this is not the time in history to experiment with ignorance.’” The importance of education is stressed, leading to the Justice Department’s concern with the Prince Edward

\textsuperscript{328} Bonastia 2012, 134-135.
\textsuperscript{329} Bonastia 2012, 135-136.
\textsuperscript{330} Bonastia 2012, 137.
case, “the United States is deeply concerned when great numbers of children are deprived of education.”\textsuperscript{331}

For the Justice Department the Prince Edward school closures posed two serious problems. Firstly, the constitutional rights of thousands of school children were being violated in Prince Edward County. Secondly, the federal judiciary seemed to be unable to put an end to this violation of constitutional rights and Prince Edward’s blatant defiance of the \textit{Brown} ruling. The Prince Edward case, according to the Justice Department, “tests whether the federal courts have power to protect these rights [Constitutional rights of U.S. citizens] before they are forever lost.”\textsuperscript{332}

The Justice Department argues three questions in their \textit{amicus} brief. The first question relates to Judge Lewis’s previous holding that Virginia is involved in the operation of public schools in the state, and that the school closures in Prince Edward therefore were a violation of the Fourteenth Amendment. The Department of Justice felt that Lewis’s ruling was “so clearly correct that we discuss it but briefly.”\textsuperscript{333} Nevertheless, the brief does dedicate a subchapter to this question, titled “The State May Not Permit Schools in One County To Be Closed To Avoid the Effect of a Desegregation Order or To Perpetuate Racial Discrimination”.\textsuperscript{334}

The Justice Department stresses that it is not advocating “the Hobson’s choice of either reopening the public schools in Prince Edward County or ceasing to maintain and support public schools elsewhere in the State.”\textsuperscript{335} The Justice Department clearly wanted to distance themselves from their previous stance,

presented in their request to join the litigation as a co-defendant. It seems likely that Judge Lewis’s rejection of the request made the Justice Department reconsider this line of reasoning. At any rate, the Justice Department argued that it was within the federal court’s powers to order Prince Edward to levy taxes for its public schools, and therefore “the Court should not consider the drastic step of interfering with the education of children throughout Virginia.” The brief goes on to state that “[t]he United States is participating in this case in the hope and expectation that public education will be restored to Prince Edward County; it is not here to advocate the spread of an educational vacuum.”

The Justice Department also notes that the complete abandonment of public education in Virginia is not an issue in this case. Therefore, there is no need for the Circuit Court to contemplate the constitutionality of an entire state abandoning public education. Consequently, the Justice Department did not find that the broad question of a constitutional right to education, or lack thereof, was relevant to the Prince Edward case.

The Justice Department did find that the school closures were unconstitutional for two reasons. Firstly, the closures were an attempt to circumvent federal court orders requiring that the county desegregate its schools. Secondly, as the Justice Department adhered to Judge Lewis’s finding that Virginia was involved in the operation of public schools in the state, the abandonment of schools in one locality violated the Equal Protection Clause of the Fourteenth Amendment.

To support the finding made by Lewis’s District Court that Virginia was indeed involved in supporting and maintaining public schools in the state, the Justice Department provide a brief analysis of the state constitution and statutes relating to public education. The Justice Department finds that the state constitution directs the General Assembly to provide funding for educational purposes in the

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state. This is considered to be irrefutable evidence that the state was involved in the funding of public education in Virginia. The mere fact that the General Assembly had a constitutional duty under the state constitution to provide funding for public schools was deemed sufficient to show that the state was financially involved in the field of public education. Further analysis on how these funds were distributed is not provided. Instead the Justice Department casually states that “[t]hese state moneys are apparently paid over to local school systems automatically when certain conditions are met.”

An examination of the state statutes relating to public education reveals further connections between the state and the public schools. The localities were not solely responsible for the administration of the public schools. In fact, a state agency, the State Board of Education, and state officials, such as the Superintendent of Public Instruction, were found to be “prominently responsible for administering the school system.”

The Justice Department’s examination of Virginia law reveals that several important functions pertaining to public education were exclusively reserved for the State Board and the state officials. These included, establishing the various school divisions within the state, setting the rules of conduct and admission policies for high schools, certifying teachers, approving of textbooks to be used in public schools, and creating rules and regulation and providing assistance to ensure that the school laws are carried out in the public schools. Moreover, state law governs which subjects must be taught in public elementary schools. This reading of the state laws led the Justice Department to the conclusion that “it

could hardly be seriously argued that public education is not a state function in Virginia.” 342

Both the Department of Justice and Judge Lewis found that Virginia was not by any means removed from the field of public education. As such, the closures constituted a violation of the Fourteenth Amendment’s Equal Protection Clause, the school children in Prince Edward County were not treated equally compared to the rest of the state’s school children. To argue this point, the Justice Department relies heavily on Hall v. St. Helena Parish School Board. In this case a federal District Court had struck down Louisiana laws that allowed localities to close its schools to avoid desegregation a violation of the Equal Protection Clause.

In the Louisiana case the District Court had found that “[t]here can be no doubt about the character of education in Louisiana as a state, and not a local function”, a holding quoted by the Justice Department. 343 The state of Louisiana was therefore committing the same offense that Virginia was now accused of, violating equal protection on geographical grounds. Moreover, the District Court in Hall also struck down the Louisiana laws because the state was attempting to avoid compliance with desegregation orders issued by a federal court, and thus violating the Constitution as interpreted by the Supreme Court in Brown. The second violation of the Constitution rested on the illicit motive behind the Louisiana laws, i.e. the intended purpose to circumvent the Brown decision. 344

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The Justice Department found that the two violations of the Constitution in the Louisiana case were “both applicable here”. There were undoubtedly similarities between the Louisiana scheme and the Prince Edward school closures. The two schemes, however, were not identical. Although the Justice Department quotes Hall extensively, they neglect to quote the sections that in further detail describe the Louisiana scheme. The purpose of the Louisiana scheme was not to afford localities the possibility to close public schools to avoid desegregation, but rather to transform the schools into private schools, outside the reach of Brown. Private schools were beyond the purview of the Brown decision, as these schools were not the result of state action. No schools would actually be closed in Louisiana, but rather be designated as private schools in name only. The state would still finance and administer these schools, as it had done before. This was not the case in Prince Edward, where the public schools were de facto closed. The Justice Department did failed to mention these discrepancies between the two cases.

The amicus brief also cites James v. Almond, the case where a federal District Court struck down Virginia’s school closures during the states massive resistance. The massive resistance laws that allowed Governor Almond to close schools in Virginia, of course, did not make any pretense to disguise that fact that the school closures were a state action. The Justice Department again compares the Prince Edward school closures to a similar, but not identical case, without considering the particular legal mechanics behind the Prince Edward closures.

It is with great confidence that the Justice Department argues that the Prince Edward School closures were unconstitutional. Although perhaps unwarranted parallels are drawn to Louisiana and the previous closures in Virginia, the fact remains that the amicus brief only repeats findings already made by a federal

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judge, Oren Lewis. As a result, the Justice Department probably felt their arguments had merit. The far more pressing matter for the Justice Department was what the federal courts could do to end the closures.

The first obstacle the Justice Department felt necessary to overcome was the protection afforded to a state though the Eleventh Amendment. Arguments on this point were presented in a chapter titled “This Suit Is Not Barred by the Eleventh Amendment.” The Eleventh Amendment grants immunity to the states from lawsuits by citizens of other states or countries in federal court, unless the state grants its consent. The amendment also cover suits in federal court brought by citizens of the same state, as held by the Supreme Court in Hans v. Louisiana.

The Justice Department provides an extensive survey of the Eleventh Amendment and the reasons why it was not relevant in the Prince Edward case. A straightforward reading of the amendment undoubtedly seems to grant some protection to Virginia. A benefit of having the Justice Department join the school closures litigation as a co-defendant would have been the negation of any Eleventh Amendment arguments, as the amendment does not cover suits in federal courts brought by the U.S. Government. The immunity granted to the states by the Eleventh Amendment, however, is not all-compassing, and the Justice Department spared no ink to prove that the amendment did not hinder the lawsuit at hand.

The Justice Department quickly dismisses the notion that a state can hide behind the Eleventh Amendment when faced with litigation in federal courts. If this

348 Papers of Allan G. Donn, Brief for the United States as Amicus Curiae, Burke Marshall, St. John Barrett, Harold H. Greene, Alan G. Marker, Cocheysie J. Griffin, et al., v. County School Board of Prince Edward Count, et al. No. 8837, 30. The text of Amendment XI is provided in the amicus brief: “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another state, or by Citizens or Subjects of any Foreign State.”


would have been the case, the previous suits that ordered the reopening of the schools closed by Governor Almond, and indeed, the suits that ordered an end to segregation in public schools, would have been invalid. The Justice Department point to *Ex parte Young*, a 1908 Supreme Court ruling, which held that while a state enjoyed protection under the amendment, state officials did not. *James v. Almond*, for example, was a suit against the governor and not barred by the Eleventh Amendment.  

The Justice Department did not rely on *Ex parte Young* in their argumentation for the validity of the Prince Edward school closure case. Instead they chose to rely on a set of Supreme Court precedents that established that political subdivisions of a state are excluded from Eleventh Amendment immunity. In order for this strategy to have validity, the Justice Department also had to argue that the Prince Edward lawsuit was a suit against a county and not the state of Virginia.

Considering the heavy emphasis the Justice Department earlier in their *amicus* brief had placed on state involvement in public education, this might seem counterintuitive.

Although the Justice Department undeniably felt that public schools in Virginia at least partly were established and maintained by the state, the question at hand here was who ultimately had closed the Prince Edward schools, and likewise, who could reopen the schools. The school closures was the result of the actions taken by the county to halt funding to the public schools, and to remedy this the federal courts should order the county, and not the state, to raise and appropriate funds for the public schools. The Justice Department holds that “only the County is recalcitrant; only the County need be coerced; only County funds raised under the County’s taxing power need be appropriated…”

The goal of the Prince Edward lawsuit, from the perspective of the NAACP and the Justice Department, was thus to modify the behavior of county, not the state.

To prove that a political subdivision of a state is excluded from Eleventh Amendment protections, the Justice Department had to argue that the Prince Edward lawsuit was a suit against the county and not the state. This, in turn, required them to assert that the Prince Edward county school board was not acting for the state.

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Amendment immunity, the Justice Department cites 14 Supreme Court cases and 19 lower court cases, both state and federal.\textsuperscript{353}

The final chapter where arguments are presented is titled “The District Court Has the Power To Compel a Levy of Taxes and a Monetary Appropriation”.\textsuperscript{354} Here the Justice Department discusses what the federal courts should, and can, do to correct the situation in Prince Edward County. The questions debated here goes to the very heart of American federalism and form of government. The county officials had made the claim that even if it was found that the school closures were unconstitutional, it was beyond a court’s power to order Prince Edward to levy a tax for public education. The power to tax did not belong to the unelected federal judiciary, but was the sole province the legislative branches, in this case the Prince Edward County Board of Supervisors, who operated with the mandate of the state legislature.\textsuperscript{355}

The Justice Department obviously felt that the federal courts did have the power to provide the relief sought by the NAACP, i.e. an order requiring that Prince Edward levy taxes and distribute funds for the county’s public schools. The rationale presented by the Justice Department was simple. The county officials had used their discretionary power to levy taxes for public schools in a way that violated the Fourteenth Amendment, when they refused to appropriate funds for the Prince Edward schools. The choice to not fund the public schools was illegal under the Constitution, and thus not part of the discretionary power afforded the county officials. The county’s discretionary power was limited “the technical problem of how they shall go about levying taxes, and in what amounts (circumscribed, of course, by their duty to provide sufficient funds to operate the

\textsuperscript{353} Papers of Allan G. Donn, Brief for the United States as Amicus Curiae, Burke Marshall, St. John Barrett, Harold H. Greene, Alan G. Marker, Coheyse J. Griffin, et al., v. County School Board of Prince Edward Count, et al. No. 8837, 30-44.

\textsuperscript{354} Papers of Allan G. Donn, Brief for the United States as Amicus Curiae, Burke Marshall, St. John Barrett, Harold H. Greene, Alan G. Marker, Coheyse J. Griffin, et al., v. County School Board of Prince Edward Count, et al. No. 8837, 44.

\textsuperscript{355} Papers of Allan G. Donn, Brief for the United States as Amicus Curiae, Burke Marshall, St. John Barrett, Harold H. Greene, Alan G. Marker, Coheyse J. Griffin, et al., v. County School Board of Prince Edward Count, et al. No. 8837, 44.
schools).” The choice not to levy any taxes at all, however, was not a permissible option, as “they are compelled to do this by the [Fourteenth] Amendment.”

The problem the Justice Department faced here was that the remedy they were advocating, an order by a federal court directing a county to levy a tax, was unchartered constitutional territory. The Supreme Court would eventually issue such an order when the Court in 1964 struck down the Prince Edward schools closures. Legal scholar Michael Klarman notes that the order directing Prince Edward to levy a tax for public schools was “a virtually unprecedented decision, about which several justices had doubts.”

The lawyers at the Justice Department certainly made a valiant attempt to argue that precedent existed supporting the issuance of an order directing a county to levy a tax in order to correct a violation of the Constitution. Twelve Supreme Court cases and three cases decided by lower courts are cited. In none of these cases, however, is the principle that a court can compel a state, or a political subdivision thereof, established. The Justice Department, nevertheless, exhibits great confidence in their argument, and concluded the chapter by stating:

... the consequences of refusal to levy taxes (...) are so egregious that to characterize the Board’s inaction here as other than a gross abuse of discretion would be to ignore reality. Surely a court of equity is not powerless to require the Board of Supervisors to act to undo these consequences of their unconstitutional conduct.

In the brief conclusion, the Justice Department stresses the human side of this case, namely that “[s]ince 1959 most of the Negro children in Prince Edward County have been deprived of a formal education”. In what reasonably can be seen as a manifestation of frustration on the part of the Justice Department, and by implication the Kennedy administration, the federal Circuit Court is given a

357 Klarman 2004, 342; Bonastia 2012, 221.
call for speedy action. “It is time—in fact, it is high time—to call a halt to this abdication of responsibility on the part of the county authorities.”

It is noteworthy that the Justice Department’s *amicus* brief put relatively small emphasis on arguments relating to the unconstitutionality of the school closures. Perhaps they relied on that Judge Lewis’s previous decision in the case would resonate with the federal Circuit Court. The Justice Department instead focuses on questions relating to the more practical aspects of how the school closures could, and should, be ended. The brief attempts to remove legal hurdles that the federal Circuit Court might find sufficient to decline issuing a decision that in no uncertain terms would end the Prince Edward debacle. The means to achieving this end came in the form of a federal judiciary empowered to involve itself in the business of taxation in a state. This was clearly a strong stance against any states’ rights argument. This line of reason is repeated in the Justice Department’s views on the immunities afforded to a state through the Eleventh Amendment.

### 5.2 County Officials’ Arguments

The county officials’ brief to the federal Circuit Court is undated. It is, however, mentioned that the brief was written and printed around the Christmas season of 1962. This rather odd piece of information made its way into the brief because the lawyers responsible for the brief found it necessary to point out that the holiday season posed some problems with printing the brief. This, in part, resulted in a hastily crafted brief that the lawyers felt was below their normal

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361 The brief was filed on behalf of the County School Board of Prince Edward County and T. J. McIlwaine, Division Superintendent of Schools of Prince Edward County. Other defendants in the case were: Board of Supervisors of Prince Edward County; State Board of Education and Superintendent of Public Instruction of Commonwealth of Virginia. These two additional defendants both filed separate briefs. There is nothing to suggest that the arguments of these three defendants are in conflict with each other. In fact, two sections of the brief examined here dealing with procedural matters, based on the topics of the sections, simply state: “This question will be discussed in the brief of one of the other defendants. We adopt what is there said.” The term “county officials” will remain in use as an umbrella term for the interest of county leaders responsible for the school closures. Papers of Allan G. Donn, Brief on Behalf of County School Board of Prince Edward County and T. J. McIlwaine, Division Superintendent of Schools of said County, Appellees and Cross-Appellants, United States Court of Appeals for the Fourth Circuit, *Cocheys E. Griffin, etc., et al.* *v. County School Board of Prince Edward County, Virginia, et al.*, No. 8837, 24, 36; *Cocheys E. Griffin, et al.* *v. Board of Supervisors of Prince Edward County, et al.*, 322 F.2d 332 (4th Cir. 1963), 333.
The main reason for the haste in which the brief was prepared was, quite obviously, not the very predictable Christmas holiday. The county officials complain that the federal Circuit Court had moved the date for arguments weeks earlier than what was to be expected according to the Circuit Court’s rules. The rescheduling had been done on request by the NAACP. The authors of the brief also lament that since the matter of the school closures under state law was yet undecided to the county officials’ satisfaction by the Virginia state courts, a considerable portion of the brief had to be devoted to arguing this question.

The rescheduling of the hearing before the federal Circuit Court, the Christmas holiday, and the inclusion of arguments under state law resulted in a brief that its authors “take no pride in”. The county officials hold the NAACP and the federal courts responsible for the time restraint under which the brief was written. Moreover, it is argued that the slow pace of the school closure litigation is due to the NAACP’s reluctance to raise federal questions with the state courts, and Judge Lewis’s acquiesce with the NAACP’s claims. The finger is also pointed at the federal Circuit Court that had accepted a request made by the NAACP to speed up the proceedings. The county officials voice their objections to what they perceive is preferential treatment of “the Negro plaintiffs” in “these racial

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362 The lawyers were: Collins Denny, Jr.; John F. Kay, Jr.; and C. F. Hicks. Papers of Allan G. Donn, Brief on Behalf of County School Board of Prince Edward County and T. J. McIlwaine, Division Superintendent of Schools of said County, Appellees and Cross-Appellants, United States Court of Appeals for the Fourth Circuit, Cocheys E. Griffin, etc., et al. v. County School Board of Prince Edward County, Virginia, et al., No. 8837, 106.

363 Papers of Allan G. Donn, Brief on Behalf of County School Board of Prince Edward County and T. J. McIlwaine, Division Superintendent of Schools of said County, Appellees and Cross-Appellants, United States Court of Appeals for the Fourth Circuit, Cocheys E. Griffin, etc., et al. v. County School Board of Prince Edward County, Virginia, et al., No. 8837, 3–4, 105–106.

364 Papers of Allan G. Donn, Brief on Behalf of County School Board of Prince Edward County and T. J. McIlwaine, Division Superintendent of Schools of said County, Appellees and Cross-Appellants, United States Court of Appeals for the Fourth Circuit, Cocheys E. Griffin, etc., et al. v. County School Board of Prince Edward County, Virginia, et al., No. 8837, 105.

365 Papers of Allan G. Donn, Brief on Behalf of County School Board of Prince Edward County and T. J. McIlwaine, Division Superintendent of Schools of said County, Appellees and Cross-Appellants, United States Court of Appeals for the Fourth Circuit, Cocheys E. Griffin, etc., et al. v. County School Board of Prince Edward County, Virginia, et al., No. 8837, 1–4; Papers of Allan G. Donn, Brief for the United States as Amicus Curiae, Burke Marshall, St. John Barrett, Harold H. Greene, Alan G. Marker, Cocheys J. Griffin, et al., v. County School Board of Prince Edward Count, et al. No. 8837, 15.
The county officials describe the process as “two teams on a football field playing without any set off rules”.

5.2.1 Arguments against the Current Cause of Action

In the chapter of the brief titled “ARGUMENT”, the county officials express more critique of the litigation. An entire subchapter is devoted to the argument that the current case is dealing with the wrong questions. The county officials point to Judge Lewis’s order of April 22, 1960, which ordered the county officials to desegregate Prince Edward’s public schools. Since the county operated no public schools at that time, the NAACP, on June 10, 1960, filed a supplemental complaint, asking that the federal District Court order the public schools to be reopened. The NAACP argued that the school closures were an action taken by the county officials to avoid compliance with the desegregation order of April 22, 1960. Judge Lewis granted the NAACP’s request on September 16, 1960. It was at this stage that the issue at hand in the litigation was expanded to not only concern segregation in public schools, but also the legality of the school closures.
The county officials felt that the school closures were a wholly different matter than the one in the original suit, which was the question of segregated public schools. The county officials point out that they had objected to the supplemental complaint since it was added to the litigation, and that these objections had been raised on several occasions during the proceedings.  

The county officials’ argument is that the federal District Court, in its order dated April 22, 1960, ordered that Prince Edward County cease its practice of segregating public schools. The county officials stressed that the order referred to public schools “operated by the defendants in the County”.  

The abandonment of all public education in Prince Edward undeniably resulted in an end to segregated public schools in the county, since there were no public schools to segregate. This is where the county officials felt the litigation should have ended. The District Court had ordered them to end segregation in public education, and they had complied.  

The NAACP’s supplemental complaint accused the county officials “of circumventing and frustrating the enforcement of the order of the court requiring the racial desegregation of the schools of Prince Edward County”. The county officials protest that they had done no such thing. The District Court’s order only required that segregation in the public schools end, the order said nothing about

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369 Papers of Allan G. Donn, Brief on Behalf of County School Board of Prince Edward County and T. J. McIlwaine, Division Superintendent of Schools of said County, Appellees and Cross-Appellants, United States Court of Appeals for the Fourth Circuit, Cocheys E. Griffin, etc., et al. v. County School Board of Prince Edward County, Virginia, et al., No. 8837, 8.
370 Papers of Allan G. Donn, Brief on Behalf of County School Board of Prince Edward County and T. J. McIlwaine, Division Superintendent of Schools of said County, Appellees and Cross-Appellants, United States Court of Appeals for the Fourth Circuit, Cocheys E. Griffin, etc., et al. v. County School Board of Prince Edward County, Virginia, et al., No. 8837, 24-26.
371 Papers of Allan G. Donn, Brief on Behalf of County School Board of Prince Edward County and T. J. McIlwaine, Division Superintendent of Schools of said County, Appellees and Cross-Appellants, United States Court of Appeals for the Fourth Circuit, Cocheys E. Griffin, etc., et al. v. County School Board of Prince Edward County, Virginia, et al., No. 8837, 27. Italics added by the county officials in their brief. The District Court’s order of April 22, 1960, quoted in the county officials brief, referred only to public high schools, however, public elementary schools were later added, so that the litigation concerned all public schools in Prince Edward, see Bonastia 2012, 99.
372 Papers of Allan G. Donn, Brief on Behalf of County School Board of Prince Edward County and T. J. McIlwaine, Division Superintendent of Schools of said County, Appellees and Cross-Appellants, United States Court of Appeals for the Fourth Circuit, Cocheys E. Griffin, etc., et al. v. County School Board of Prince Edward County, Virginia, et al., No. 8837, 26.
whether public schools had to be operated or not. The omission of any requirement that public schools must remain operational in the county was made even though the District Court knew that desegregation very well might lead to school closures. The county officials point to the fact that decisions by both the federal District Court, and the federal Circuit Court, had mentioned the possibility of school closures in Prince Edward if the county was ordered to desegregate its schools. Even though the federal courts, in particular Lewis’s District Court that handed down the order to desegregate the schools, were aware that school closures were a possibility, they did not rule on this matter in the cases concerning the desegregation of Prince Edward’s schools.373 “Had the District Court intended to require the operation of schools in Prince Edward County,” the county officials write, “it surely would have done so in language clear and unmistakable.”374

The issues of segregated public schools, and the abandonment of all public schools in a county, were not, according to the county officials, related questions. The former question had been resolved when the District Court ordered Prince Edward to desegregate its schools. The latter question was a new “cause of action”, i.e. “the specific conduct of the defendant upon which plaintiff bases his claim for relief.”375 As such, the county officials requested that the federal Circuit Court dismiss the NAACP’s supplemental complaint asking the courts to reopen the schools. This was a new matter, and if the NAACP wanted to litigate it, they should file new suit. In essence, the county officials wanted the process to return to square one.376

373 Papers of Allan G. Donn, Brief on Behalf of County School Board of Prince Edward County and T. J. McIlwaine, Division Superintendent of Schools of said County, Appellees and Cross-Appellants, United States Court of Appeals for the Fourth Circuit, Cocheyse E. Griffin, etc., et al. v. County School Board of Prince Edward County, Virginia, et al., No. 8837, 26-29.
374 Papers of Allan G. Donn, Brief on Behalf of County School Board of Prince Edward County and T. J. McIlwaine, Division Superintendent of Schools of said County, Appellees and Cross-Appellants, United States Court of Appeals for the Fourth Circuit, Cocheyse E. Griffin, etc., et al. v. County School Board of Prince Edward County, Virginia, et al., No. 8837, 29.
375 Papers of Allan G. Donn, Brief on Behalf of County School Board of Prince Edward County and T. J. McIlwaine, Division Superintendent of Schools of said County, Appellees and Cross-Appellants, United States Court of Appeals for the Fourth Circuit, Cocheyse E. Griffin, etc., et al. v. County School Board of Prince Edward County, Virginia, et al., No. 8837, 30.
376 Papers of Allan G. Donn, Brief on Behalf of County School Board of Prince Edward County and T. J. McIlwaine, Division Superintendent of Schools of said County, Appellees and Cross-Appellants, United States Court of Appeals for the Fourth Circuit, Cocheyse E. Griffin, etc., et al. v. County School Board of Prince Edward County, Virginia, et al., No. 8837, 24-35.
5.2.2 Arguments Defending Virginia's System of Public Education

The county officials did not end their arguments with their request to dismiss the matter of the school closures on the grounds that the case was dealing with the wrong cause of action. As in their brief to the Virginia Supreme Court of Appeals in Leslie Francis Griffin et al. v. Board of Supervisors of Prince Edward County, covered here in chapters 4.1 and 4.2, the county officials provided arguments as to why the school closures were permissible under both state and federal law. The state laws that allowed for the school closures are explained and defended in a separate section of the brief.377

The county officials defend Virginia’s decentralized system of public education, where local communities are left in charge of their school systems. It is held that the Virginia system is constitutional under the Fourteenth Amendment, as “the Fourteenth Amendment does not require uniformity throughout the State.” 378 The same cases that were cited in the section of the county officials’ brief to the Virginia high court analyzing the Equal Protection Clause of the Fourteenth Amendment are cited here.379

The brief goes on to in no small detail explain the laws, both statutes and the state constitution, which sets up Virginia’s system of public education. The purpose of this section of the brief is to “clearly demonstrate that the public schools in Virginia are not and have not since 1902 been established, maintained and operated by the State but rather by the political subdivisions of the State.”380

377 Papers of Allan G. Donn, Brief on Behalf of County School Board of Prince Edward County and T. J. McIlwaine, Division Superintendent of Schools of said County, Appellees and Cross-Appellants, United States Court of Appeals for the Fourth Circuit, Cocheyse E. Griffin, etc., et al. v. County School Board of Prince Edward County, Virginia, et al., No. 8837, 41.
378 Papers of Allan G. Donn, Brief on Behalf of County School Board of Prince Edward County and T. J. McIlwaine, Division Superintendent of Schools of said County, Appellees and Cross-Appellants, United States Court of Appeals for the Fourth Circuit, Cocheyse E. Griffin, etc., et al. v. County School Board of Prince Edward County, Virginia, et al., No. 8837, 41.
379 Papers of Allan G. Donn, Brief on Behalf of County School Board of Prince Edward County and T. J. McIlwaine, Division Superintendent of Schools of said County, Appellees and Cross-Appellants, United States Court of Appeals for the Fourth Circuit, Cocheyse E. Griffin, etc., et al. v. County School Board of Prince Edward County, Virginia, et al., No. 8837, 41.
380 Papers of Allan G. Donn, Brief on Behalf of County School Board of Prince Edward County and T. J. McIlwaine, Division Superintendent of Schools of said County, Appellees and Cross-Appellants, United States Court of Appeals for the Fourth Circuit, Cocheyse E. Griffin, etc., et al. v. County School Board of Prince Edward County, Virginia, et al., No. 8837, 47. The year 1902 is a reference to year when Virginia’s constitution was revised. At the time of the school closure litigation the 1902 constitution was the state’s valid constitution, see Papers of Allan G. Donn,
The sections of the state constitution that govern public education, sections 129, 130, 132 and 133, are interpreted to place no duty on the state to provide for public education. Rather, the state constitution “only requires the establishment and maintenance of a ‘system’.”

The county officials argue that this requirement had been fulfilled by the passing of a school code. This, according to the county officials, was tantamount to establishing a school “system”. This interpretation of the Virginia constitution’s provisions dealing with public education had been expressed by the state’s courts in a 1937 decision.

The school code, i.e. the state statutes that in further detail govern public education in Virginia, does set up a “system” for public education in the state. The purpose of this system, however, was only to provide support for those localities that choose to operate public schools. State funds were made available for public education purposes only for those localities that raised local funds for public schools. The state would thus supplement local school budgets, on the condition that a locality adopted such a budget. The county officials, of course, stressed that no state law required a locality to raise any funds for public schools.

Virginia was, according to the state’s laws, required to provide some funds to all localities for public education regardless if schools were operated or not. These funds were very limited, and the county officials state that the mandatory funds would have covered approximately 5 per cent of what was needed to operate public schools in Prince Edward County. Nevertheless, Prince Edward County

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381 Papers of Allan G. Donn, Brief on Behalf of County School Board of Prince Edward County and T. J. McIlwaine, Division Superintendent of Schools of said County, Appellees and Cross-Appellants, United States Court of Appeals for the Fourth Circuit, Cocheys E. Griffin, etc., et al. v. County School Board of Prince Edward County, Virginia, et al., No. 8837, 47-48.

382 Papers of Allan G. Donn, Brief on Behalf of County School Board of Prince Edward County and T. J. McIlwaine, Division Superintendent of Schools of said County, Appellees and Cross-Appellants, United States Court of Appeals for the Fourth Circuit, Cocheys E. Griffin, etc., et al. v. County School Board of Prince Edward County, Virginia, et al., No. 8837, 49.

383 Papers of Allan G. Donn, Brief on Behalf of County School Board of Prince Edward County and T. J. McIlwaine, Division Superintendent of Schools of said County, Appellees and Cross-Appellants, United States Court of Appeals for the Fourth Circuit, Cocheys E. Griffin, etc., et al. v. County School Board of Prince Edward County, Virginia, et al., No. 8837, 48-49. The state court decision referred to is Scott County School Board v. Board of Supervisors, 169 Va. 213 (1937).

384 Papers of Allan G. Donn, Brief on Behalf of County School Board of Prince Edward County and T. J. McIlwaine, Division Superintendent of Schools of said County, Appellees and Cross-Appellants, United States Court of Appeals for the Fourth Circuit, Cocheys E. Griffin, etc., et al. v. County School Board of Prince Edward County, Virginia, et al., No. 8837, 50-58.
had received these state monies, fulfilling the requirements established by Virginia law.\textsuperscript{384}

With the exception of state requirements in regards to certain subjects that must be taught in public schools and a set level of qualification for public school teachers, the state had no say in how, or if, public schools were operated. The state, according to the county officials, is thus divorced from the operation of the public schools in Virginia. That Judge Lewis in his ruling in the \textit{Eva Allen} case, decided on July 25, 1962, had found that the state was indeed involved in the field of public education, is argued to be a misunderstanding of the case law regarding Virginia’s system of public education. Judge Lewis is said to have interpreted a state court decision out of context, and failed to consider the varying facts of that case and \textit{Eva Allen}. The federal judge is also accused of failing to realize that according to state law, at least as interpreted by the county officials, “[t]he local school board runs the schools.”\textsuperscript{385}

\textbf{5.2.3 Arguments against a Constitutional Right to Desegregated Education}

Following the elaborate depiction of the nature of public education in Virginia, the county officials face the accusation made by the NAACP in their supplemental complaint in the school segregation cases following the school closures in Prince Edward. This was the supplemental complaint that accused the county officials “of circumventing and frustrating the enforcement of the order of the court requiring the racial desegregation of the schools of Prince Edward County”. As is noted earlier, the county officials felt that this question should not be part of the current litigation, as they asserted that it raised different questions than the original complaint, which only concerned school segregation.

The opinion that the order to desegregate the county’s schools had been fulfilled when all public schools were closed is repeated. The argument on this matter is

\textsuperscript{384} Papers of Allan G. Donn, Brief on Behalf of County School Board of Prince Edward County and T. J. McIlwaine, Division Superintendent of Schools of said County, Appellees and Cross-Appellants, United States Court of Appeals for the Fourth Circuit, \textit{Cocheyse E. Griffin, etc., et al. v. County School Board of Prince Edward County, Virginia, et al.}, No. 8837, 51, 53.

\textsuperscript{385} Papers of Allan G. Donn, Brief on Behalf of County School Board of Prince Edward County and T. J. McIlwaine, Division Superintendent of Schools of said County, Appellees and Cross-Appellants, United States Court of Appeals for the Fourth Circuit, \textit{Cocheyse E. Griffin, etc., et al. v. County School Board of Prince Edward County, Virginia, et al.}, No. 8837, 61-63, quote on page 63. The state court case referred to was \textit{Board of Supervisors of Chesterfield County v. School Board of Chesterfield County}, 182 Va. 266 (1944).
expanded by a comparison to another instance of resistance to federal court orders to desegregate. The case in point was the efforts of Louisiana to avoid the desegregation of public schools in New Orleans. The county officials find that the federal District Court in the New Orleans cases had determined that the state legislature had attempted to “circumvent” and “frustrate” federal court orders to desegregate public schools. In fact, the county officials claim that these words were used in this context for the first time in the New Orleans litigation. The implied comparison between New Orleans and Prince Edward County, through the usage of the same terms, is thoroughly rejected by the county officials. The New Orleans cases concerned an overt attempt by the Louisiana legislature to continue operating segregated schools, constituting a clear violation of Brown and the orders of District Courts to implement desegregation. This was not the case in Prince Edward as no segregated schools were operated.

At this stage the brief turns to a question which received a great deal of attention in the county officials’ brief to the state supreme court, namely the nature of public education in the eyes of the Constitution. In the brief before the Circuit Court, the county officials focus on how public education had been viewed in the context of desegregation. The question addressed is then not if the constitution guarantees a general right to public education, but rather if a right to desegregated education exists. An extensive discussion on public education in general, similar to the one present in the brief before the Virginia high court is therefore avoided. Instead the argument is narrowed down to deal with how the federal courts, had viewed public education in school segregation cases.

This part of the brief is a response to the claim made by the NAACP that “[e]qual educational opportunities through access to non-segregated public


387 The name of this subchapter is “The Supreme Court Has Not Held That Public Schools Must Be Operated”, see Papers of Allan G. Donn, Brief on Behalf of County School Board of Prince Edward County and T. J. McIlwaine, Division Superintendent of Schools of said County, Appellees and Cross-Appellants, United States Court of Appeals for the Fourth Circuit, Cocheyse E. Griffin, etc., et al. v. County School Board of Prince Edward County, Virginia, et al., No. 8837, 67.
schools is secured by the Constitution.” The county officials find this contention to be the central tenet of the NAACP’s argumentation against the school closures, calling all other assertions “pure window-dressing.” If the NAACP was correct, and the Supreme Court had indeed found that the Constitution demanded that desegregated schools be provided, the county officials acquiesce that the school closures were unconstitutional. For the NAACP to assert that this is how the Supreme Court had interpreted the Constitution and to prove that this was indeed the case, however, were two entirely different things. “Let them point to the language of the Constitution so providing”, the county officials write in their brief, “let them point to the decision of the Supreme Court of the United States which so construes the Constitution.”

The county officials find nothing to support the NAACP’s claim, quite to the contrary. In their reading of the Supreme Court’s school segregation decisions, the county officials find that “[a]ll the Supreme Court has held is that segregation may not be enforced by law in the schools which are operated.” Here the brief makes reference to Brown and Cooper v. Aaron, where it was explicitly held that enforcement of racial segregation in public schools was unconstitutional. The decisions, however, only creates a restriction on how public schools may be operated, not a requirement that desegregated schools must be operated. The Supreme Court, in other words, had only banned one type of activity, the operation of segregated schools; it had not created the duty that the states must provide a specific service, desegregated schools.

The county officials also point to lower federal court decisions, dealing with segregated schools that more explicitly tackle the issue of a positive duty to provide public education. Here reference is made to the Virginia case James v.

388 Papers of Allan G. Donn, Brief on Behalf of County School Board of Prince Edward County and T. J. McIlwaine, Division Superintendent of Schools of said County, Appellees and Cross-Appellants, United States Court of Appeals for the Fourth Circuit, Cocheys E. Griffin, etc., et al. v. County School Board of Prince Edward County, Virginia, et al., No. 8837, 68. The NAACP’s brief is quoted in the county officials brief.

389 Papers of Allan G. Donn, Brief on Behalf of County School Board of Prince Edward County and T. J. McIlwaine, Division Superintendent of Schools of said County, Appellees and Cross-Appellants, United States Court of Appeals for the Fourth Circuit, Cocheys E. Griffin, etc., et al. v. County School Board of Prince Edward County, Virginia, et al., No. 8837, 69.

390 Papers of Allan G. Donn, Brief on Behalf of County School Board of Prince Edward County and T. J. McIlwaine, Division Superintendent of Schools of said County, Appellees and Cross-Appellants, United States Court of Appeals for the Fourth Circuit, Cocheys E. Griffin, etc., et al. v. County School Board of Prince Edward County, Virginia, et al., No. 8837, 68-70.
Almond, where a federal District Court held that there is no constitutional requirement that a state operate public schools. In Briggs v. Elliott, a case that was part of the Brown case, a federal District Court interpreted Brown as placing no obligation on a state to actively provide desegregated schools. “The Constitution,” said the District Court in Briggs “in other words, does not require integration.” The county officials also quote three cases handed down by federal Circuit Courts, that all support the claim that Brown did not require that desegregated schools should be provided. Also quoted is a report by the U.S. Commission on Civil Rights, and a study on public schools by James Conant, former President of Harvard. Finally several federal court decisions are cited, but not quoted. All quotes and citations naturally support the county officials’ claim.

5.2.4 Arguments in Support of the Closures as a Means to avoid Desegregation

The final subchapter in the brief is titled: “Public Schools of Prince Edward County May Be Closed To Avoid the Effect of the Law of the Land as Interpreted by the Supreme Court While Public Schools Remain Open Elsewhere in Virginia.”

The title, and subject matter covered in the section, is a response to Judge Lewis’s holding in the Eva Allen case, where the federal District Court arrived at the exact opposite finding. It is also a reply to arguments made by the Justice Department in their amicus brief before the Federal Circuit Court. The issue covered in the section is broken down into two questions. The first question

391 Papers of Allan G. Donn, Brief on Behalf of County School Board of Prince Edward County and T. J. McIlwaine, Division Superintendent of Schools of said County, Appellees and Cross-Appellants, United States Court of Appeals for the Fourth Circuit, Cocheyse E. Griffin, etc., et al. v. County School Board of Prince Edward County, Virginia, et al., No. 8837, 69: James v. Almond, 170 F. Supp. 331 (1959), 337.
392 Papers of Allan G. Donn, Brief on Behalf of County School Board of Prince Edward County and T. J. McIlwaine, Division Superintendent of Schools of said County, Appellees and Cross-Appellants, United States Court of Appeals for the Fourth Circuit, Cocheyse E. Griffin, etc., et al. v. County School Board of Prince Edward County, Virginia, et al., No. 8837, 70-71; Briggs v. Elliott, 132 F.Supp. 776 (1955), 777.
393 Papers of Allan G. Donn, Brief on Behalf of County School Board of Prince Edward County and T. J. McIlwaine, Division Superintendent of Schools of said County, Appellees and Cross-Appellants, United States Court of Appeals for the Fourth Circuit, Cocheyse E. Griffin, etc., et al. v. County School Board of Prince Edward County, Virginia, et al., No. 8837, 71-73.
394 Papers of Allan G. Donn, Brief on Behalf of County School Board of Prince Edward County and T. J. McIlwaine, Division Superintendent of Schools of said County, Appellees and Cross-Appellants, United States Court of Appeals for the Fourth Circuit, Cocheyse E. Griffin, etc., et al. v. County School Board of Prince Edward County, Virginia, et al., No. 8837, 73.
relates to the legality of the school closures considering that all other schools in Virginia remained operational. The second question asks whether Prince Edward can close its schools to avoid desegregation.  

The first question, “may public schools be closed in Prince Edward while they remain open elsewhere in Virginia?” touches upon issues already covered in the brief, and is therefore answered concisely. The argument that the Equal Protection clause of the Fourteenth Amendment allows for discrepancies within a state is repeated here. As long as the public schools in Prince Edward are under local control, and equality is provided within the county, the requirements of the Fourteenth Amendment are satisfied.

The county officials admit that they were somewhat surprised by the Justice Department’s *amicus* brief. In particular the fact that the Justice Department was no longer advocating that Virginia be forced to choose between open schools in Prince Edward, or no public schools in the state whatsoever. Perhaps this question would have received more attention if the Justice Department would have persisted in this line of reasoning? The brief does not reveal whether this was the case, but the county officials do not miss the chance to mention the department’s inconsistency in their views on the school closures. “We are amused”, proclaims the county officials, “at the way the position of the Attorney General of the United States varies from day to day.”

The second question, “may public schools in Prince Edward be closed to avoid integration?” is given far more attention. Indeed, this question is itself divided into three separate arguments. The first argument holds that “an activity which has theretofore been carried on may be terminated in order to avoid integration.” Here the county officials cite several decisions made by federal District Courts,

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395 Papers of Allan G. Donn, Brief on Behalf of County School Board of Prince Edward County and T. J. McIlwaine, Division Superintendent of Schools of said County, Appellees and Cross-Appellants, United States Court of Appeals for the Fourth Circuit, *Cocheyse E. Griffin, etc., et al. v. County School Board of Prince Edward County, Virginia, et al.*, No. 8837, 73-74.

396 Papers of Allan G. Donn, Brief on Behalf of County School Board of Prince Edward County and T. J. McIlwaine, Division Superintendent of Schools of said County, Appellees and Cross-Appellants, United States Court of Appeals for the Fourth Circuit, *Cocheyse E. Griffin, etc., et al. v. County School Board of Prince Edward County, Virginia, et al.*, No. 8837, 75-76.

397 Papers of Allan G. Donn, Brief on Behalf of County School Board of Prince Edward County and T. J. McIlwaine, Division Superintendent of Schools of said County, Appellees and Cross-Appellants, United States Court of Appeals for the Fourth Circuit, *Cocheyse E. Griffin, etc., et al. v. County School Board of Prince Edward County, Virginia, et al.*, No. 8837, 73-74.
many of them affirmed by federal Circuit Courts, upholding the selling or closing of a public facility to avoid desegregation. The facilities closed or sold were public swimming pools and parks. The federal courts had consistently found that nothing in the Constitution required that these services be provided. As long as the closure or sale of a public facility affected everyone equally, there was no violation of the Constitution. Of course, if the state or a local subdivision of the state, resumed its involvement with the operation of the facility in question, the federal courts found that any segregation at that point would be unconstitutional. The county officials found the connection between these cases, in particular the swimming pool case, and the Prince Edward case to be “self-evident.”

The second argument looks at other instances when the federal courts had ruled in cases where attempts had been made to avoid school segregation. Here the county officials wished to prove that the Prince Edward school closures were not comparable to previous attempts to circumvent Brown. Instances of resistance to school desegregation, and the resulting federal cases, from three southern states, Arkansas, Louisiana, and Virginia, are examined. The county officials contend that the legislative schemes struck down in the other school cases, all involved attempts to perpetuate segregated public schools.

The cases from Arkansas all pertain to the Little Rock school crisis and its aftermath. The crisis was a prime example of defiance of Brown and desegregation orders issued by the federal judiciary, culminating in President Eisenhower sending federal troops to ensure desegregation in Little Rock. Even after the president sent troops to Little Rock to guarantee that the desegregation

398 Papers of Allan G. Donn, Brief on Behalf of County School Board of Prince Edward County and T. J. McIlwaine, Division Superintendent of Schools of said County, Appellees and Cross-Appellants, United States Court of Appeals for the Fourth Circuit, Cocheyse E. Griffin, etc., et al. v. County School Board of Prince Edward County, Virginia, et al., No. 8837, 76-79. The cited cases were: Tonkins v. City of Greensboro, 162 F. Supp. 549 (1958) affirmed by the United States Court of Appeals Fourth Circuit in 276 F.2d 890 (1960), the subject matter was a public swimming pool that was sold; Gilmore v. City of Montgomery, 176 F. Supp. 776 (1959), affirmed by the United States Court of Appeals Fifth Circuit in 277 F.2d 364 (1960), the subject matter was several parks owned by the City of Montgomery, Alabama; Clark v. Flory, 141 F. Supp. 248 (1956), affirmed by the United States Court of Appeals Fourth Circuit in 237 F.2d 597 (1956), the subject matter was a state park; Willie v. Harris County, 202 F. Supp. 549 (1962), the subject matter was a county operated park.

399 Papers of Allan G. Donn, Brief on Behalf of County School Board of Prince Edward County and T. J. McIlwaine, Division Superintendent of Schools of said County, Appellees and Cross-Appellants, United States Court of Appeals for the Fourth Circuit, Cocheyse E. Griffin, etc., et al. v. County School Board of Prince Edward County, Virginia, et al., No. 8837, 80.
orders by the federal courts were followed, the debacle did not end. The Little Rock school board asked the federal courts to postpone desegregation for two and a half years due to the many disturbances caused by those opposing desegregation, including the state’s governor and legislature. This eventually led to the Supreme Court’s ruling in *Cooper v. Aaron*, where the Court held that opposition to a Supreme Court decision is no valid reason not to enforce it. The Constitution was the “supreme Law of the Land”, and the Supreme Court had the power to “to say what the law is.” The *Brown* decision could therefore not be resisted any more than the Constitution itself.400

The *Cooper* decision put to rest the notion that a state, while operating within the law, could avoid to comply with *Brown*. The county officials chose to view *Cooper v. Aaron* in a very limited fashion. Making reference to *Cooper* in a single sentence, the county officials writes that the ruling “affirmed that the *Brown* decision was to be deemed as holding that enforced racial segregation was the illegal act.”401 Here the county officials were portraying the *Cooper* ruling as only barring a state from actively “enforcing racial segregation”. This rather blatant oversimplification of *Cooper* serves the purpose of connecting that forceful ruling to instances where segregated schools were still being operated. In Prince Edward, of course, no such public schools were in operation.

Following *Cooper v. Aaron*, in fact on the same day the ruling was handed down; Arkansas Governor Orval Faubus closed all public high schools in Little Rock. The legislation that allowed the governor to close down schools under threat of being desegregated also provided for the possibility of channeling the assets previously reserved for those closed schools to other, public or private, schools operating on a segregated basis. Under this scheme the governor had proclaimed

that Little Rock High, the public school ordered by the federal courts to
desegregate, could operate as a segregated private school.  

The plan to operate closed schools as private segregated schools was struck
down by a federal Circuit Court. That court found that the transfer of assets,
which included funds, buildings, equipment, and even teachers, from the closed
schools to private schools constituted state support of segregated schools. The
scheme was found to be in violation of the Supreme Court’s recent holding in
*Cooper v. Aaron.* The county officials accepted this decree, stating that: “the
Circuit Court could have held nothing less… You cannot change the nature of a
school and make a ‘private school’ out of a public school simply by changing its
managers.”

The Little Rock school closures were not resolved by the Circuit Court, but were
later struck down by a federal District Court in *Cooper v. McKinley.* The county
officials portray this decision as striking down the school closures on the grounds
that only some schools in a school district were closed, while others remained
open. This line of reasoning supports the claim that the Fourteenth Amendment
can be satisfied, as long uniformity exists within a political subdivision of a state,
a criteria which was not fulfilled in Little Rock. This reasoning, however, is not
mentioned in the District Court’s ruling in *Cooper v. McKinley.* Although
admittedly not a straightforwardly formulated decision, it does appear that the
school closures were struck down as a device to avoid compliance with the
federal courts’ desegregation orders.

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402 Papers of Allan G. Donn, Brief on Behalf of County School Board of Prince Edward County
and T. J. McIlwaine, Division Superintendent of Schools of said County, Appellees and Cross-
Appellants, United States Court of Appeals for the Fourth Circuit, *Cocheyse E. Griffin, etc., et al.*
v. *County School Board of Prince Edward County, Virginia, et al.*, No. 8837, 81-82; Bartley 1999,
403 *Cooper v. Aaron*, 261 F.2d 97 (1958).
404 Papers of Allan G. Donn, Brief on Behalf of County School Board of Prince Edward County
and T. J. McIlwaine, Division Superintendent of Schools of said County, Appellees and Cross-
Appellants, United States Court of Appeals for the Fourth Circuit, *Cocheyse E. Griffin, etc., et al.*
v. *County School Board of Prince Edward County, Virginia, et al.*, No. 8837, 82.
405 Papers of Allan G. Donn, Brief on Behalf of County School Board of Prince Edward County
and T. J. McIlwaine, Division Superintendent of Schools of said County, Appellees and Cross-
Appellants, United States Court of Appeals for the Fourth Circuit, *Cocheyse E. Griffin, etc., et al.*
v. *County School Board of Prince Edward County, Virginia, et al.*, No. 8837, 82-83; *Cooper v.
The brief then turns to a series of cases arising out of attempts made by the state of Louisiana to resist desegregation. The first series of cases stem from the desegregation of schools in New Orleans. The New Orleans cases, most commonly going under the name *Bush v. Orleans Parish School Board*, were easy to differentiate from the Prince Edward case. In the *Bush* cases the federal judiciary was faced with blatant attempts by Louisiana to actively resist all orders to desegregate. Here the state, acting through both the legislature and the governor, took control of the schools and attempted to operate them on a segregated basis, clearly a violating of the *Brown* decree. The county officials find the federal court rulings stinking down Louisiana’s defiance to be fully in order.\(^{406}\)

One more case from Louisiana is included in the county officials’ brief. *Hall v. St. Helena Parish School Board* had been cited by Judge Lewis in his ruling in the *Eva Allen* case and by the Justice Department in their *amicus* brief. Therefore, the county officials give far more attention to this case than the New Orleans cases. The Justice Department is accused of ignoring the background and facts of the case, and creating an unwarranted connection between *Hall* and the Prince Edward case. Unsurprisingly, the county officials offer to place the *Hall* case in its proper context. “As we give that background, as we give the facts of the case, as we point out the law of Louisiana which determines who shall operate public schools in that state, we ask the Court to note that the situation there is radically different from the situation here.”\(^{407}\)

The county officials’ contextualization of the *Hall* case boils down to the degree of state involvement. Whereas Virginia had a plausible claim to a decentralized system of public education, the state of Louisiana could make no such claim. In *Hall*, the federal District Court had found that public education in Louisiana was a state, and not a local matter. The legislation that was struck down in *Hall* was a

\(^{406}\) Papers of Allan G. Donn, Brief on Behalf of County School Board of Prince Edward County and T. J. McIlwaine, Division Superintendent of Schools of said County, Appellees and Cross-Appellants, United States Court of Appeals for the Fourth Circuit, *Cocheyse E. Griffin, etc., et al. v. County School Board of Prince Edward County, Virginia, et al.*, No. 8837, 83-84. For more on the desegregation of the New Orleans schools, see: Bartley 1995, 250-253; Douglas 2005, 1-28.

\(^{407}\) Papers of Allan G. Donn, Brief on Behalf of County School Board of Prince Edward County and T. J. McIlwaine, Division Superintendent of Schools of said County, Appellees and Cross-Appellants, United States Court of Appeals for the Fourth Circuit, *Cocheyse E. Griffin, etc., et al. v. County School Board of Prince Edward County, Virginia, et al.*, No. 8837, 84.
local option law that would have allowed a locality to close down schools threatened by desegregation. These schools would then have been transformed into private schools, and continued to operate as segregated schools. State involvement continued even after the public-private transformation of the schools. The District Court had found, and was accordingly quoted by the county officials, that “the State Legislature has not even made a pretense of abandoning its control of education to autonomous subdivisions.”

While the county officials admit that the District Court found several reasons as to why the Louisiana scheme was unconstitutional in *Hall*, they find “the real gist of its holding” to be state involvement. The heavy state involvement in the private schools, which would have replaced the closed public schools, and in reality would have been the same schools, was a state action that operated segregated schools. This was a clear violation of the Fourteenth Amendment’s Equal Protection Clause as interpreted by the Supreme Court in *Brown*. The unconstitutional act, according to the county officials, was the operation by the state of segregated schools. “It was not held [in *Hall*] that desegregated public schools must be operated”, wrote the county officials, “[i]t was held that the equal protection clause was violated if under the guise of ‘private’ schools, public schools segregated by law, were operated.”

State involvement also provided the foundation for the District Court’s finding in *Hall* that the Equal Protection Clause was violated on a geographical basis. Since schools remained operational in all other localities in Louisiana, the school children in St. Helena Parish were being deprived of their constitutional rights. The county officials agree that this was the correct finding, but it was not

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408 Papers of Allan G. Donn, Brief on Behalf of County School Board of Prince Edward County and T. J. McIlwaine, Division Superintendent of Schools of said County, Appellees and Cross-Appellants, United States Court of Appeals for the Fourth Circuit, *Coheyse E. Griffin, etc., et al. v. County School Board of Prince Edward County, Virginia, et al.*, No. 8837, 86, italics by the county officials, original text in *Hall v. St. Helena Parish School Board*, 197 F. Supp. 649 (1961), 658.

409 Papers of Allan G. Donn, Brief on Behalf of County School Board of Prince Edward County and T. J. McIlwaine, Division Superintendent of Schools of said County, Appellees and Cross-Appellants, United States Court of Appeals for the Fourth Circuit, *Coheyse E. Griffin, etc., et al. v. County School Board of Prince Edward County, Virginia, et al.*, No. 8837, 88.

410 Papers of Allan G. Donn, Brief on Behalf of County School Board of Prince Edward County and T. J. McIlwaine, Division Superintendent of Schools of said County, Appellees and Cross-Appellants, United States Court of Appeals for the Fourth Circuit, *Coheyse E. Griffin, etc., et al. v. County School Board of Prince Edward County, Virginia, et al.*, No. 8837, 88.
applicable to the situation in Prince Edward. Public education in Louisiana was a state matter, and as such had to be provided equally within the state. The District Court in *Hall* had rejected Louisiana’s references to the aforementioned swimming pool and park cases, where public facilities had been closed to avoid desegregation. The District Court had found that the closing of public facilities that were operated locally were permissible, as everyone within that locality was affected equally. This principle, held the court, could not be applied to Louisiana, where the public schools were operated on a statewide basis.\textsuperscript{411}

With this contextualization of *Hall*, the county officials maintain that “[i]t will have been apparent that ‘the circumstances’ which existed in Louisiana are entirely different from the circumstances existing in Virginia.”\textsuperscript{412} The varying circumstances in the two states are used to explain away a finding in *Hall* that had great potential to harm the county officials’ position. The District Court in *Hall* had held that “The United States Constitution recognizes no governing units except the federal government and the states.” Furthermore, it was held that “a state can no more delegate to its subdivisions the power to discriminate than it can itself directly establish inequalities.” This was held to be especially true in regards to education. Judge Lewis had relied on this finding in his ruling in *Eva Allen*.\textsuperscript{413}

An essential part of the county officials’ argument was that the Equal Protection Clause did allow for discrepancies within as state, as long as equal conditions

\textsuperscript{411} Papers of Allan G. Donn, Brief on Behalf of County School Board of Prince Edward County and T. J. McIlwaine, Division Superintendent of Schools of said County, Appellees and Cross-Appellants, United States Court of Appeals for the Fourth Circuit, *Cocheyse E. Griffin, etc., et al. v. County School Board of Prince Edward County, Virginia, et al.*, No. 8837, 89-90. The particular cases cited in *Hall* and subsequently cited in the county officials’ brief were *Tonkins v. City of Greensboro*, 276 F.2d 890 (1960) and *Gilmore v. City of Montgomery*, 277 F.2d 364 (1960). At this stage of the brief, and in the *Hall* decision the latter case is titled *Montgomery v. Gilmore*, otherwise, however, the case citation remains the same.

\textsuperscript{412} Papers of Allan G. Donn, Brief on Behalf of County School Board of Prince Edward County and T. J. McIlwaine, Division Superintendent of Schools of said County, Appellees and Cross-Appellants, United States Court of Appeals for the Fourth Circuit, *Cocheyse E. Griffin, etc., et al. v. County School Board of Prince Edward County, Virginia, et al.*, No. 8837, 90.

\textsuperscript{413} Papers of Allan G. Donn, Brief on Behalf of County School Board of Prince Edward County and T. J. McIlwaine, Division Superintendent of Schools of said County, Appellees and Cross-Appellants, United States Court of Appeals for the Fourth Circuit, *Cocheyse E. Griffin, etc., et al. v. County School Board of Prince Edward County, Virginia, et al.*, No. 8837, 90; *Hall v. St. Helena Parish School Board*, 197 F. Supp. 649, (1961), 658; *Eva Allen et al. v. County School Board of Prince Edward County, etc., et al.*, 207 F.Supp. 349 (1962) Civil Action No. 1333, [unpaginated].
existed within the borders of a political subdivision. The county officials were aware that this aspect of the *Hall* ruling posed a potential threat to their case. “Some are prone” write the county officials “to take this language as a holding of this District Court that there must be uniformity in all things throughout the State.” Yet again, the county officials point to the specific circumstances in Louisiana, and argue that the District Court was addressing how the Equal Protection Clause applied to the facts present in *Hall*. A by now familiar logic is presented. Public education in Louisiana was a state matter, and as such had to be provided on an equal basis throughout the state. It was in this light that the District Court spoke of the Equal Protection Clause. Conversely, “[w]hen the service is one furnished by an autonomous subdivision, the equal protection clause speaks to the locality.”

The county officials reveal some uncertainty in their belief that this is the one true understanding of the District Court’s holding in regards to the Equal Protection Clause. Seemingly hedging their argument, they urge the Circuit Court to: “[i]f on the other hand this language is not to be considered separate and apart from the case in which it is used, then it is an attempt to alter our settled law, is wrong and is not to be blessed by this Court.”

Finally the Prince Edward case is juxtaposed to the previous school closures in Virginia. The closures implemented by the governor during Virginia’s massive resistance were obviously, according to the county officials, not constitutional. They targeted only those schools threatened by desegregation, while other

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414 Papers of Allan G. Donn, Brief on Behalf of County School Board of Prince Edward County and T. J. McIlwaine, Division Superintendent of Schools of said County, Appellees and Cross-Appellants, United States Court of Appeals for the Fourth Circuit, *Cocheyse E. Griffin, etc., et al. v. County School Board of Prince Edward County, Virginia, et al.* No. 8837, 90.
415 Papers of Allan G. Donn, Brief on Behalf of County School Board of Prince Edward County and T. J. McIlwaine, Division Superintendent of Schools of said County, Appellees and Cross-Appellants, United States Court of Appeals for the Fourth Circuit, *Cocheyse E. Griffin, etc., et al. v. County School Board of Prince Edward County, Virginia, et al.* No. 8837, 90.
416 Papers of Allan G. Donn, Brief on Behalf of County School Board of Prince Edward County and T. J. McIlwaine, Division Superintendent of Schools of said County, Appellees and Cross-Appellants, United States Court of Appeals for the Fourth Circuit, *Cocheyse E. Griffin, etc., et al. v. County School Board of Prince Edward County, Virginia, et al.* No. 8837, 90-91.
schools remained operational. Not much more is said about the massive resistance closures, as they clearly violated the Fourteenth Amendment.\footnote{Papers of Allan G. Donn, Brief on Behalf of County School Board of Prince Edward County and T. J. McIlwaine, Division Superintendent of Schools of said County, Appellees and Cross-Appellants, United States Court of Appeals for the Fourth Circuit, \textit{Cocheys E. Griffin, etc., et al. v. County School Board of Prince Edward County, Virginia, et al.}, No. 8837, 91.}

The final issue dealt with in the county officials brief is that of legislative motive. “We assert that if it be otherwise legal to close schools, that legal act is not rendered illegal because the legislative body bringing about the closure may be motivated by the purpose of avoiding integration.”\footnote{Papers of Allan G. Donn, Brief on Behalf of County School Board of Prince Edward County and T. J. McIlwaine, Division Superintendent of Schools of said County, Appellees and Cross-Appellants, United States Court of Appeals for the Fourth Circuit, \textit{Cocheys E. Griffin, etc., et al. v. County School Board of Prince Edward County, Virginia, et al.}, No. 8837, 91-92.}

This section of the brief reads very similarly to the corresponding section in the county officials brief before the Virginia Supreme Court of Appeals, which has been examined here in chapter 4.2.3. As in the previous brief, it is admitted that the Supreme Court has not always been consistent on the permissibility of taking legislative motive into account. “[F]or a number of years the Supreme Court of the United States vacillated back and forth upon that point.”\footnote{Papers of Allan G. Donn, Brief on Behalf of County School Board of Prince Edward County and T. J. McIlwaine, Division Superintendent of Schools of said County, Appellees and Cross-Appellants, United States Court of Appeals for the Fourth Circuit, \textit{Cocheys E. Griffin, etc., et al. v. County School Board of Prince Edward County, Virginia, et al.}, No. 8837, 92.} The county officials proceed to assert that:

finally in 1942 [sic] in one of the great decisions on “New Deal” legislation, the Court apparently put to rest the contention that legislation otherwise constitutional could be rendered unconstitutional by the purpose or motive of the legislature in adopting it. The Supreme Court has not varied from that view.\footnote{Papers of Allan G. Donn, Brief on Behalf of County School Board of Prince Edward County and T. J. McIlwaine, Division Superintendent of Schools of said County, Appellees and Cross-Appellants, United States Court of Appeals for the Fourth Circuit, \textit{Cocheys E. Griffin, etc., et al. v. County School Board of Prince Edward County, Virginia, et al.}, No. 8837, 92. United Stated v. Darby, 312 U.S. 100 (1941). The case is cited incorrectly in the brief on page 102; however, the year is correct on that page.}

As previously, the lower federal courts are accused of attempting to revive legislative motive, in particular when deciding cases of a racial nature. These courts, “only in these racial cases, has unearthed what we believe to be a legal
heresy and has asserted that an improper motive or purpose may render legislation unconstitutional.”

As in the brief before the Virginia high court, the rulings of lower federal courts in *NAACP v. Patty* and *Bush v. Orleans Parish School Board* are identified as the main promoters of the “legal heresy”. It is interesting to note that *Hall v. St. Helena Parish School Board* is completely neglected in this section of the brief. The fact remains that the District Court in *Hall* placed great weight on legislative motive. While the District Court found the Louisiana legislation to “appear inoffensive”, that court also found that “particularly in the area of racial discrimination, courts must determine its purpose as well as its substance and effect.” The District Court looked to public statements made by the legislators behind the Louisiana laws, and concluded that “the legislative leaders announced without equivocation that the purpose of the packaged plan was to keep the state in the business of providing public education on a segregated basis.” This aspect of the *Hall* decision is wholly omitted from the county officials’ brief, perhaps because it did not fit the argument that nothing in *Hall* could be applied to strike down the Prince Edward school closures.

Once more the county officials provide a survey of the case law governing legislative motive. Going as far back in time as 1810, the county officials begin their survey with Chief Justice Marshall’s opinion in *Fletcher v. Peck*, and traces the constitutional developments up until the 1960 Supreme Court ruling in *Gomillion v. Lightfoot*. Citing 32 other Supreme Court cases, the county officials arrive at the foregone conclusion that legislative motive has no place in constitutional law.

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421 Papers of Allan G. Donn, Brief on Behalf of County School Board of Prince Edward County and T. J. McIlwaine, Division Superintendent of Schools of said County, Appellees and Cross-Appellants, United States Court of Appeals for the Fourth Circuit, *Coheyse E. Griffin, etc., et al. v. County School Board of Prince Edward County, Virginia, et al.*, No. 8837, 92.


424 Papers of Allan G. Donn, Brief on Behalf of County School Board of Prince Edward County and T. J. McIlwaine, Division Superintendent of Schools of said County, Appellees and Cross-Appellants, United States Court of Appeals for the Fourth Circuit, *Coheyse E. Griffin, etc., et al. v. County School Board of Prince Edward County, Virginia, et al.*, No. 8837, 92-105.
The county officials’ brief before the federal Circuit Court has many similarities with the brief filed before the Virginia Supreme Court of Appeals. There are, however, some noteworthy differences. The more recent brief is clearly addressing more specific challenges to the school closures in Prince Edward. This is an obvious result of the more advanced state of the litigation. By now two courts had already ruled on the school closures, and the Justice Department had joined the fray as *amicus curiae*. It is clear that the county officials were responding to the challenges presented to the school closures thus far in the litigation, in particular Judge Lewis’s ruling in the *Eva Allen* case.

This translates into a more focused argument, where more specific issues are addressed. The prime example of this focus is the question of a constitutional right to education. In the earlier brief this question received a great deal of attention, including a detailed examination of the Fourteenth Amendment. This very broad line of argumentation is now replaced by the precise question of what the Supreme Court had held in regards to public education in *Brown*. The reason for this is clear, in the proceedings before the Virginia high court, the NAACP had declined to argue federal questions. Now, as the case was before a Federal Court of Appeals, or Circuit Court, federal questions were central to the matter at hand. In fact, the county officials mention that they were responding to a claim made by the NAACP, and that this claim was central to the NAACP argument. As neither the NAACP, nor any other party, or court for that matter, had argued for a general constitutional right to education, this questions was now omitted.

Another aspect of the more advanced nature of the litigation was that other cases involving resistance to desegregation had now been ruled upon by the federal judiciary, and consequently cited by both parties, and Judge Lewis. The county officials therefore include in their brief a lengthy section where the Prince Edward school closures are compared to the circumstances existing in the other cases.

One final discrepancy between the county officials’ two briefs was the tone used. In the brief before the Virginia court, the tone can be described as both more scornful and defiant. Arguments against the school closures were depicted in mocking terms. Moreover, the issue of states’ rights is featured more frequently,
and is also depicted using colorful and even dramatic terms. That is to say, before the Virginia court, the county officials used rhetoric that depicted the issue as a conflict between a state operating within the boundaries provided to it by the Constitution, and an oppressive federal judiciary imposing its will on the states. Here the argument is made, that the county officials felt comfortable using a more fiery rhetoric when arguing before the Virginia Supreme Court of Appeals, than when arguing before a federal court. The reason is obvious, the state court was perceived as more susceptible to the states’ right rhetoric, while a federal court was thought to not find this sort of language as persuasive.

Whether the county officials’ toned down language and restraint in raising states’ rights arguments had an effect on the Circuit Court must remain unknown. What is known is that federal court, or at least a majority of the three Circuit Judges presiding in the case, sided with the county officials.

5.3 Opinion of the U.S. Court of Appeals for the 4th Circuit

The Circuit Court handed down its decision in Cocheys J. Griffin, et al. v. Board of Supervisors of Prince Edward County, et al. on August 12, 1963.\textsuperscript{425} Presiding were Circuit Judges Haynsworth, Boreman, and Bell. The majority opinion was by Haynsworth and Boreman, with Bell in dissent.

The first question addressed by the majority is whether the Fourteenth Amendment requires that desegregated public schools must be maintained. On this matter, the majority sides wholly with the county officials. The Fourteenth Amendment, writes the majority:

…prohibits discrimination by a state, or one of its subdivisions, against a pupil because of his race, but there is nothing in the Fourteenth Amendment which requires a state, or any of its political subdivisions with freedom to decide for itself, to provide schooling for any of its citizens. Schools that are operated must be made available to all citizens without regard to race, but what public schools a state provides is not the subject of constitutional command.\textsuperscript{426}


\textsuperscript{426} Cocheys J. Griffin, et al. v. Board of Supervisors of Prince Edward County, et al, 322 F.2d 332 (4th Cir. 1963), 336.
Similarly, the majority “summarily dismisses” the notion argued by the NAACP, that the school closures violated the initial court order, issued by Judge Lewis, requiring that Prince Edward desegregate its schools. As the county officials had argued in their brief, this order only held that Prince Edward must end its practice of segregating public schools. As far as Judges Haynsworth and Boreman were concerned “they abandoned discriminatory admission practices when they closed all schools as fully as if they had continued to operate schools, but without discrimination.”

Moreover, it was held that there was no violation of the Equal Protection Clause if a public service was abandoned to avoid having that service be provided to all races. Here the majority of the Circuit Court point to its own ruling in *Tonkins v. City of Greensboro*, where the sale of a city swimming pool, for the purpose of avoiding desegregation, was found to be valid. The majority finds that other courts have shared this view. For an abandonment of a service, or closure of a facility, to pass constitutional muster, it is required that all governmental ties, state or municipal, be severed. Desegregation could not be avoided “by an incomplete or limited withdrawal from the operation of them.”

The Circuit Court looks at cases where schemes to avoid desegregation had been struck down by federal District Courts. These cases had been cited to challenge the notion that a community could abandon public education to avoid desegregating its schools. In *James v. Almond* nothing was found that contradicts this view. The Governor of Virginia had closed only schools ordered to desegregate, while others remained opened, an act the Circuit Court’s majority found to be in obvious conflict with equal protection. The court also found that *Hall v. St. Helena Parish School Board* did not proscribe a ban on closing schools in order to avoid desegregation. The Louisiana scheme was unconstitutional because the state had not removed itself from the operation of the schools, which were private in name only.

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“private” schools was found to be the sole reason for the invalidation of the Louisiana scheme:

Desegregation orders may not be avoided by such schemes, but there is nothing in the Hall case which suggests that Louisiana might not have withdrawn completely from the school business. It was only because it had not withdrawn that the statutes which composed its evasive scheme of avoidance were struck down.\footnote{Cocheyse J. Griffin, et al. v. Board of Supervisors of Prince Edward County, et al, 322 F.2d 332 (4th Cir. 1963), 338.}

The fact that Prince Edward County had closed its schools, even if the motive behind the closures was to avoid desegregation, was not in itself found to be unconstitutional. If, however, “Prince Edward County has not completely withdrawn from the school business, then it cannot close some schools while it continues to operate others on a segregated basis.”\footnote{Cocheyse J. Griffin, et al. v. Board of Supervisors of Prince Edward County, et al, 322 F.2d 332 (4th Cir. 1963), 338.} Specifically the majority was referring to the private schools operated in the county by the Prince Edward School Foundation. If Prince Edward County, or the state of Virginia, were found to be involved in the running of schools in the county, by providing public monies to the Foundation, the school closures would be unconstitutional. While the Foundation had functioned without county or state support during its first year of operation, subventions in the form of tuition grants and tax credits had been accepted in 1960. One year later they were struck down by Judge Lewis’s District Court.\footnote{Cocheyse J. Griffin, et al. v. Board of Supervisors of Prince Edward County, et al, 322 F.2d 332 (4th Cir. 1963), 338-340, endnotes 19, 21.}

The state and county subsidies to the Foundation did not, according to the majority, necessarily mean that the county or the state was involved in operating segregated schools. Not all subsidies granted by a government, federal, state, or local, equated to government control of the recipient of the subsidy.\footnote{Cocheyse J. Griffin, et al. v. Board of Supervisors of Prince Edward County, et al, 322 F.2d 332 (4th Cir. 1963), 338-340.} Pointing to the operation of the Foundation schools during the first year of their operation without any subsidies, and “the clear showing of independence of the Foundation from the direction and control of the defendants”,\footnote{Cocheyse J. Griffin, et al. v. Board of Supervisors of Prince Edward County, et al, 322 F.2d 332 (4th Cir. 1963), 339.} the majority display uncertainly as to the nature of the subsidies. It felt that whether the subsidies
resulted in an unlawful operation of a segregated school system, “the effect of tax credits and tuition grants ought to be determined only in the light of the correlative duties and responsibilities of the Commonwealth and the County in connection with the operation of schools in the County.”

The Circuit Court’s majority thus found that the constitutionality of the school closures was tied to the subsidies to the Foundation. This in turn was tied to the nature of how public education was operated in Virginia. This line of reasoning also raises the question argued by the Justice Department in their amicus brief. If Virginia operated a statewide system of public schools, which had been held by Judge Lewis and was argued by the Justice Department, it would be a denial of equal protection to close the Prince Edward schools, while other schools in the state remained open. The court’s majority finds this to be true, if Virginia indeed operated a statewide system of public schools. “The answers to these questions” write the majority about the nature of education in Virginia “are unresolved and unclear.”

The answer to how public schools were operated in Virginia, and in Prince Edward County, was to be found in Virginia law. This, felt the court’s majority, was for the Virginia high court to decide. The Virginia high court “alone has the power to give an authoritative interpretation of the relevant sections of Virginia’s Constitution and of her statutes.”

Citing Railroad Commission v. Pullman, the court’s majority found that the federal courts once more should abstain, and allow the state courts to rule on the relevant state laws. “Abstention, under the circumstances, is all the more appropriate because the case of County School Board of Prince Edward County, Virginia, et al. v. Griffin et al., is already pending on the docket of the Supreme Court of Appeals of Virginia.” The majority was referring to the case initiated

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by the county officials in the Circuit Court of the City of Richmond on August 31, 1962. That court’s ruling had by now been appealed to the Virginia Supreme Court of Appeals. Judge Lewis’s earlier ruling was vacated and the case was returned to him with orders to abstain until the Virginia Supreme Court of Appeals had ruled in *County School Board of Prince Edward County, et al. v. Leslie Francis Griffin, Sr. et al.*

Circuit Judge J. Spencer Bell did not agree with his colleagues and wrote a forceful dissent. Bell thought Lewis’s finding to strike down the closures was correct and should be “implemented at once for either of two reasons”. The reasons were that Virginia was indeed operating the public schools in the state, and the schools in Prince Edward could therefore not be closed without violating equal protection. The closures were also carried out “solely in order to frustrate the orders of the federal courts that the schools be desegregated.”

Bell was utterly unconvinced by the argument that public education in Virginia was a local matter, calling it an “inescapable fact” that “Virginia is maintaining and operating a statewide system of schools”. Virginia’s local option laws, which left the choice to operate schools to the localities, did not make the closures any more permissible than when the state, through the actions of Governor Almond had closed schools during massive resistance. Under Virginia’s local option scheme “the county is acting as an agency of the state, and the state may not directly or indirectly evade the command of the Amendment.”

Bell disagrees with the majority that Prince Edward County had complied with the federal District Court’s order to desegregate when all public schools were closed, which the majority found had ended segregation in the schools. Bell finds that the closures were an obvious act of resistance to the Supreme Court’s ruling in *Brown*. As such the closures constituted an act that deprived the African

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American school children in Prince Edward their constitutional rights guaranteed to them under the Fourteenth Amendment. “The state” writes Bell “has an affirmative duty to accord to all persons within its jurisdiction the benefits of that constitutional guarantee.”

In his dissent, Bell also rejects that Virginia enjoys any protection from being sued under the Eleventh Amendment. The majority had raised some concerns that the Eleventh Amendment becomes more relevant the more issues of state involvement in public education are stressed. Bell does not find this to be the case, as a political subdivision of a state does not enjoy Eleventh Amendment immunity. In the case at hand it is Prince Edward County that must be forced to take a certain action, levy taxes for public education. While the role of the state is material to the case, in the end, it is the county that is the subject of the litigation. Here Bell seems to be convinced by the Justice Departments arguments in their *amicus* brief.

Bell also accepted the Justice Department’s argument that a federal court had the power to order the county to levy a tax in order to make funds available for the public schools. This matter had not been raised by the majority, but Bell addresses it in his dissent. As argued in the *amicus* brief, Bell arrives at the conclusion that this power exists, because the county’s unconstitutional behavior cannot be accepted. The end, it would seem, justifies the means.

Bell displays no small amount of frustration with delays resulting in the adherence to federal abstention, and the county officials’ exploitation of this doctrine. Writing about the county officials’ request that Judge Lewis abstain after they had filed suit in the state courts, Bell finds that, “[t]his is not abstention—this would be a humble acquiescence in outrageously dilatory tactic, and the district court was right to reject it.” About his fellow judges’ choice to

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abstain he writes “[t]o do so now under the present posture of this case is not abstention, it is abnegation of our plain duty.” In the last paragraph of his dissent, Bell offers one last scathing critique of the majority’s ruling.

It is tragic that since 1959 the children of Prince Edward County have gone without formal education. Here is a truly shocking example of the law’s delays. In the scales of justice the doctrine of abstention should not weigh heavily against the rights of these children.

The perhaps most telling aspect of the opinion of the U.S. Court of Appeals for the 4th Circuit in Cocheyse J. Griffin, et al. v. Board of Supervisors of Prince Edward County, et al is how divided the Circuit Judges were in the case. Judges Haynsworth and Boreman, who wrote the majority opinion, seemed to find merit in the county officials’ arguments, although some skepticism is found on certain aspects. At the very least, they found it prudent to abstain, and hence further delay an already protracted litigation. Judge Bell was of a completely different mind. He saw the closures as a clear-cut violation of the Constitution, and felt that a remedy should be provided with the utmost haste. If Judge Lewis is added to the count, there were at this stage two federal judges who would strike down the closures, and two who seemingly leaned towards accepting them.

The Prince Edward closures and Virginia’s legal scheme that made them possible clearly posed a challenge for the federal judiciary. Widely different views on how the Constitution should be applied in the Prince Edward case are presented by the federal judges. Here the argument is made that both side present valid reasoning behind their conclusions. The opinions no longer contain obscure references to Solon, or the possibility of civil unrest as a result of desegregation, which were included in the earlier opinions of Judge Hutcheson. Instead the judges concern themselves with actual questions of law, such as the extent of equal protection, state involvement in public education, Eleventh Amendment immunity, adherence to federal abstention, and whether the fact that the closures were an attempt to avoid desegregation should be taken into account, etc.

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If any conclusions are to be drawn from the divisions on the federal bench in regards to the constitutionality of the school closures, two in particular are worth mentioning. Firstly, the Virginia scheme under the Perrow Plan, which allowed a locality to close its schools, and the county officials’ defense of this scheme, was effective. Compared to the Louisiana laws struck down in *Hall v. St. Helena Parish School Board*, the Prince Edward closures were sophisticated. Unlike the Louisiana scheme, Virginia did make an effort to remove state action from both the closures and the operation of the private schools ran by the Prince Edward School Foundation. The lawyers representing the county officials were therefore able to rather convincingly argue that the closures did not constitute the state action barred by the Supreme Court’s interpretation of the Fourteenth Amendment in *Brown*. Had the Foundation operated without subsidies from state and county, it would appear that judges Haynsworth and Boreman would have found no state involvement, and thus no violation of the Constitution.

The second conclusion that can be drawn from the opinions of the federal judges was that there existed some serious disagreements as to how federal abstention should be applied. The doctrine of federal abstention would appear to be the main reason why this litigation had been dragged on for four years, and still had no end in sight. The county officials skillfully exploited the ambiguous nature of this doctrine, and had kept the litigation bouncing between the state and federal courts. The initiation of the suit in the Virginia courts by the county officials had paid off. The Circuit Court’s majority was clearly influenced by the existence of a case pending before the Virginia high court when they ordered the District Court to abstain. The county officials’ exploitation of federal abstention now set the litigation back one step, to Lewis’s District Court, where it would remain until the Virginia Supreme Court of Appeals had handed down its ruling. As far as obstruction in the form of delay goes, the county officials’ strategy can only be evaluated as successful.
6 “Too Much Deliberation and not Enough Speed”

6.1 Opinion of the Virginia Supreme Court of Appeals

The school closures now made a second appearance in the Virginia Supreme Court of Appeals. This court handed down its ruling in County School Board of Prince Edward County, et al. v. Leslie Francis Griffin, Sr. et al. on December 2, 1963. Of the seven judges presiding, six formed a majority that upheld the ruling if the Circuit Court of the City of Richmond, a Virginia court, of April 10, 1963. Chief Justice Eggleston dissented.

The Virginia high court’s majority found that Virginia’s system of public education was indeed decentralized under the state’s constitution and laws. A county did have the power to decide if schools were to be operated or not. Nothing in the state constitution, or laws, required a county to provide funds for and public free schools. As to the state’s involvement in public education, the state laws were interpreted as only requiring that a system be set up to support those localities wishing to maintain public education. The school closures implemented by Governor Almond during massive resistance in 1959 had been struck down in Harrison v. Day because they violated a localities right to govern the public schools. The majority viewed Harrison as establishing a precedent in support of the decentralization of the Virginia school system.

The court’s majority did not find that the subsidies granted the private schools violated state law. Subsidies to pupils attending private schools were authorized

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451 Opinion of the Virginia Supreme Court of Appeals, Rendered December 2, 1963, County School Board of Prince Edward County, Virginia, et al. v. Leslie Francis Griffin, Sr., et al., as appendix to Papers of Allan G. Donn, Memorandum for the United States as Amicus Curiae, Archibald Cox, Burke Marshall, Harold Greene, Alan Marer, United States Supreme Court, Cocheysse J. Griffin, et al. v. County School Board of Prince Edward County, et al., No. 592, 8; Turner 2001, 373.

452 Opinion of the Virginia Supreme Court of Appeals, Rendered December 2, 1963, County School Board of Prince Edward County, Virginia, et al. v. Leslie Francis Griffin, Sr., et al., as appendix to Papers of Allan G. Donn, Memorandum for the United States as Amicus Curiae, Archibald Cox, Burke Marshall, Harold Greene, Alan Marer, United States Supreme Court, Cocheysse J. Griffin, et al. v. County School Board of Prince Edward County, et al., No. 592, 37; Turner 2001, 373-374.

453 Opinion of the Virginia Supreme Court of Appeals, Rendered December 2, 1963, County School Board of Prince Edward County, Virginia, et al. v. Leslie Francis Griffin, Sr., et al., as appendix to Papers of Allan G. Donn, Memorandum for the United States as Amicus Curiae, Archibald Cox, Burke Marshall, Harold Greene, Alan Marer, United States Supreme Court, Cocheysse J. Griffin, et al. v. County School Board of Prince Edward County, et al., No. 592, 13-32.
under state law. The majority’s reading of the Virginia statutes and constitution found nothing to suggest that the existence of public schools was a requirement for the payment of tuition grants for the purpose of attending private schools. Tax credits are not mentioned in the opinion, but a county is found to be allowed to issue tuition grants. 454

Unlike the previous time the Virginia Supreme Court of Appeals ruled on the school closures, federal questions were now part of the case. The NAACP’s avoidance of federal questions in the previous proceedings had been the grounds for the United States Court of Appeals for the Fourth Circuit’s decision to order further federal abstention. The Virginia high court’s majority finds nothing in the Constitution, or federal law, that requires a state to maintain public schools. The fact that public schools were operated in all other localities than Prince Edward does not make the county’s school closures unconstitutional. 455

The Virginia court does not find any state or county involvement “in the establishment or operation” of the private schools run by the Foundation. 456 The state and county subsidies, it was held by referring to the federal Circuit Court, was not akin to state, or county, action. The Prince Edward school closures had once again been found to be legal by the Virginia Supreme Court of Appeals. 457

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454 Opinion of the Virginia Supreme Court of Appeals, Rendered December 2, 1963, County School Board of Prince Edward County, Virginia, et al. v. Leslie Francis Griffin, Sr., et al, as appendix to Papers of Allan G. Donn, Memorandum for the United States as Amicus Curiae, Archibald Cox, Burke Marshall, Harold Greene, Alan Marer, United States Supreme Court, Cocheysse J. Griffin, et al. v. County School Board of Prince Edward County, et al., No. 592, 32-34.

455 Opinion of the Virginia Supreme Court of Appeals, Rendered December 2, 1963, County School Board of Prince Edward County, Virginia, et al. v. Leslie Francis Griffin, Sr., et al, as appendix to Papers of Allan G. Donn, Memorandum for the United States as Amicus Curiae, Archibald Cox, Burke Marshall, Harold Greene, Alan Marer, United States Supreme Court, Cocheysse J. Griffin, et al. v. County School Board of Prince Edward County, et al., No. 592, 34.

456 Opinion of the Virginia Supreme Court of Appeals, Rendered December 2, 1963, County School Board of Prince Edward County, Virginia, et al. v. Leslie Francis Griffin, Sr., et al, as appendix to Papers of Allan G. Donn, Memorandum for the United States as Amicus Curiae, Archibald Cox, Burke Marshall, Harold Greene, Alan Marer, United States Supreme Court, Cocheysse J. Griffin, et al. v. County School Board of Prince Edward County, et al., No. 592, 36.

457 Opinion of the Virginia Supreme Court of Appeals, Rendered December 2, 1963, County School Board of Prince Edward County, Virginia, et al. v. Leslie Francis Griffin, Sr., et al, as appendix to Papers of Allan G. Donn, Memorandum for the United States as Amicus Curiae, Archibald Cox, Burke Marshall, Harold Greene, Alan Marer, United States Supreme Court, Cocheysse J. Griffin, et al. v. County School Board of Prince Edward County, et al., No. 592, 36-37.
That court’s Chief Justice interpreted both state and federal law differently. Chief Justice Eggleston agreed that the Virginia school system left it to “the local school boards to operate public free schools.” The state, however, had a responsibility under the Virginia constitution “to maintain and support” public schools.\textsuperscript{458} This responsibility, found Eggleston, was far greater than merely establishing a system supporting schools in localities choosing to operate them. The state had a positive duty to provide funds for all public schools in the state. When Prince Edward County chose to appropriate no money to the schools, the state had to fill this vacuum.\textsuperscript{459}

The Virginia Chief Justice also came to the conclusion that while the local governing bodies to some extent had discretion over the operations of the schools, they were “mere agencies of the State in providing the local funds necessary for the maintenance and operation of the schools.”\textsuperscript{460} This finding is a rejection of the majority’s interpretation of Virginia law as establishing a decentralized school system void of any state involvement. State involvement in the schools meant that the closings of schools in one county resulted in a violation of equal protection guaranteed under the Fourteenth Amendment. Eggleston does not consider the Prince Edward closures comparable to other instances where localities had closed facilities; here he is most certainly referring to the swimming pool and parks cases. In the Chief Justice’s opinion “we may not equate the constitutional right to an education in the public free schools in the State with such local option privileges.”\textsuperscript{461} Unfortunately, Eggleston does not


\textsuperscript{461} Opinion of the Virginia Supreme Court of Appeals, Rendered December 2, 1963, \textit{County School Board of Prince Edward County, Virginia, et al. v. Leslie Francis Griffin, Sr., et al}, as
elaborate if he is referring to a constitutional right to education under the state, or federal Constitution. Public education, however, is clearly ranked as more important than swimming pools and parks. The dissent is concluded with a forceful statement, and an accurate prediction of the future of the litigation:

The refusal of the highest court of this State to recognize here the rights of the citizens of Prince Edward county [sic], guaranteed to them under the Constitution of the United States, is a clear invitation to the federal courts to step in and enforce such rights. I am sure that that invitation will be promptly accepted. We shall see!"  

6.2 U.S. Supreme Court Grants Certiorari

The federal Circuit Court had ordered Lewis’s District Court to abstain until the Virginia Supreme Court of Appeals had ruled on the legality of the school closures under state law. With the Virginia high court’s ruling issued, the case was now, once more, bound for the U.S. District Court. Assuming the very likely scenario that the dissatisfied party would appeal Lewis’s ruling, the case would then proceed to the U.S. Court of Appeals for the 4th Circuit, the same Circuit Court that ordered Judge Lewis to abstain. This court’s decision could then most likely be appealed to the Supreme Court. Under the normal rules of procedure for the federal courts, this would have been the procession of Prince Edward school closure litigation. Had these rules been followed, the already drawn out proceedings would have been even further protracted. As it turns out, this would not be the case.  

The NAACP had appealed the federal Circuit Court’s ruling that sent the case back to the District Court with orders to abstain, to the U.S. Supreme Court. That court had to decide whether it should hear the Prince Edward case by granting a writ of certiorari. The Justice Department supported the NAACP’s petition of
writ of certiorari, and in December, 1963, filed a memorandum as amicus curiae.\footnote{Papers of Allan G. Donn, Memorandum for the United States as Amicus Curiae, Archibald Cox, Burke Marshall, Harold Greene, Alan Marer, United States Supreme Court, Cocheys J. Griffin, et al. v. County School Board of Prince Edward County, et al., No. 592, 1, 7.}

In the memorandum, the Justice Department notes that Prince Edward had been a part of Brown v. Board of Education, and following that ruling “the case was remanded to the district court for implementation of the Brown decree ‘with all deliberate speed.’ The lower courts have been deliberating ever since, but this Court’s mandate has never been implemented.” In a footnote it is mentioned that since Brown, the case has been before the federal District Court four times, the federal Circuit Court three times, and twice before the Virginia Supreme Court of Appeals.\footnote{Papers of Allan G. Donn, Memorandum for the United States as Amicus Curiae, Archibald Cox, Burke Marshall, Harold Greene, Alan Marer, United States Supreme Court, Cocheys J. Griffin, et al. v. County School Board of Prince Edward County, et al., No. 592, 2, footnote 1 on page 2.}

The Justice Department urges the Supreme Court to take the case, and provides several arguments why it should do so. To begin with, the question of mootness is addressed. As has been mentioned, federal courts only deal with real cases, as opposed to hypothetical ones. As a result, there has to be a real controversy over an issue that can be adjudicated by the courts. The decision by the federal Circuit Court that was appealed to the Supreme Court had held that the District Court should abstain pending the proceedings in the state courts. These proceedings had been completed prior to the filing of the Justice Departments memorandum, on the same month. This resulted in there being no actual dispute for the Supreme Court to resolve, as the order to abstain could no longer be overturned.\footnote{Papers of Allan G. Donn, Memorandum for the United States as Amicus Curiae, Archibald Cox, Burke Marshall, Harold Greene, Alan Marer, United States Supreme Court, Cocheys J. Griffin, et al. v. County School Board of Prince Edward County, et al., No. 592, 4.}

The Justice Department argues that while the Circuit Court’s order appears to only direct the District Court to abstain, it actually says more than that. The Circuit Court’s ruling ‘read together with the opinion of the State Court, now constitutes a final instruction to deny the petitioners’ federal constitutional claim
which will be binding on the district court if left undisturbed.” Read in its entirety, the Justice Department interpreted the Circuit Court’s ruling as approving of the school closures if Virginia law was deemed to create a school system where the state was not involved. The Virginia high court, of course, had held that public schools in Virginia were not operated by the state, but by the local communities. So, what is being appealed is not the ruling to abstain, but the Circuit Court’s finding that the school closures do not violate the Constitution if the state courts find that the Virginia is removed from the operation of public schools.

Having set aside mootness, the memorandum goes on to argue why the Supreme Court should take the case by granting certiorari. The Court is not required to grant certiorari, and more often than not this writ is denied. The role of the Supreme Court is to say “what the law is”, to quote Marbury v. Madison. It does so by deciding cases where there is a need to clarify how the law should be read. For the Court to hear a case, a minimum of four of the nine Justices must find that there is a need for the Court to settle an uncertain aspect of federal law.

The Justice Department felt that the Prince Edward school closures, and the support given to the private schools, created a situation where the state was operating segregated schools. The U.S. Court of Appeals for the 4th Circuit’s had erred when it found that the Prince Edward case was different from the Louisiana case and the Little Rock case. In both of these instances the Supreme Court had found that a state, under no circumstances, was allowed to be involved in the operations of a segregated school system. The Circuit Court had thus handed down a decision that was in violation with previous Supreme Court decisions. The Justice Department also argued that the Eleventh Amendment posed no

467 Papers of Allan G. Donn, Memorandum for the United States as Amicus Curiae, Archibald Cox, Burke Marshall, Harold Greene, Alan Marer, United States Supreme Court, Cocheys J. Griffin, et al. v. County School Board of Prince Edward County, et al., No. 592, 4.
468 Papers of Allan G. Donn, Memorandum for the United States as Amicus Curiae, Archibald Cox, Burke Marshall, Harold Greene, Alan Marer, United States Supreme Court, Cocheys J. Griffin, et al. v. County School Board of Prince Edward County, et al., No. 592, 4-5.
restrictions on the Supreme Court’s ability to intervene in Prince Edward County.  

Stressing the urgency that the Supreme Court take the case and rule on the constitutionality of the school closures the Justice Department conclude their memorandum by stating that: “there can be no question but that they [the issues in this case] are of fundamental importance not only to the children of Prince Edward County but also to the United States and its system of justice.”

On January 6, 1964, the Supreme Court granted certiorari. By doing so the Court intervened in the normal process the Prince Edward case should have advanced in the federal judiciary. The Circuit Court had vacated the District Court’s ruling, with orders to abstain until the state courts had ruled. This meant that technically no lower federal court had actually ruled on the Prince Edward school closures. The Supreme Court, which in this case had appellate jurisdiction, therefore decided to rule on a case without the existence of a ruling by a lower court. In the opinion to grant certiorari, the Supreme Court hinted at its frustration with the delays the case had faced, writing that:

> In view of the long delay in the case since our decision in the Brown case and the importance of the questions presented, we grant certiorari and put the case down for argument March 30, 1964, on the merits, as we have done in other comparable situations without waiting for final action by the Court of Appeals.

6.3 NAACP’s Arguments before the U.S. Supreme Court

The NAACP’s brief for petitioners is undated, but obviously was filed sometime between January, when the Supreme Court granted certiorari, and March 30, 1964, when the case was argued before the Supreme Court. The NAACP begins

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471 Papers of Allan G. Donn, Memorandum for the United States as Amicus Curiae, Archibald Cox, Burke Marshall, Harold Greene, Alan Marer, United States Supreme Court, Cocheys J. Griffin, et al. v. County School Board of Prince Edward County, et al., No. 592, 7.

472 When a ruling is vacated it is cancelled. In the Prince Edward case, the federal Circuit Court had cancelled Judge Lewis’s ruling, and ordered him to only rule in the case again after the state courts had settled the matter of the closures under state law, for more on orders to vacate, see: http://legal-dictionary.thefreedictionary.com/vacate accessed on March 17, 2014.

473 Griffin et al. v. County School Board of Prince Edward County et al., 375 U.S. 391 (1964).
by noting that the Virginia Supreme Court of Appeals has handed down a ruling on the school closures under state law, “leaving no vestige of the doctrine of federal abstention in the way of a final adjudication of petitioners’ federal rights and of respondents’ Fourteenth Amendment obligations.”

Although federal abstention no longer was pertinent to the Prince Edward litigation, the NAACP, in a footnote, condemns how the lower federal courts had made use of the doctrine. The “meaning, import and application” of federal abstention, the NAACP “respectfully submit” has been “grossly misunderstood and misconceived” by the lower federal courts. The NAACP felt that abstention should not have been relied upon in the Prince Edward cases. Furthermore, if abstention is used, the state courts should only concern themselves with questions of state law, maintaining a party’s right “to return to the federal courts for final determination of his federal claims.” The NAACP is justified in their criticism. The confusion over how abstention should be used, in particular the question of whether federal questions should be raised in state courts, had severely delayed the Prince Edward litigation. By now, the Supreme Court had cleared up this issue in England v. Louisiana State Board of Medical Examiners, decided January 13, 1964.

In England the Supreme Court had clarified the confusion caused by their previous ruling in Government Employees v. Windsor, decided in 1957. The England ruling spelled out that Windsor “does not mean that a party must litigate his federal claims in the state courts, but only that he must inform those courts what his federal claims are, so that the state statute may be construed ‘in light of’ those claims.” By the time the NAACP’s brief was written, the England case

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474 Papers of Allan G. Donn, Brief for Petitioners, Cocheysie J. Griffin, etc., et al., U.S. Supreme Court, Cocheysie J. Griffin, etc., et al. v. County School Board of Prince Edward County, et al., No. 592, 2.
475 Papers of Allan G. Donn, Brief for Petitioners, Cocheysie J. Griffin, etc., et al., U.S. Supreme Court, Cocheysie J. Griffin, etc., et al. v. County School Board of Prince Edward County, et al., No. 592, footnote 1 on page 2.
was still so recent, that it is not even provided a proper case citation in the brief. The *England* case had been handed down too late to have an impact on the Prince Edward cases. The Virginia Supreme Court of Appeals had handed down not one, but two decisions on the legality of the school closures under state law, both upholding the closures. The question before the Supreme Court in this case, however, was whether the closures violated the federal Constitution. The NAACP found that they did so for three reasons. “Firstly, public education in Prince Edward County was discontinued to abrogate, frustrate, avoid, and circumvent implementation of petitioners’ right to equal educational opportunities.”

This argument holds that the closures were a means to deny the realization of a constitutional right. According to this line of reasoning, it is not the closures themselves that are important, but their purpose. The closures become unconstitutional because they were “clearly designed to accomplish and did accomplish an unconstitutional purpose.” The NAACP notes that the county officials, on two occasions, had publicly declared that they would close the public schools if they were ordered by the federal courts to desegregate. In light of this, the NAACP finds that it was obvious that purpose of the closures were to avoid desegregation, and to deprive the African American school children of their rights.

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477 Papers of Allan G. Donn, Brief for Petitioners, Cocheysse J. Griffin, etc., et al., U.S. Supreme Court, *Cocheysse J. Griffin, etc., et al. v. County School Board of Prince Edward County, et al.*, No. 592, footnote 1 on page 2, 9.
478 Papers of Allan G. Donn, Brief for Petitioners, Cocheysse J. Griffin, etc., et al., U.S. Supreme Court, *Cocheysse J. Griffin, etc., et al. v. County School Board of Prince Edward County, et al.*, No. 592, 11-12, 20.
479 Papers of Allan G. Donn, Brief for Petitioners, Cocheysse J. Griffin, etc., et al., U.S. Supreme Court, *Cocheysse J. Griffin, etc., et al. v. County School Board of Prince Edward County, et al.*, No. 592, 32.
480 Papers of Allan G. Donn, Brief for Petitioners, Cocheysse J. Griffin, etc., et al., U.S. Supreme Court, *Cocheysse J. Griffin, etc., et al. v. County School Board of Prince Edward County, et al.*, No. 592, 29.
481 Papers of Allan G. Donn, Brief for Petitioners, Cocheysse J. Griffin, etc., et al., U.S. Supreme Court, *Cocheysse J. Griffin, etc., et al. v. County School Board of Prince Edward County, et al.*, No. 592, 5-6.
482 Papers of Allan G. Donn, Brief for Petitioners, Cocheysse J. Griffin, etc., et al., U.S. Supreme Court, *Cocheysse J. Griffin, etc., et al. v. County School Board of Prince Edward County, et al.*, No. 592, 12.
Whether it was the county or the state that was responsible for the closures is “immaterial” in this line of reason, as: “The controlling factor is the attempt and intent, by acts of commission or of omission, to effect a denial of equal educational opportunities secured by the federal constitution [sic].” 483 This is what the county officials, in their earlier briefs, had called a “legal heresy,” namely legislative motive. Unlike the county officials, the NAACP provides no extensive argumentation on the case law governing taking legislative motive into account, nor do they even use the term “legislative motive.” That purpose and motive can make an act unconstitutional is more implied than explicitly stated.

The NAACP relies on recent cases by the Supreme Court, and the lower federal courts, where the federal judiciary had invalidated schemes to avoid or delay desegregation. The leading case cited is Cooper v. Aaron, which the NAACP felt “concerned a similar attempt of a state to avoid implementation of equal educational opportunities for Negro children.” 484 The Cooper case prohibited all state action aimed at depriving “the constitutional rights of children not to be discriminated against in school admission on grounds of race or color declared by this Court in the Brown case…” 485

However, the evasive scheme in Arkansas can hardly be compared to the Prince Edward school closures. In Little Rock desegregation was resisted to the extent that desegregation only could be implemented after President Eisenhower dispatched troops to the city. In Cooper, there was no need for the Court to consider legislative motive, the state’s resistance to Brown was in direct confrontation with the Constitution. Furthermore, as has been noted earlier, Cooper held that public education was a state matter, as long as segregation was not enforced.

483 Papers of Allan G. Donn, Brief for Petitioners, Cocheysse J. Griffin, etc., et al., U.S. Supreme Court, Cocheysse J. Griffin, etc., et al. v. County School Board of Prince Edward County, et al., No. 592, 28.
484 Papers of Allan G. Donn, Brief for Petitioners, Cocheysse J. Griffin, etc., et al., U.S. Supreme Court, Cocheysse J. Griffin, etc., et al. v. County School Board of Prince Edward County, et al., No. 592, 28.
485 Papers of Allan G. Donn, Brief for Petitioners, Cocheysse J. Griffin, etc., et al., U.S. Supreme Court, Cocheysse J. Griffin, etc., et al. v. County School Board of Prince Edward County, et al., No. 592, 18; Cooper v. Aaron, 358 U.S. 1 (1958), 17.
While the applicability of *Cooper* to a legislative motive argument can be questioned, *Gomillion v. Lightfoot*, decided in 1960, provides more solid support for this argument. Although a voting rights case, decided under the Fifteenth Amendment, it does take into account the intended purpose of a state action, in this case redrawing a voting district to exclude African Americans. The brief quotes Justice Frankfurter’s opinion: “When a state exercises power fully within the domain of state interest’, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right.”

As has been noted, the NAACP did not attempt to make an explicit argument concerning legislative motive, and indeed, *Gomillion* is the only cited Supreme Court case that holds that an otherwise permissible act can become unconstitutional due to the purpose of the act. What is far more explicitly argued by the NAACP is that the school closures were in direct violation of the *Brown* ruling. This is done by simply taking for granted that *Brown* stipulated that desegregated public education must be provided, as opposed to merely prohibiting segregation in public schools. When *Brown* is viewed in this light, the Prince Edward school closures can to a much greater extent be compared to Little Rock. If the Supreme Court had held that unsegregated public schools are constitutionally required, Prince Edward County would indeed be in direct violation of the Constitution, as Arkansas had been in *Cooper*. The legislative motive behind the closures would accordingly not be important, as a direct violation of the constitution would have taken place. The NAACP provides no arguments supporting the claim that the Supreme Court had held that desegregated public schools must be provided. Instead this is repeated throughout the brief as self-evident.

Interestingly, the NAACP comes close to arguing for a constitutional right to public education under the Due Process Clause of the Fourteenth Amendment. It

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486 Papers of Allan G. Donn, Brief for Petitioners, Cocheysse J. Griffin, etc., et al., U.S. Supreme Court, Cocheysse J. Griffin, etc., et al. v. County School Board of Prince Edward County, et al., No. 592, 28; *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), 347. For more on *Gomillion v. Lightfoot*, see: Klarman 2004, 336.

487 Papers of Allan G. Donn, Brief for Petitioners, Cocheysse J. Griffin, etc., et al., U.S. Supreme Court, Cocheysse J. Griffin, etc., et al. v. County School Board of Prince Edward County, et al., No. 592, 12, 14, 20-22, 25, 27-29, 32, 34,
is noted that the Supreme Court in *Cooper* “held that the right not to be segregated in the public schools was ‘so fundamental and pervasive that it is embraced in the concept of due process of law.’”\(^{488}\) So, in addition to the Equal Protection Clause, the NAACP argues that the school closures also violate the Due Process Clause of the Fourteenth Amendment. This finding in itself is not a substantive due process argument, merely a pronouncement that school segregation violates both due process and equal protection. It is also noted that in the Prince Edward case “no abstract question of the duty of the state to provide a public education to all its citizens need be decided; nor must the court [sic] deal with the power of a state to abandon public schools altogether.”\(^ {489}\) Yet, the NAACP cites the importance the Court placed on public education in a democratic society in the *Brown* decision. If a state were to abandon public education, the NAACP argues, it would raise “serious questions of substantive due process.”\(^ {490}\)

The NAACP does not elaborate their substantive due process argument further in regards to a constitutional right to public education. The argument is made, however, that the great importance public education plays in “our democratic institutions” makes it important to the national interest. The comparison is made to public recreational facilities, such as swimming pools and parks. The lower federal courts had sustained the abandonment, for the purpose of avoiding desegregation, of these kinds of public facilities. This, argues the NAACP, “does

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\(^ {488}\) Papers of Allan G. Donn, Brief for Petitioners, Coheyse J. Griffin, etc., et al., U.S. Supreme Court, *Coheyse J. Griffin, etc., et al. v. County School Board of Prince Edward County, et al.*, No. 592, 20; *Cooper v. Aaron*, 358 U.S. 1 (1958), 19. The Court in *Cooper* found that segregation in public schools violated due process because segregation in the Washington D.C. public schools had been struck down relying on the Due Process Clause of the Fifth Amendment. *Cooper* does not mention a substantive Due Process right to education.

\(^ {489}\) Papers of Allan G. Donn, Brief for Petitioners, Coheyse J. Griffin, etc., et al., U.S. Supreme Court, *Coheyse J. Griffin, etc., et al. v. County School Board of Prince Edward County, et al.*, No. 592, 13. This quote is preceded by the statement that: “Public education is a vital government function. In Prince Edward County, there has been an unconscionable experimentation with ignorance.”

\(^ {490}\) Papers of Allan G. Donn, Brief for Petitioners, Coheyse J. Griffin, etc., et al., U.S. Supreme Court, *Coheyse J. Griffin, etc., et al. v. County School Board of Prince Edward County, et al.*, No. 592, 13, 21; *Brown v. Board of Education*, 347 U.S. 483 (1954), 493.
not mean that such conduct in the more vital area of public education is similarly free from constitutional proscription.”

The NAACP presses the point of public education’s importance with the following statement:

"Current newspapers and periodicals reflect a national concern with the quality of public education provided American youth. Survival of our civilization is closely related to governmental ability to provide a broad free public educative process for large numbers of people … This is surely not the “moment in history for the state to experiment with ignorance” Hall v. St. Helena Parish School Board, supra. This is not the time for a state to question the propriety of its support of public education as an appropriate function of government."

Based on this observation, the NAACP finds that the county officials have violated the Fourteenth Amendment, when they refused to provide desegregated public schools.

The second reason the NAACP felt the Supreme Court should strike down the school closures was: “Virginia is providing, supporting, and maintaining public schools in all localities of Virginia except Prince Edward County, thereby discriminating geographically against all students in the county.”

The state courts had found that Virginia maintained a decentralized system of public schools, under which a locality was allowed to abandon public education. The NAACP, however, argued that “Virginia is deeply involved in the maintenance and operation of a statewide public school system.”

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491 Papers of Allan G. Donn, Brief for Petitioners, Cocheysse J. Griffin, etc., et al., U.S. Supreme Court, Cocheysse J. Griffin, etc., et al. v. County School Board of Prince Edward County, et al., No. 592, 21.
492 Papers of Allan G. Donn, Brief for Petitioners, Cocheysse J. Griffin, etc., et al., U.S. Supreme Court, Cocheysse J. Griffin, etc., et al. v. County School Board of Prince Edward County, et al., No. 592, 22.
493 Papers of Allan G. Donn, Brief for Petitioners, Cocheysse J. Griffin, etc., et al., U.S. Supreme Court, Cocheysse J. Griffin, etc., et al. v. County School Board of Prince Edward County, et al., No. 592, 22.
494 Papers of Allan G. Donn, Brief for Petitioners, Cocheysse J. Griffin, etc., et al., U.S. Supreme Court, Cocheysse J. Griffin, etc., et al. v. County School Board of Prince Edward County, et al., No. 592, 32.
495 Papers of Allan G. Donn, Brief for Petitioners, Cocheysse J. Griffin, etc., et al., U.S. Supreme Court, Cocheysse J. Griffin, etc., et al. v. County School Board of Prince Edward County, et al., No. 592, 11.
The NAACP points to the fact that the state of Virginia supports schools in all localities in the state, except Prince Edward. The Virginia schools are “financed, supervised and operated jointly by the central and local government.” Funding for the schools come from tax revenues, “including taxes collected from petitioners and other residents of Prince Edward County.”\textsuperscript{496} The Prince Edward county officials are all considered by the NAACP to be “agents of the state… and their acts in regard to the operation of public schools constitute ‘state action’ within the meaning of the Fourteenth Amendment.”\textsuperscript{497} The state action that led to the closures was the failure to levy taxes and appropriate funds for the public schools. The NAACP argues that an omission to act can constitute unconstitutional state action in the same way as positive acts. “A surrender of power and authority which effectuates a denial of equal educational opportunities guaranteed by the constitution [sic] is as impermissible as a positive act of discrimination.”\textsuperscript{498}

The NAACP’s understanding of state action is backed up by a citation to the Supreme Court’s ruling in \textit{Burton v. Wilmington Parking Authority}, decided in 1961.\textsuperscript{499} In \textit{Burton} the Court defined state action broadly, and held that inaction on the part of the state also might violate equal protection.

In spite of the findings of the state courts, the NAACP argued that the state of Virginia operated a statewide school system. The abandonment of public schools in Prince Edward created a geographical inequality within the state. The Prince Edward school children were treated differently than other children in the state, resulting in a violation of their right to equal protection guaranteed by the Fourteenth Amendment. Again the brief takes note of \textit{Montgomery v. Gilmore}
and *Tonkins v. Greensboro*, the public park and swimming pool cases. The Prince Edward case is differentiated from these cases by arguing that the facilities closed in the aforementioned cases were maintained and operated locally, while public education in Virginia was not a local matter. Rulings by the federal District Courts in *Hall v. St. Helena Parish School Board* and *James v. Almond* are cited to support this claim.\(^500\)

Those two cases are also relied upon when the NAACP argues that it is unconstitutional for a state to “withdraw from the field of education in one county while it continues to furnish educational facilities in all other areas of the state.”\(^501\)

The final reason presented in the brief targets the public funds provided for the private, and segregated, schools operated by the Prince Edward Foundation. The tuition grants and tax credits are viewed in two respects by the NAACP. Seen in combination with the school closures, they are part of a scheme to preserve school segregation. The public schools under court order to desegregate were closed, and private segregated schools, funded by state and county took their place. “Thus, the state continued its denial of equal educational opportunities mandated by the United States Constitution.”\(^502\)

The NAACP, however, also found that the subsidies by themselves were a scheme by the state to operate segregated schools. While subsidies to private schools in general were not prohibited the Constitution, the NAACP argued that they became unconstitutional “when used to effectuate an illegal or unlawful end. Again legislative motive is argued, without expressly stating so and again *Gomillion* is cited to support the argument. The NAACP urged the Supreme

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\(^500\) Papers of Allan G. Donn, Brief for Petitioners, Cocheys J. Griffin, etc., et al., U.S. Supreme Court, *Cocheys J. Griffin, etc., et al. v. County School Board of Prince Edward County, et al.*, No. 592, 12, 14, 22, 25-26, 32. Three Supreme Court cases concerning voting districts are also cited to support the arguments that the Constitution required geographical equality: *Baker v. Carr*, 369 U.S. 186 (1962); *Gomillion v. Lighfoot* 364 U.S. 339 (1960); *Wesberry v. Sanders*, 376 U.S. 1 (1964), cited in the brief at page 14, the *Wesberry* case is cited without a case citation for the Supreme Court’s ruling in the case.

\(^501\) Papers of Allan G. Donn, Brief for Petitioners, Cocheys J. Griffin, etc., et al., U.S. Supreme Court, *Cocheys J. Griffin, etc., et al. v. County School Board of Prince Edward County, et al.*, No. 592, 25.

\(^502\) Papers of Allan G. Donn, Brief for Petitioners, Cocheys J. Griffin, etc., et al., U.S. Supreme Court, *Cocheys J. Griffin, etc., et al. v. County School Board of Prince Edward County, et al.*, No. 592, 27.
Court to strike down the subsidies to segregated private schools even if the public schools were to be reopened.\textsuperscript{503}

For these reasons the NAACP asked that the Supreme Court provide relief that would result in the reopening of the schools. Specifically, the NAACP wanted the Supreme Court to order that a tax be levied in Prince Edward County for the purpose of funding public schools. As has been shown in the subchapter dealing with the Justice Department’s \textit{amicus} brief before the federal Circuit Court, this form of relief was not supported by case law. Nevertheless, the NAACP made this argument and ten cases are cited to support this, nine of which were cited in the Justice Department’s \textit{amicus} brief.\textsuperscript{504}

It was also requested that the Court prohibit public funds to be provided for the segregated private schools in Prince Edward. The NAACP did not find the suit was barred by the Eleventh Amendment. It is argued that the amendment does not apply when a state official attempts to implement an unconstitutional act.\textsuperscript{505}

In this study of the legal history of the Prince Edward school closures, the arguments made by the involved parties are identified, isolated, and analyzed in order to provide a qualitative examination of those arguments. In regards to the NAACP’s brief, this proved to be a difficult task. Unlike the other source material examined with here, the NAACP does not structure their brief so that one issue or argument is presented separately. Instead issues and arguments are dealt with throughout the brief, as opposed to in a section dedicated to that issue or argument.

When the arguments made by the NAACP are identified, isolated, and analyzed, it is here contended that they are not very convincing. Several important points are more or less assumed, rather than argued. When arguments are made and cases cited, the NAACP heavily rely on the same cases, \textit{Cooper v. Aaron} being

\textsuperscript{503} Papers of Allan G. Donn, Brief for Petitioners, Cocheys J. Griffin, etc., et al., U.S. Supreme Court, \textit{Cocheys J. Griffin, etc., et al. v. County School Board of Prince Edward County, et al.}, No. 592, 12-13, 29-30, 32.

\textsuperscript{504} Papers of Allan G. Donn, Brief for Petitioners, Cocheys J. Griffin, etc., et al., U.S. Supreme Court, \textit{Cocheys J. Griffin, etc., et al. v. County School Board of Prince Edward County, et al.}, No. 592, 32-34.

\textsuperscript{505} Papers of Allan G. Donn, Brief for Petitioners, Cocheys J. Griffin, etc., et al., U.S. Supreme Court, \textit{Cocheys J. Griffin, etc., et al. v. County School Board of Prince Edward County, et al.}, No. 592, 34.
the prime example of this. At times the brief reads more like social commentary than a legal argument, in particular the referenced made to the importance of education. In short, the brief can be described as a declaration how things ought to be, rather than an argumentation on what the law stipulates. The NAACP seems to focus more on notions of social justice and equality than on legal tradition and precedents.

Seen in its proper historical context, however, the NAACP’s brief is perfectly logical, and indeed makes a powerful argument. This statement is of course validated by the fact that the Supreme Court would rule in the NAACP’s favor. If the brief seems to go against tradition, it is because this is precisely what the NAACP was doing. In *Brown* they had argued, successfully, that the legal tradition of “separate but equal,” going back to the 1896 ruling in *Plessy*, should be reversed. In the Prince Edward cases, they were simply continuing on this path.

The tradition challenged in the Prince Edward case was a state’s wide discretion over public education. The governing case law seemed to suggest that as long as a state did not support a segregated school system, it was allowed administer public schools freely. This included allowing a county to abandon public schools. Here the argument is made that the NAACP were well aware that the legal arguments that could be made against the school closures would be weak. Instead they focus on the fact that the closures were undoubtedly an attempt to avoid compliance with the Supreme Court’s ruling in *Brown*. The Supreme Court would thus be faced with the choice of adhering to a tradition that allowed their ruling in *Brown* to be circumvented, or the Justices could reject tradition in order to suppress defiance of their own desegregation ruling.

Throughout the brief countless references are made to the fact that the closures were an attempt to resist the *Brown* ruling. Herein lies the strength of the NAACP’s brief. These references are a constant reminder to the readers; the Justices of the Supreme Court, that Prince Edward County for ten years had opposed a ruling by the highest court in the land. When the NAACP argues that “public education in Prince Edward County was discontinued to abrogate, frustrate, avoid, and circumvent implementation of petitioners’ right to equal
educational opportunities” that are also saying that Prince Edward is not obeying the Supreme Court.

Although the Supreme Court following *Brown* and *Brown II*, had been largely absent in the struggle over desegregation, *Cooper v Aaron* being the exception, by 1964 there were signs that the Court had grown frustrated with southern resistance to their *Brown* ruling. This is also manifested in the NAACP’s brief. Excluding citations made to earlier decisions in the Prince Edward litigation, and to cases pertaining the issues of the Eleventh Amendment and the Court’s power to order a county to levy a tax, 25 Supreme Court cases are cited in the brief. Of these only nine were handed down prior to 1954, when *Brown* was decided and eleven were handed down in 1960 or later.

Of the more recent cases cited in the brief it is worth mentioning *Goss v. Board of Education*, decided in 1963. In *Goss*, the Court invalidated a Tennessee transfer provision part of a desegregation plan. The transfer provision allowed students to transfer from a school where the student was in the racial minority, to a school where the student would belong to a racial majority. The Court found it “readily apparent that the transfer system proposed lends itself to perpetuation of segregation.” *Goss* marked a shift in the Supreme Court’s tolerance for evasive schemes in the field of school desegregation. In 1959 the Justices had denied to review a decision by a federal Circuit Court approving of a similar transfer plan. By 1963 the Justices had developed a considerably lower tolerance for such evasive schemes.

In another 1963 ruling, *Watson v. Memphis*, the court reversed a federal District Court’s ruling delaying the desegregation of public parks in Memphis. The Court commented that they in *Brown II* “never contemplated that the concept of ‘deliberate speed’ would countenance indefinite delay in elimination of racial barriers” in schools or other public facilities.

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Seen together with the already mentioned 1960 ruling in *Gomillion*, it would appear that the Court by the early 1960’s were willing to abandon some traditions to make the South obey their *Brown* ruling. Mikael Klarman notes that the Court by the 1960’s “eventually grew tired of the endless evasion and bad faith, and they adjusted constitutional and other doctrines in response.”\(^{511}\) In a sense the NAACP were adhering to a recent tradition established by the Supreme Court.

### 6.4 County Officials’ Arguments before the Supreme Court

The county officials brief for respondents is undated, but as the NAACP’s brief it was filed between January and March 30, 1964. The brief begins with a preliminary statement taking notice of the death of the county officials’ chief counsel, Collins Denny Jr., who had died on January 14, 1964. More specifically, Denny had represented the Prince Edward County School Board and the Division Superintendent of Schools in Prince Edward County.\(^{512}\)

It is important to note that the brief examined here was filed on behalf of the County School Board and the Division Superintendent. Another county body, the Board of Supervisors, filed a separate brief before the Supreme Court. The different responsibilities and powers of the School Board and Division Superintendent, and the Board of Supervisors play a significant role in the defense of the school closures in this final stage of the litigation. The umbrella term “county officials” can still be used to denote county leaders who all have the same interest, to keep the public schools closed. When reference is made to the view expressed in the brief examined here, however, the term “School Board” will be used.\(^{513}\)

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\(^{511}\) Klarman 2004, 342.

\(^{512}\) Papers of Allan G. Donn, Brief for Respondents, County School Board of Prince Edward County, Virginia and T. J. McIlwaine, Jr., Division Superintendent of Schools of Said County, U.S. Supreme Court, *Cocheyse J. Griffin, etc., et al. v. County School Board of Prince Edward County, et al.*, No. 592, 1-2.

\(^{513}\) All defendants in the case were: “the Board of Supervisors, School Board, Treasurer, and Division Superintendent of Schools of Prince Edward County, and the State Board of Education and the State Superintendent of Education.” *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964), 232. It can be ascertained that the Board of Supervisors and the State Board of Education and Superintendent of Public Instruction of Commonwealth of Virginia filed separate briefs because the names of the lawyers who represented these parties in the proceedings before the federal Circuit Court appear on page 220 of the Supreme Court decision. The lawyers for the School Board do not appear on this page. That the brief examined here was
The School Board’s brief is unlike the previous briefs examined here. Throughout the entire brief only 24 cases are cited, of which only five were Supreme Court decisions. Most of the cited cases were previous rulings relating to the Prince Edward schools. This is truly in stark contrast to the both lengthy and detailed arguments found in earlier briefs. The reason for the scarcity of citations is that the School Board’s brief makes no attempt to argue for the constitutionality of the school closures. Instead the Supreme Court is asked to dismiss the case on procedural grounds.

The School Board presents their arguments in two sections. The first one titled:

The Amended Supplemental Complaint Filed by Petitioners Upon Which the Proceedings Now Before this Court Are Based Presents a New and Different Cause of Action from that Presented in the Original Complaint and Should be Dismissed.

This is the same argument that was presented in the brief before the federal Circuit Court around Christmas, 1962. This argument holds that the case now before the Supreme Court is dealing with the wrong questions. The litigation that had now reached the highest court in the land had begun in 1951 as a desegregation suit. In 1960 federal District Judge Lewis had ordered the School Board to desegregate the public schools operated by that county board. Before that order was handed down, on May 5, 1959, the Board of Supervisors of Prince Edward County had refused to provide any funds for the public schools. With no funds the School Board could operate no schools, segregated or desegregated, and therefore fulfilled its obligations under the court order.

actually filed with the Supreme Court can be verified by the fact that the Supreme Court explicitly name the School Board as a defendant in the case, and respond directly to several of the arguments presented in the brief. Furthermore, Christopher Bonsatia makes reference to the School Board’s arguments before the Supreme Court, Bonastia 2012, 220.

Papers of Allan G. Donn, Brief for Respondents, County School Board of Prince Edward County, Virginia and T. J. McIlwaine, Jr., Division Superintendent of Schools of Said County, U.S. Supreme Court, Cocheye J. Griffin, etc., et al. v. County School Board of Prince Edward County, et al., No. 592, 3, 11-12, 29-30.
As has been noted, the NAACP filed a supplemental complaint that added the question of the school closures to the litigation. Since the School Board has no power over the levying of county taxes and appropriation of funds for the schools, the County Board of Supervisors, which has this power, was added as a defendant in the case. In September, 1960, Judge Lewis granted this request.\footnote{The State Board of Education and the Superintendent of Public Instruction for the Commonwealth of Virginia also joined the School Board as defendants. Later, on April 24, 1961, the Treasurer of Prince Edward County was also added as a defendant. Papers of Allan G. Donn, Brief for Respondents, County School Board of Prince Edward County, Virginia and T. J. McIlwaine, Jr., Division Superintendent of Schools of Said County, U.S. Supreme Court, Cocheysse J. Griffin, etc., et al. v. County School Board of Prince Edward County, et al., No. 592, 3-4, 11-12, 26, 29-30.}

The NAACP, in their supplemental complaint, had charged that the:

action, inaction and contemplated action of each and all defendants was, has been, and will be taken for the sole purpose of circumventing and frustrating the enforcement of the order of the court requiring the racial desegregation of the public schools of Prince Edward County.\footnote{The NAACP’s supplemental complaint quoted in: Papers of Allan G. Donn, Brief for Respondents, County School Board of Prince Edward County, Virginia and T. J. McIlwaine, Jr., Division Superintendent of Schools of Said County, U.S. Supreme Court, Cocheysse J. Griffin, etc., et al. v. County School Board of Prince Edward County, et al., No. 592, 29, 33.}

The NAACP views the litigation concerning the school closures as a continuance of the school segregation litigation that began in 1951. When ordered by the District Court to desegregate, the county had “circumvented” and “frustrated” this order. As such, the litigation still concerned the same fundamental question as it had in 1951, the desegregation of public schools.

The School Board disagrees, and the same arguments found in the county officials’ brief before the federal Circuit Court, examined here in chapter 5.2.1, are now repeated before the Supreme Court. The “specific conduct” challenged in the original suit, the operation of segregated schools, had been resolved. The District Court had provided the relief that the NAACP had requested when an order to desegregate was handed down. The School Board holds that Lewis’s “order of April 22, 1960, did not require the operation of schools in the county but only restrained segregation in such schools that were operated.”\footnote{Papers of Allan G. Donn, Brief for Respondents, County School Board of Prince Edward County, Virginia and T. J. McIlwaine, Jr., Division Superintendent of Schools of Said County, U.S. Supreme Court, Cocheysse J. Griffin, etc., et al. v. County School Board of Prince Edward County, et al., No. 592, 29, 33.}
The supplemental complaint therefore sought to target a new “specific conduct,” the abandonment of public education, which had not been part of the original lawsuit. The relief requested was, according to the School Board, wholly different in the supplemental complaint. Now the NAACP asked that the courts order the county to operate public schools, including levying taxes for this purpose. The issues raised in the supplemental complaint are so different from the subject matter of the original case that under the Federal Rules of Civil Procedure these two cannot be merged. The issues raised in the supplemental complaint, argues the School Board, “should be litigated in a separate and independent suit.”

The School Board feels that the introduction of the supplemental complaint into the litigation had corrupted the proceedings. The Supreme Court was now faced with ruling on a case that was “grounded on quicksand.” By this the School Board means that since the supplemental complaint was added, new questions have continuously been raised in the litigation. The School Board argues that the confusion that followed the addition of the supplemental complaint has compromised the integrity of the proceedings. Several questions now before the Supreme Court had not been given the proper attention in the proceedings in the lower federal courts. One question in particular concerns the School Board. “The question whether a federal court can compel a local legislative body to levy taxes and appropriate money for public school purposes…” This question, felt the School Board, “is among the most important and far-reaching ever to come before this Court—it goes to the very vitals of our federal system of government.”

U.S. Supreme Court, Cocheyse J. Griffin, etc., et al. v. County School Board of Prince Edward County, et al., No. 592, 30.
520 Papers of Allan G. Donn, Brief for Respondents, County School Board of Prince Edward County, Virginia and T. J. McIlwaine, Jr., Division Superintendent of Schools of Said County, U.S. Supreme Court, Cocheyse J. Griffin, etc., et al. v. County School Board of Prince Edward County, et al., No. 592, 32-35.
521 Papers of Allan G. Donn, Brief for Respondents, County School Board of Prince Edward County, Virginia and T. J. McIlwaine, Jr., Division Superintendent of Schools of Said County, U.S. Supreme Court, Cocheyse J. Griffin, etc., et al. v. County School Board of Prince Edward County, et al., No. 592, 35.
522 Papers of Allan G. Donn, Brief for Respondents, County School Board of Prince Edward County, Virginia and T. J. McIlwaine, Jr., Division Superintendent of Schools of Said County, U.S. Supreme Court, Cocheyse J. Griffin, etc., et al. v. County School Board of Prince Edward County, et al., No. 592, 35-36.
Now, the Supreme Court would decide this issue “without having been briefed, argued or considered by the District Court or the Court of Appeals.”

Judge Lewis’s decision to allow the supplemental complaint, argues the School Board, had led to a breach in procedure that had led to several issues not having been included in the proceeding in the lower courts. To remedy this, the School Board asks that the Supreme Court to refrain from deciding the case, and dismiss it so that it may be “properly pleaded, briefed, argued and decided by the courts below.”

The second argument put forth in the brief is presented in a section titled: “No Action Has Been Taken By Respondents Which Violates Any Constitutional Rights of Petitioners.” This section further elaborates the notion that the School Board has complied with federal court orders since no segregated schools were being operated in the county. The only thing the federal courts had held was that it was unconstitutional to operate segregated schools. The NAACP’s claim that there existed a constitutional right to desegregated education was unsubstantiated. Moreover, the accusation that Prince Edward had “circumvented and frustrated” or “defeated and frustrated” the federal courts when public education was abandoned is found irrelevant.

A court order can either be complied with or violated, the School Board “know no half-way point.”

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523 Papers of Allan G. Donn, Brief for Respondents, County School Board of Prince Edward County, Virginia and T. J. McIlwaine, Jr., Division Superintendent of Schools of Said County, U.S. Supreme Court, Cocheesy J. Griffin, etc., et al. v. County School Board of Prince Edward County, et al., No. 592, 38.
524 Papers of Allan G. Donn, Brief for Respondents, County School Board of Prince Edward County, Virginia and T. J. McIlwaine, Jr., Division Superintendent of Schools of Said County, U.S. Supreme Court, Cocheesy J. Griffin, etc., et al. v. County School Board of Prince Edward County, et al., No. 592, 38.
525 Papers of Allan G. Donn, Brief for Respondents, County School Board of Prince Edward County, Virginia and T. J. McIlwaine, Jr., Division Superintendent of Schools of Said County, U.S. Supreme Court, Cocheesy J. Griffin, etc., et al. v. County School Board of Prince Edward County, et al., No. 592, 39.
526 Papers of Allan G. Donn, Brief for Respondents, County School Board of Prince Edward County, Virginia and T. J. McIlwaine, Jr., Division Superintendent of Schools of Said County, U.S. Supreme Court, Cocheesy J. Griffin, etc., et al. v. County School Board of Prince Edward County, et al., No. 592, 40-43.
527 Papers of Allan G. Donn, Brief for Respondents, County School Board of Prince Edward County, Virginia and T. J. McIlwaine, Jr., Division Superintendent of Schools of Said County, U.S. Supreme Court, Cocheesy J. Griffin, etc., et al. v. County School Board of Prince Edward County, et al., No. 592, 42.
Brown had outlawed segregation in public schools. That the NAACP expected that desegregated public schools should be operated does not make the school closures a violation of that decree. The School Board takes this logic one step further. “If respondents have “circumvented” or “frustrated” the desires of the petitioners or the expectations of this Court, it does not follow that the decrees of the courts have been circumvented or violated.” Merely because Prince Edward County by closing its schools had avoided providing the expected result of Brown, it does not mean that that ruling had been violated. This line of reasoning appears to be an indirect attack on legislative motive. When deciding if a court decree has been violated, the School Board argues, the courts should only look at the exact meaning of that decree. That the intent behind an action was to avoid compliance does not equate that action to a violation of a court order.

The School Board holds that they “[w]ithout a doubt” have fulfilled all its obligations pertaining to this case. The School Board has authority over the public schools in the county. Whether those schools are segregated or not falls squarely within their responsibility, the school closures had settled this matter. The NAACP had charged that the School Board had done nothing to reopen the schools. The board, however, had no power to levy taxes or appropriate funds for the schools, and therefore “has done everything it can or is required to do.”

The argument that the school closures violated the Fourteenth Amendment’s Equal Protection Clause because schools were operated in all other localities in Virginia could “by no stretch of the imagination […] involve the two original defendants.” The original defendants, i.e. the School Board and Division Superintendent, “have not a scintilla of a voice in determining whether of how schools be operated elsewhere.”

528 Papers of Allan G. Donn, Brief for Respondents, County School Board of Prince Edward County, Virginia and T. J. McIlwaine, Jr., Division Superintendent of Schools of Said County, U.S. Supreme Court, Cocheyse J. Griffin, etc., et al. v. County School Board of Prince Edward County, et al., No. 592, 43.
529 Papers of Allan G. Donn, Brief for Respondents, County School Board of Prince Edward County, Virginia and T. J. McIlwaine, Jr., Division Superintendent of Schools of Said County, U.S. Supreme Court, Cocheyse J. Griffin, etc., et al. v. County School Board of Prince Edward County, et al., No. 592, 45.
530 Papers of Allan G. Donn, Brief for Respondents, County School Board of Prince Edward County, Virginia and T. J. McIlwaine, Jr., Division Superintendent of Schools of Said County, U.S. Supreme Court, Cocheyse J. Griffin, etc., et al. v. County School Board of Prince Edward County, et al., No. 592, 37.
The brief is concluded with a yet another request that the Supreme Court dismiss the case. The request for dismissal applies to all respondents or “at the least” to the School Board.\textsuperscript{531}

This final brief filed by the county officials, or rather the School Board, is curious. The elaborate surveys of the Fourteenth Amendment, comparisons to other litigation concerning evasion of desegregation, and in-depth accounts of case law governing public education and legislative motive, found in the previous briefs are now absent. The School Board does not seem to provide a comprehensive legal defense of the constitutionality of the school closures, as previous briefs had done, but rather attacks the procedure under which the school closures had been litigated.

Christopher Bonastia describes the county officials’ defense of the school closures before the Supreme Court as “a round of blame shifting.” Bonastia goes on to briefly depict the defense of the school closures as one where all defendants were merely defending their role in the closures.\textsuperscript{532} In previous briefs the closures were defended as a whole, and very little emphasis was placed on the responsibilities and powers of the different county and state boards and officials. In the final stage of the litigation it would indeed appear that the county officials’ unanimity had dissipated.

What then was the reason for this shift in the county officials’ defense of the school closures? Here two possible reasons are identified. The first is the death of Collins Denny Jr. He may very well have been responsible for the more coordinated defense seen in the previous briefs. His passing may have disintegrated the network between the lawyers defending the various state and county boards and officials. This, it is argued, could very well have led to the fragmented defense of the closures presented before the Supreme Court.

The second reason is the changing trend in the Supreme Court’s attitude towards schemes to avoid desegregation. The county officials’ brief before the federal

\textsuperscript{531} Papers of Allan G. Donn, Brief for Respondents, County School Board of Prince Edward County, Virginia and T. J. McIlwaine, Jr., Division Superintendent of Schools of Said County, U.S. Supreme Court, \textit{Cocheysie J. Griffin, etc., et al. v. County School Board of Prince Edward County, et al.}, No. 592, 46.

\textsuperscript{532} Bonastia 2012, 220.
Circuit Court was authored around Christmas 1962. The Supreme Court handed down their ruling in *Watson v. Memphis* in April 1963 and *Goss v. Board of Education* was decided in June that same year. Both decisions marked a stark reduction in the Court’s tolerance for evasion of desegregation. In this study it is argued that the county officials felt that their scheme to abandon public education would not pass scrutiny by the Court’s recently developed standard. Finding that they would probably not be able to successfully argue for the legality of the closures, they adopted a new strategy. The supplemental complaint of 1960 posed a procedural weakness, and this was exploited by the county officials.

The question of the reasons behind the shift in the county officials’ defense of the closures cannot be answered to any degree of certainty using the source material examined here. A more extensive study of all the briefs filed before the Supreme Court is required to explore a possible shift in the defense of the closures.

### 6.5 The Supreme Court’s Decision

The Supreme Court handed down its ruling in *Griffin v. County School Board of Prince Edward County* on May 25, 1964, ten years and eight days after *Brown* was decided. The opinion was authored by Justice Hugo Black, and the other Justices joined the opinion. Justices John Marshall Harlan II and Tom Clark disagreed with a certain aspect of the opinion, but nevertheless joined the majority.\(^{533}\)

The decision is divided into three sections, of which the first one considers procedural questions. The addition of the supplemental complaint, which the School Board had objected to vehemently, did not violate the Federal Rules of Civil Procedure. Under these rules activates that had taken place after a lawsuit was initiated could be added to that suit. The Court found that additional defendants could be named, if they were involved with the activity added to the lawsuit. The claim that the school closures were a completely different issue than what was raised in the original lawsuit is rejected by the Court. The school closures and the subsidies afforded to the segregated private school operated by

\(^{533}\) *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964), 218, 220, 234.
the Prince Edward School Foundation constituted a continuance the school segregation prohibited by Brown. The NAACP had been consistent in their demands for relief; that African American school children be allowed to attend the same schools as white children. This had been “thwarted before 1959 by segregation in in the public schools and after 1959 by a combination of closed public schools and state and county grants to white children at the Foundations’ private schools.” The Court accordingly found that supplemental complaint did not raise different issues than the original lawsuit, and as a result did not need to be litigated separately.534

The Court summarily rejected the argument that the Eleventh Amendment prevented the federal courts from hearing this case because it was a suit against a state. Referring to Ex Parte Young the Justices notes that Eleventh Amendment immunity does not extend to state officials if they are involved in infringement of constitutional rights. The Justices rather casually sets this issue aside.535

The final procedural question considered by the Court was that of federal abstention. The Justices note that it at times is proper for a federal court to abstain, and point to their ruling in Railroad Commission v. Pullman. In the Prince Edward case, however, the doctrine of federal abstention should not be applied, and the Court finds two reasons for this finding. Firstly, the school closures had already been reviewed under state law by the Virginia Supreme Court of Appeals.536 This settles the matter of abstention, and there was no need for the Supreme Court to elaborate any further. Justice Black, however, had a few choice words to say about abstention and more to the point, about the slow progress of the litigation:

…we hold that the issues here imperatively call for decision now. The case has been delayed since 1951 by resistance at the state and county level, by legislation, and by lawsuits. The original plaintiffs have doubtless all passed high school age. There has been entirely too much deliberation and not enough speed in enforcing the constitutional rights which we held in Brown v. Board of Education, supra, had been denied Prince Edward County Negro children. We accordingly reverse the Court of Appeals' judgment remanding the

535 Griffin v. County School Board of Prince Edward County, 377 U.S. 218 (1964), 228.
536 Griffin v. County School Board of Prince Edward County, 377 U.S. 218 (1964), 228-229.
case to the District Court for abstention, and we proceed to the merits. 537

Clearly Justice Black, and presumably his brethren who joined him in the opinion, were frustrated with the many delays this litigation had suffered. It is interesting that the Court’s recent decision in *England v. Louisiana State Board of Medical Examiners* is not mentioned in the opinion. Much of the delays were the result of confusion about whether federal questions had to be raised in the state courts following an abstention. The *England* ruling had clarified this matter. It is curious that this was not mentioned in the section of the opinion covering federal abstention.

As stated by Justice Black, the Court, in the second section of the opinion, “proceed to the merits.” The Court resolved that the school closures in combination with the subsidies granted to the Foundation’s private schools violated the Fourteenth Amendment’s Equal Protection Clause. The Court points out the obvious fact that public education was made available everywhere in Virginia, except Prince Edward County. The school children in Prince Edward were therefore treated differently than children in the rest of the state. 538

The fact that the school closures created a geographical discrepancy within Virginia was not found to be, in itself, a violation of equal protection. Citing their 1954 ruling in *Salsburg v. Maryland*, the Court observes that the Equal Protection Clause allows for variations within a state. The Justices even go further, and indicates that different treatment of persons might be permissible under the Equal Protection Clause. “It is the circumstances of each case which govern.” 539

Relying on *Salsburg*, the Court suggests that a state, under certain circumstances, was allowed to treat its counties, and even its citizens, differently. The circumstances in Prince Edward, however, were not found to be permissible. The school closures and the apportionment of subsidies for the private schools were found to be actions taken “for one reason, and one reason only: to ensure, through measures taken by the county and the State, that white and colored

537 *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964), 229.
538 *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964), 230.
539 *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964), 230.
children in Prince Edward County would not, under any circumstances, go to the same school.” The reason behind the actions of the state and county placed them in violation of equal protection, “grounds of race and opposition to desegregation do not qualify as constitutional.” The county was therefore not allowed to treat its school children differently that the rest of the state.

The Court also likens the Prince Edward scheme to avoid desegregation to the Louisiana scheme struck down by a federal District Court in *Hall v. St. Helena Parish School Board*. While admitting that the two schemes were not identical, the Court finds that the purpose behind both was the same, the preservation of segregated education. In both instances this was done by replacing public schools under court order to desegregate with private schools more or less maintained with public funds. As the District Court in *Hall* had found, the Supreme Court ruled that this scheme violated the African American school children’s rights under the Equal Protection Clause.

Having arrived at the conclusion that Prince Edward County was infringing upon the constitutional rights guaranteed by the Equal Protection Clause, the Court arrived at the final section of the opinion. Here the Court stipulated what actions should be taken to bring Prince Edward back into compliance with the Constitution. The task of guiding Prince Edward from unconstitutional to constitutional conduct fell on Judge Lewis.

Oren Lewis had already in his ruling in the *Eva Allen* case, handed down on August 25, 1961, prohibited Prince Edward County from providing tuition grants and tax credits while the public schools remained closed. The Supreme Court approved of Lewis’s ruling in this regard, and found that it was well within the District Court’s power to issue such an order. These subsidies should only be disallowed for as long as the public schools were closed. The Court was not persuaded by the NAACP to prohibit the allocation of public funds for segregated private schools even if public schools were operated. They did agree with the organization that the District Court was empowered, “to prevent further

racial discrimination,” to order the Board of Supervisors to use their taxation powers to procure funding for the public schools.\textsuperscript{543}

To make sure that the District Court had all the necessary tools to make Prince Edward comply with the \textit{Brown} ruling, it is suggested that Judge Lewis “may find it necessary to consider” issuing an order compelling the county to reopen its public schools. To drive home the point that there could be no more delays in Prince Edward, the Court, speaking through Justice Hugo Black, declares: “The time for mere ‘deliberate speed’ has run out, and that phrase can no longer justify denying these Prince Edward County school children their constitutional rights to an education equal to that afforded by the public schools in other parts of Virginia.”\textsuperscript{544}

The District Court is given one final tool to bring Prince Edward to submission, the authority to add new parties should the situation so require. Justices John Marshall Harlan II and Tom Clark opposed the notion that federal courts had the power to order that a county operate public schools, but did not file separate opinions.\textsuperscript{545}

The Prince Edward case now returned to Judge Lewis’s District Court. This time the federal judge was armed with a forceful decree by the Supreme Court, and on June 16, 1964, he handed down his ruling. The county was ordered to reopen the public schools, and following some last ditch efforts by the county officials to keep on resisting, the Prince Edward public schools reopened in September 1964. Thus ended Prince Edward’s five year “experimentation with ignorance.”\textsuperscript{546}

In the very beginning of this thesis, the Supreme Court’s opinion in \textit{Griffin v. County School Board of Prince Edward County} was described as being motivated more by frustration with Prince Edward’s resistance to desegregation, than by legal reasoning. Michael Klarman maintains that the \textit{Griffin} case broke new constitutional ground in several ways. The holding that the Equal Protection Clause demanded that Prince Edward could close its schools while all other schools in Virginia remained open is called “novel and unpersuasive.” Nor is

\textsuperscript{543} \textit{Griffin v. County School Board of Prince Edward County}, 377 U.S. 218 (1964), 232-233.
\textsuperscript{544} \textit{Griffin v. County School Board of Prince Edward County}, 377 U.S. 218 (1964), 233-234.
\textsuperscript{545} \textit{Griffin v. County School Board of Prince Edward County}, 377 U.S. 218 (1964), 234.
\textsuperscript{546} Bonastia 2012, 221-226; Turner 2001, 375-376.
Klarman convinced by the Court’s finding that the subsidies afforded the private schools violated equal protection. Klarman observes that these subsidies were also offered to establish private schools for African American pupils, an offer they deliberately refused on the advice of the NAACP.\textsuperscript{547} This fact was not mentioned in the Court’s opinion, although they must have been aware of this given that the School Board mentions it in their brief.\textsuperscript{548}

The Court’s consideration of legislative motive is also found by Klarman to be unorthodox. Prince Edward was not the only case during this time period when the Court took motive into account, a practice that previously had been “disfavored.” The Court’s recent adoption of this approach to judging was, according to Klarman, a response to the South’s lengthy struggle to resist the federal judiciary and its attempts to implement \textit{Brown}.\textsuperscript{549}

The Court’s approval of the broad powers granted to the District Court to end the school closures is what Klarman finds the most striking aspect of the \textit{Griffin} ruling. For a federal court to be empowered to order a county to levy taxes and operate public schools was described by Klarman as “a virtually unprecedented decision, about which several justices had doubts.” Indeed, Justices Harlan and Clark noted their objections to this remedy in the opinion.\textsuperscript{550}

In order for the Supreme Court to rein in Prince Edward County, it had to become creative. Under most circumstances, creativity is a positive mindset. For a court of law to become too creative, however, can potentially be a dangerous thing. As the Supreme Court held in \textit{Marbury v, Madison} “[i]t is emphatically the duty of the Judicial Department to say what the law is.” The Court thus interprets the law. If too much creativity is utilized, the interpretation of the law risks becoming the creation of law. This is a power reserved for the elected legislators, and is off limits to the appointed judges with lifelong tenures.

\textsuperscript{547} Klarman 2004, 341.
\textsuperscript{548} Papers of Allan G. Donn, Brief for Respondents, County School Board of Prince Edward County, Virginia and T. J. McIlwaine, Jr., Division Superintendent of Schools of Said County, U.S. Supreme Court, \textit{Cocheysie J. Griffin, etc., et al. v. County School Board of Prince Edward County, et al.}, No. 592, 12-13.
\textsuperscript{549} Klarman 2004, 342.
\textsuperscript{550} Klarman 2004, 342, Wilkinson 1979, 100.
In *Griffin* the Justices were willing to adopt no small amount of creativity. If they had been more conservative, it is hard to see how they could have struck down the closures. The illicit motive of the county officials plays a central role in the Court’s reasoning, in fact, it can be argued that the whole decision relies on it. The federal Circuit Court that did not take motive into account leaned heavily towards upholding the closures. The authorization of court orders requiring the levying of taxes and operation of schools was a dramatic increase in the powers of the federal courts, at the expense of the state.

In *Griffin* the Court pushed the boundaries of its powers. However, it did so after a decade of seeing their *Brown* decree thwarted by Prince Edward. For five years the county avoided desegregation by closing its schools. To repeat what Harvey Wilkinson wrote of the Supreme Court’s opinion, “[t]he object of *Griffin*, as it virtually had to be, was to get Prince Edward in line, never mind how.”\(^551\) It would appear that in the end it was Prince Edward’s successful defense of the school closures that ultimately doomed them.

\(^{551}\) Wilkinson 1979, 100.
7 Conclusions

This study has explored the legal battle fought over Prince Edward County’s schools from 1959 to 1964. The purpose has been to determine how the county was able to successfully defend the closures for a period of five years. In doing so, this examination has shed some light on an aspect of the Prince Edward school shut down that has previously received very little scholarly attention. While previous studies have covered the closures from several perspectives, none have focused on how the closures were defended in the courts. This study answers that question.

The reason behind Prince Edward’s radical strategy to avoid desegregation is well covered by the research literature. This reason was Prince Edward’s early involvement in desegregation litigation, which began in 1951. Following the Brown ruling, Prince Edward was under constant threat of being ordered by a federal court to desegregate. This created a situation where the county very early on was preparing to circumvent such an order. The path the county chose was to abandon public schools and make preparations to set up private schools that would operate on a segregated basis.552

It is also established that Prince Edward, by abandoning public education altogether, had discovered a novel and effective means to resist desegregation of its public schools. When the Supreme Court in 1964 struck down the closures, the Justices acted out of frustration with the county’s defiance of the Brown ruling. To reopen the schools, the Court had to resort to methods described as both “novel and unpersuasive” and “virtually unprecedented.”553

Yet, the question how the closures were defended during the five year period has remained largely unanswered. The county’s strategy is deemed successful because of the lengthy period the schools remained closed, and because the Supreme Court had to bend the rules in order to issue a ruling reopening the schools. The previous research notes that the closures raised new and difficult constitutional questions, in particular the question if public schools had to be operated. These findings, however, are not based on an examination of the

litigation, but rather on the end result of the Prince Edward school closures cases. What this study provides is a detailed account of every step of the litigation and a complete description how the closures were defended. This results in a comprehensive understanding of the defense of the closures and explains how they were maintained for such a long time period.

The findings of this study support the view that Prince Edward had indeed discovered an innovative method to avoid desegregation. Neither public schools in general, nor access to desegregated public schools, were required by the Constitution. The county officials successfully make this argument, and no convincing arguments to the contrary are presented during the litigation. Moreover, public education within the American system of federalism is clearly a state matter, or if the state so chooses, a matter for a political subdivision of the state. The Brown ruling did place a restriction on a state’s discretion in regards to public education, when the operation of segregated public schools was barred. Public schools, however, did not have to be operated. The only viable argument against the school closures was that they were initiated to avoid compliance with Brown and lower court orders to implement desegregation. The illicit motive behind the closures, in other words, made them unconstitutional.

The examination of the litigation presented here shows that the county officials succeeded much better than any other party or court involved in the litigation to anchor their arguments in existing case law. Although some of citations made by the county officials are subject to criticism, their arguments were to great extent more convincing. This includes the question of a court taking legislative motive into account, which proved to be reason for striking down the closures. On virtually all issues dealt with during the litigation, the county officials were able to cite precedents supporting their claim. Those opposed to the closures were at times unable to cite any precedents, and attempted to hide the lack of any supporting case law by presenting the issue at hand as axiomatic.

The statement that the county officials’ arguments were supported by existing legal tradition must be seen in its proper historical context. The 1950’s and 1960’s was a transformative time period in the United States, in particular in regards to race relations. To achieve any meaningful changes old traditions had
to be abandoned. In Brown the longstanding legal precedent that “separate but equal” established in Plessy v. Ferguson in 1896 was overturned and replaced by a new understanding of the Constitution, one that did not allow state mandated segregation. In the Prince Edward litigation, the school closures could successfully be defended relying on precedent and legal traditions. The only way to reopen the schools and put an end to the county’s stubborn resistance to the Brown decree was to adopt new methods.

It is established that the Supreme Court departed from traditional constitutional doctrines when the school closures were struck down.\footnote{Bonastia 2012, 14-15, 183, 219-221; Klarman 2004, 341-342; Wilkinson 1979, 97-101.} This study, however, shows that this view of the school closures was not limited to the final stage of the litigation. Rather, this was prevalent throughout the litigation. This finding places the Prince Edward school closures in a historical context where a traditional understanding of the Constitution and American federalism proved to be at odds with social change. While segregation in public schools had been declared unconstitutional, Prince Edward County could still rely on other constitutional traditions to avoid desegregation of its schools. The battle over the county’s public schools was therefore a struggle between a conservative and a progressive notion of the Constitution. The former supported states’ rights and limited judicial power, while the latter advocated limited states’ rights and both a powerful and activist judiciary.

Even within the context of the predominant constitutional traditions of the late 1950’s and early 1960’s, there were limits as to how far a state could go to avoid desegregation. Instances from three southern states are of interest to the Prince Edward litigation, Louisiana, Arkansas, and the school closures in Virginia initiated by Governor Almond. The cases that struck down the schemes to avoid desegregation, in particular Hall v. St. Helena Parish, Cooper v. Aaron, and James v. Almond, are often cited in the Prince Edward litigation. Comparisons are made between these cases and the Prince Edward cases to argue that also the Prince Edward scheme should be struck down.

The controlling issue in Hall, Cooper, and James was state involvement in the schemes to avoid desegregation. This study reveals that an important aspect of
the defense of the school closures was the system of public education set up in Virginia under the Perrow plan. By relying on this system a plausible argument could be made that schools in Virginia were a local matter, and not operated by the state. By referring to Virginia’s decentralized system, the county officials could differentiate the Prince Edward school closures from the other instances of resistance to school desegregation in the South. By removing, or at the very least minimizing, state involvement in public education the argument that the closures violated the Fourteenth Amendment’s guarantee to equal protection could be countered. A state that was involved in public education was prohibited from closing some schools while others remained opened, the state was required to treat all school children equally. If the state was not involved, however, this criterion could be avoided.

As Virginia’s role in public education under the Perrow plan was greatly diminished, the county officials could depict public education as a wholly local matter. In combination with the fact that all public schools were closed in the county, a convincing argument could be made that there was no denial of equal protection in both Prince Edward and the state of Virginia.

While other scholars have placed great emphasis on the actual abandonment of public education in Prince Edward, the role of the Virginia system under the Perrow plan has gone largely unnoticed. This study shows that the defense of the school closures relied heavily on a plausible absence of state involvement. Much of the arguments both for and against the closures deal with the question whether Virginia was involved in public education. Even though Prince Edward was the only locality in Virginia to abandon public education, the school closures should not be viewed as a solely local matter. Virginia’s policy following the collapse of massive resistance was an essential part of the school closures.

The state laws that governed public education also played another important role in the Prince Edward cases. When investigating why the litigation was so protracted, one issue is clearly the cause of much delay, the doctrine of federal abstention. On August 25, 1961, Judge Lewis decided to abstain in his ruling in the Eva Allen case. This sent the case to the state courts and clearly delayed the litigation. Yet, Lewis’s decision to abstain was correct. The purpose of the
doctrine is to allow state courts to decide matters pertaining to state law, before the federal courts decide the federal questions. In the Prince Edward cases there were obviously matters of state laws pertaining to public education in Virginia that had to be adjudicated, and abstention was therefore the proper procedure to adhere to.

Following Judge Lewis’s decision to abstain, the litigation took a curious turn. Uncertainties as to how federal questions should be raised before the state courts resulted in the county officials arguing federal questions, while the NAACP focused solely on questions under state law. The Virginia high court only considered state law, and ignored the federal questions. This created a situation that the county officials could exploit. The governing case law at that time stipulated that a state court had to be informed of any federal questions. How this should be done was not, however, specified. The NAACP had not wanted to risk that the state courts rule on federal questions, as this might have obstructed the litigation in the federal courts. The county officials, on the other hand, felt that the Virginia high court had not handed down a ruling with full knowledge of the pertinent federal questions.

When the case returned to Judge Lewis’s federal District Court, the county officials began utilizing federal abstention as a means to delay the litigation. This was done in two ways. Firstly, the county officials would request that the federal courts abstain on the grounds that the matter had not been properly argued before the state courts. Secondly, a new case was initiated by the county officials in a state trial court to once again have the state courts rule on the Virginia school laws. This proved to be a wise course of action. When the case arrived at the federal Circuit Court, this court decided to abstain, citing the existence of a case before the state courts as a reason for the choice.

At this stage, the Supreme Court took the unusual step of intervening, although the case had not gone through the proper procedures in the lower federal courts. If the Supreme Court had not taken this uncommon measure, the case would have returned to the federal District Court, in effect setting the litigation back to its beginning. As a strategy to delay and obstruct the proceedings this strategy had great potential. It should be noted that the Supreme Court removed the
uncertainties as to how federal question should be raised in the state courts following an abstention in *England v. Louisiana State Board of Medical Examiners*, decided January 13, 1964. Incidentally, this case was unrelated to issues regarding African American rights.

Federal abstention played a highly important role in the Prince Edward cases, yet it is virtually completely overlooked in the previous works on the Prince Edward school closures. Lewis’s choice to abstain, although correct, is the one reason that without a doubt delayed the litigation, other reasons most likely did exist, but are susceptible to a degree of speculation. When exploring why the litigation was dragged on for five years, federal abstention is therefore a vital factor. Moreover, it casts a new light on the county officials’ defense of the school closures. They did not exclusively rely on that they would be able to defend the closures as constitutional, but also pursued other means to delay a potential verdict putting an end to their experimentation with ignorance. This study has proven that the county lawyers were very skillful at exploiting any possibility that presented itself to keep the county’s schools closed.

This finding is further supported by another procedural strategy employed by the county officials. The Prince Edward litigation began as a desegregation suit. Following the county’s abandonment of public schools, the NAACP filed a supplemental complaint with Judge Lewis and added the issue of the school closures to the litigation, along with additional defendants. The county officials opposed the addition of the supplemental complaint as a breach in procedure. The school closures, argued the county officials was a different cause of action, and should be litigated in a separate suit. Although this approach did not prove to be as effective as the other defense strategies, it still has some merit, and proves that the county officials diversified their defense strategy.

In their brief before the Supreme Court, however, the county officials had completely shifted from a multifaceted defense of the closures, to one that completely relied on procedural arguments aimed at delaying the proceedings. The brief examined in this study was filed on behalf of the Prince Edward County School Board and Division Superintendent of Schools. In previous briefs the school closures had been defended as a whole, but in the final brief the
defendants focus on their specific role in the closures. Although a more extensive study is required to draw any conclusions with a higher degree of certainty, it seems very likely that the county officials shifted strategy before the Supreme Court.

Two theories are proposed in this study. The first postulates that the death of Collins Denny Jr., lead council for the Prince Edward County School Board, had an impact on the legal defense of the closures in the final stage of the litigation. The other theory hypothesizes that the county officials felt that in light of recent Supreme Court decisions, it was likely that the closures would be struck down on the merits of the case. Therefore any attempts to argue for the constitutionality of the closures were abandoned in favor of a procedural defense. The latter theory does suggest that the county officials’ defense of the closures was highly flexible, and responded to the changing attitudes of the Supreme Court as it grew more aggressive in its civil rights rulings. Whatever the case may be, further research into this subject is required to fully explore these possibilities.

This study of the Prince Edward school closures has demonstrated how the closures were defended in the courts. The results show that the county officials were able to argue that the closures were constitutional relying on the existing constitutional traditions prevalent at that time. This largely supports claims already made, albeit greater depth and detail is provided here. What is more, here it is also established that the closures were defended, and thus maintained for a lengthy period, employing other strategies. Perhaps most startling is the role the doctrine of federal abstention played in the litigation. This study concludes that the legal defense of the closures was more complex and versatile that has previously been believed. A solid defense of the constitutionality of the closures was combined with an aggressive criticism of any perceived weaknesses in the procedures. Moreover, heavy reliance was placed to the Perrow plan, which attempted to remove the state from the field of public education. Together these factors amounted to a very successful defense of an action that for five years deprived Prince Edward County’s school children of public education.

As a final note, this study shows that at times cherished American ideals of liberty cannot be reconciled. In the Prince Edward cases the values of states’
rights, a cornerstone in the American system of federalism clashed with the very American creed that “all men are created equal.” In the end, the liberties of a state had to be diminished in order to give meaning to Thomas Jefferson’s salient proclamation. In the opinion of the author, this was a fair tradeoff.
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