CHAPTER FOURTEEN

Justice Is Never Simple: *Brown I* and *II*

Despite all of his years in Georgia and despite his considerable political insight, Elbert Tuttle badly misread the effect that the Supreme Court's decision in *Brown v. Board of Education* would have. When he casually told a friend, "they'll fall in line," meaning the southern states would accept the mandate laid down by the court, he meant it.[1] In later years, he understood the miscalculation he had made. He had not anticipated that the political and social leaders of the South would defer to the demagogues, even join them. He thought responsible, thoughtful politicians would stand up and be counted—that at a minimum, they would say, this is the law, this is what the Supreme Court has determined our Constitution provides, and we will comply. He was not alone in his optimism. At least one "discerning southern journalist," Jonathan Daniels, editor of the *Raleigh News and Observer*, in a speech in the spring of 1954, "optimistically predicted that the South would respond to any decision the Court might make 'with the good sense and goodwill of the people of both races in a manner which will serve the children and honor America.'"[2] Shortly after the opinion was announced, John Popham reported in the *New York Times* on May 18, 1954, that "the South's reaction . . . appeared to be tempered considerably today."[3] Senator Russell B. Long of Louisiana, while making it clear that he deplored the ruling and completely disagreed with it, called for compliance. "My oath of office requires me to accept it as the law. Every citizen is likewise bound by his oath of allegiance to his country. I urge all Southern officials to avoid any sort of rash or hasty action."[4]

On the other hand, at least some of the writing was on the wall. Even before the decision in *Brown*, ardent segregationists like Herman Talmadge in Georgia had taken preemptive steps. In 1953 Talmadge proposed a short

but sweeping amendment to the Georgia Constitution. It authorized using public money to provide grants directly to state citizens "for educational purposes, in discharge of all obligations of the State to provide adequate education for its citizens."[5] In other words, the amendment allowed the state to abandon the public school system and instead provide "tuition grants" that could be used at private schools, which would be beyond the reach of any Supreme Court ruling. Talmadge staked his reputation on passing the amendment, so much so that some thought its passage "essential to Talmadge's prestige." The General Assembly created the Georgia Commission on Education, "a segregationist strategy group." Talmadge himself chaired the commission; swearing in the other members in January 1954, he announced his readiness to use the state militia in the service of preserving segregation in education.[6]

Talmadge had reacted to a line of cases that culminated in two cases, decided in 1950, that presaged Brown: *Sweatt v. Painter* and *McLaurin v. Oklahoma State Regents*. Heman Marion Sweatt had applied to the law school of the University of Texas and been rejected because of his race. Texas realized that if it were to exclude citizens from state-operated schools because of race, it would have to provide "separate but equal" accommodations—that was the lesson of the Supreme Court's approval of segregated, separate but equal railroad cars in *Plessy v. Ferguson* in 1896. While several states did so by paying out-of-state tuition for black students, Texas decided to take a different route; Texas created a black law school. Without overruling the concept that separate but equal facilities satisfied the mandate of the equal protection clause, the Court found that Texas's alternative did not meet the test.

At the turn of the century, in *Plessy* itself, a majority of the justices had put blinders on and ruled that relegating black train passengers to segregated cars did not create, or bespeak, a badge of inferiority. As long as the accommodations were equal, it was not discriminatory to force black passengers into them—to forbid them passage in the white-only cars. After all, whites were forbidden access to the black cars by the same law. The only member of the Court who had been a slaveholder, Justice John Marshall Harlan of Kentucky, dissented. No justice joined him, even though he pointed out the obvious. The law did bespeak and enforce a badge of inferiority, and to pretend otherwise was to do just that—to pretend. In *Plessy* the majority articulated an absurd concept, but it was just that, a concept.

There was no contention that the accommodations provided were not, in fact, equal. In *Sweatt* the Court was asked to find an absurd fact, to find that the hastily conceived and constructed law school for blacks provided by Texas was equal to its white counterpart, the prestigious University of Texas Law School. That the Court could not, and did not, do.[7]

On the same day that the Court announced its decision in *Sweatt*, it also handed down its ruling in *McLaurin v. Oklahoma State Regents*.[8] Oklahoma had taken a different tack. After George W. McLaurin won a challenge to the Oklahoma statutes that enforced segregation by making it a misdemeanor to provide or receive an education in integrated facilities, he was admitted to the Graduate School of Education of the University of Oklahoma. The state provided him with separate accommodations. McLaurin had his own table in the cafeteria and his own table in the library; he even had his own classroom. "He was required to sit apart at a designated desk in an anteroom adjoining the classroom; to sit at a designated desk on the mezzanine floor of the library, but not to use the desks in the regular reading room; and to sit at a designated table and to eat at a different time from the other students in the school cafeteria."[9]

McLaurin went back to the three-judge district court that had struck down the Jim Crow laws and asked for an injunction requiring the university to provide "equal" facilities. The court denied relief; "while conceivable the same facilities might be afforded under conditions so odious as to amount to a denial of equal protection of the law," the lower court ruled, "we cannot find any justifiable legal basis for the mental discomfiture which the plaintiff says deprives him of equal educational facilities here."[10] While the case was on its way back to the Supreme Court, Oklahoma relented, a little. Previously, McLaurin had sat behind a rail with a sign that said "Reserved for Colored"; now he sat in a row specified for colored students—but there was no rail and no sign. He still had an assigned table in the library, but it was now on the main floor. He still had an assigned table in the cafeteria, but now he could eat at the same time as other students did. The United States Supreme Court was unimpressed. As had been the case in *Sweatt*, the Court could not regurgitate the Oklahoma position and pretend it made sense: McLaurin was not receiving the same educational opportunity as his fellow students were, and his right to equal protection under the Constitution was being violated.

Southern leaders intent on preserving segregation were concerned about *Sweatt* and *McLaurin*. They went on high alert two years later, in 1952, when the Court set for oral argument five cases challenging segregation in public school systems in Kansas, South Carolina, Virginia, Delaware, and the District of Columbia.[11] For the NAACP, having the five school cases before the Court was the culmination of decades of work under the visionary leadership of Charles Hamilton Houston. A 1922 graduate of Harvard Law School, he had been the first African American student to be elected as an editor of the *Law Review*; moreover, he had been a protégé of one of Harvard's leading faculty members, Felix Frankfurter. Under Frankfurter's tutelage, Houston had come to understand law as "social engineering" and lawyers as social engineers who "had to decide what sort of society they wanted to construct."[12] Houston knew what kind of society he wanted to construct—one that honored the promise of the equal protection clause. It was that simple, and that hard.

After practicing law with his father, Houston joined the Howard Law School faculty and became academic dean in 1929. Houston brought high standards and the rigor necessary to accomplish them. Under his guidance, the Howard University School of Law earned accreditation from the Association of American Law Schools, considerably improved its library, and attracted prominent attorneys and serious scholars, Clarence Darrow and Roscoe Pound among them, to address the students. The students could not all rise to the challenge; of the class that entered with Thurgood Marshall, only a quarter graduated with him in 1933.[13] Of that quarter, more than a few were committed to Houston's vision. By 1930 the vision had a focus—creating the best legal strategy to deal with *Plessy v. Ferguson*. When it legitimated Jim Crow seating on train cars, *Plessy* legitimated all manner of legally enforceable segregation. Houston and the NAACP understood that nothing stood more in the way of racial equality than the Supreme Court's decision in *Plessy*.

Charles Hamilton Houston served as NAACP legal counsel from 1935 to 1940; in 1936 he hired his protégé, Howard Law School graduate Thurgood Marshall, as associate counsel. When Houston died of a heart attack in 1950 at the age of fifty-four, his friends thought he had simply worked himself to death. Thurgood Marshall was a worthy heir. He built the office until by the end of 1949 he had five attorneys on staff: himself, Constance Baker Motley, Robert Carter, Jack Greenberg, and Franklin Williams. Beginning

in the 1930s, the NAACP had managed to actively litigate on many fronts, including salary equalization for black teachers, jury discrimination, and voting discrimination. If there was a focus, however, it was the school cases. Marshall and his colleagues understood that if *Plessy* was to be overcome, it would happen in the schools.[14] Now, finally, in 1952 they were poised for a frontal assault on the concept of separate but equal.

The cases known collectively and colloquially as *Brown v. Board of Education* were argued from December 9 through December 12, 1952.[15] On December 13 the justices discussed the cases in conference. The conference is, by highly respected tradition, confidential. *Brown*, however, has drawn such intensive scrutiny that historians have penetrated the veil of confidentiality.[16] While there appears to have been a consensus that *Plessy* had been wrong, there was not a consensus as to why, as a constitutional matter, it was wrong or as to how to proceed. Ordinarily, the opinion would have been delivered by July, before the court went into recess. Instead, on June 8, 1953, the court ordered reargument and directed counsel to address five questions, three of which had subparts. Some of the questions sought an articulation of the constitutional theory determinative of the substantive question, Is segregation in public schools inconsistent with the Fourteenth Amendment? The last two questions strongly suggested the direction the Court was taking; they asked how the Court should effectuate its opinion if it ruled that segregation was unconstitutional.

On September 8, 1953, Chief Justice Fred M. Vinson died. On September 30, President Eisenhower nominated Earl Warren to succeed Vinson as chief justice; on October 5 Warren took his seat as a recess appointment. He had not yet been confirmed by the Senate; that confirmation would come on March 1, 1954. Because of the rise in political contentiousness over nominees, recess appointments are no longer used. It is an interesting quirk of history that when Chief Justice Earl Warren presided over the reargument of *Brown* between December 7 and 9, 1953, and presided over the Court's conferences, he had not yet been confirmed by the Senate.

Earl Warren had the political wisdom to see the importance of the Court speaking with one voice and the political skill necessary to bring it about, and he is widely credited with moving the Court to unanimity in *Brown*, although not all scholars agree. Justice Byron White's biographer, Dennis Hutchinson, calls that theory a "persistent myth" and argues that "unanimity in 1954 was the ultimate step in a gradual process that had be-

gun with the 1950 Trilogy [*Sweatt v. Painter*, *McLaurin v. Oklahoma State Regents*, and *Henderson v. United States*]."[17] On May 17, 1954, in an opinion written by Chief Justice Earl Warren and joined by every other justice, the Supreme Court found that segregation in public schools violated the equal protection clause of the Fourteenth Amendment. A year later, on May 31, 1955, the Court issued *Brown II* with its infamous mandate: desegregation should proceed "with all deliberate speed." The ambiguity of *Brown II* would plague the country for the next two decades. Half a century later, civil rights historian Michael Klarman concluded that it "seems to have encouraged defiance and undermined those moderates who were already taking preliminary steps toward desegregation."[18]

Elbert Tuttle found the decision disappointing from the beginning. He had thought the southern states would comply with a direct order from the Supreme Court, an order that said, for instance, that at a minimum either one grade or a certain percentage of schools in a district must be desegregated by the end of each year. "All deliberate speed" allowed segregationists to deliberately fail to comply and then to argue that they were not in noncompliance. After all, who could say how long it would take to desegregate with all deliberate speed? A federal judge could, but only after costly, laborious, time-consuming litigation.

Tuttle first sat as a judge of the Fifth Circuit the week of October 4, 1955. The court sat in panels of three and heard oral arguments in morning and afternoon sessions. After the last argument of the day, the judges held a confidential conference in which they would vote on how to decide the cases and assign the task of writing the opinion to one of their number. Tuttle took his fair share of cases from the conference and went to work. By October 22 his first three opinions had been issued: he had written them, circulated them to the other members of the court, and delivered them to West Publishing Company in time to allow them to be printed and circulated on the 22nd.[19] None of the three cases was particularly notable, nor was the way in which Tuttle handled them, except that they exemplified his approach to his work. He was decisive; once he understood the facts and the law, he made a decision and moved forward. He wrote spare, lucid opinions. Concerned with getting the job done, he did not labor over rhetorical devices or sophisticated allusions. Finally, he worked hard and efficiently. The very first opinion issued under his name involved a commercial dispute over electric motors; decades later, the court's deputy clerk, Gilbert Ganucheau, quipped that Tuttle had been going like an electric motor ever since.

One other thing distinguished those first opinions. Of the three, one was per curiam, that is, it did not carry Tuttle's name as author. By agreement among the judges, if an opinion was less than three double-spaced pages, it was not signed. Charles Hornsbrook had filed a petition for writ of habeas corpus seeking to vacate a conviction. He had raised some seven grounds. Tuttle recited them in crisp phrases, rejected them in one paragraph, and affirmed the trial court's dismissal of the petition. It would have been a very simple matter to stretch the opinion enough to allow him to sign it. Tuttle wanted only to decide the case as fairly and quickly as possible. He took that approach with all matters before the court, including desegregation litigation. If any area demanded quick resolution, in Tuttle's mind it was civil rights. Justice—basic constitutional rights—had been long delayed, and justice delayed was justice denied. Yet in the first school desegregation case he sat on, he joined with Judge Rives in an opinion that would come to haunt the court, an opinion that, some judges felt, "held us back for years."[20]

Tuttle did not sit on the panel that issued the first desegregation order in the Fifth Circuit; that fell to Judges Hutcheson, Rives, and Brown. On October 7, 1955, three black high school students filed a complaint seeking an injunction against the Mansfield, Texas, Independent School District. All twelve of the black high school students who lived in Mansfield were bused to Fort Worth, allowing the Mansfield school to remain segregated. After a hearing, the trial court judge, Joe Ewing Estes, an Eisenhower appointee who had taken office on August 1, denied the request for an injunction. The school year had already begun, he noted, and transferring students midyear would be awkward on many levels. Moreover, in his opinion, the farmers who sat on the school board were "making the start toward 'obeying the law' which their abilities dictated."[21]

On appeal, writing for the panel, Chief Judge Hutcheson disagreed with Judge Estes's estimation of the situation. The only decision the board had made, he noted, was not to desegregate during the 1955–56 academic year. Cowed by—or perhaps in agreement with—the community sentiment against desegregation, the board had no plan to move forward. "We are going to try to desegregate as soon as we think it is practical at all," a member of the subcommittee working on the issue testified. No one knew when

that might be. Where Judge Estes had found "good faith efforts toward integration," Judge Hutcheson saw stalling. The panel reversed and remanded the case to Judge Estes with instruction that an injunction declaring the plaintiffs' right to enter Mansfield High School issue forthwith. On August 27, 1956, in time to allow the students to register and attend the first day of classes, Judge Estes entered the injunction.

Like many towns in the South, Mansfield had a white Citizens' Council, a suit-and-tie Ku Klux Klan. Council members flooded the town's newspaper with letters denouncing integration of the high school; the newspaper published the letters as well as "editorials expressing extreme prosegregationist views." When a group of local ministers tried to disperse hostile crowds, the paper called them "'pin-head preachers who preach the brotherhood of man.'"[22] Moderate civil and political leaders remained silent as crosses burned in black neighborhoods and crowds gathered at the school to protest. A black effigy was hung on Main Street, another from the school itself. Finally, on August 31 Governor Allan Shivers sent in the Texas Rangers. By then, there was no need to protect black students who wanted to attend Mansfield High. No black student tried to register. They had gotten the message, and they got back on the bus to Fort Worth.

One hundred miles or so away, in Wichita Falls, Texas, in January 1956, twenty black students filed a class-action lawsuit, asking the court to certify students discriminated against by the Wichita Falls Independent School District as a class and to enjoin the district from denying them the right to attend the public school nearest their home. The district served some thirteen thousand students, of whom slightly over a thousand were black. Virtually all of the black families in Wichita Falls lived in what the court called one single concentrated area, but they did not all live in one school district. About 140 black children, including the 20 plaintiffs, lived in the Barwise School District; about 17 lived in other school districts. Yet all black children in Wichita Falls, with the exception of 14 to 16 who attended school on Sheppard Air Force Base, were assigned to one school—Booker T. Washington.

After the complaint was filed but before it was decided, the district opened a new school in Sunnyside Heights, a white section of town. All of the white students who had previously attended Barwise transferred to Sunnyside. Barwise, renamed the A. E. Holland School after a black principal at the Booker T. Washington School, reopened as a nominally desegregated school in which only black students enrolled. The result was that the schools were still segregated, but the students who had applied to Barwise and been rejected were now enrolled there. On motion of the school district, the trial court dismissed the complaint because the defendant school district said it was going "to carry out desegregation in the schools of the District during the next school term."[23] At that moment, the district argued, it could not be charged with doing anything wrong—the black students who had applied to Barwise were going to Barwise, so the lawsuit should be dismissed. The plaintiffs did not want it dismissed because they did not anticipate that the district would spontaneously desegregate the schools, and they did not want to have to start over with the time-consuming, expensive process of filing a complaint and getting a lawsuit off the ground.

On appeal, Judge Rives and Judge Tuttle, with Judge Rives writing, reversed. They agreed with the attorneys for the children, Thurgood Marshall among them, who had argued that "voluntary cessation of illegal conduct" does not make a case moot. Dismissal is only appropriate, Rives wrote, when "the court finds that there is no reasonable probability of a return to the illegal conduct[,] . . . that no disputed question of law or fact remains to be determined, [and] that no controversy remains to be settled."[24] The trial court should not have dismissed this case, Rives and Tuttle held. Rather, it should hold evidentiary hearings on the matter of the district's good-faith compliance with the mandate of *Brown v. Board of Education*, and it should retain jurisdiction so that it could ascertain or, if necessary, require good-faith compliance.

The holding in the Wichita Falls case presages the Fifth Circuit's approach to school desegregation cases. School board platitudes would not be taken at face value; technical ploys would not suffice; and the court would not be dissuaded from seeing the matter through. The opinion would be remembered, however, not for its ruling but for its dictum—material included in the opinion that was not necessary to its resolution. Judge Rives quoted a substantial chunk of the opinion of a three-judge court in South Carolina that was issued in one of the five cases decided under the rubric of *Brown v. Board of Education* after its remand. The *Briggs* court, expounding on the meaning of *Brown*, articulated in several different ways the notion that the Constitution does not require integration; rather, it forbids discrimination. Moreover, the Constitution does not forbid voluntary segregation, only segregation enforced by governmental power.[25] In isolation,

the *Briggs* dictum simply sets forth important constitutional principles. In the context of dismantling state-enforced segregation that had been put into place during a century of apartheid, the *Briggs* dictum all too often wreaked havoc.

Not burdened by the distorted perception of those who had been raised in the Deep South, Elbert Tuttle did not foresee the harm the *Briggs* dictum would wreak. To his eye, governmental involvement in the continued segregation in Wichita Falls was apparent. The government of Texas, from the school board through the governor, was committed to maintaining segregation in public education and in much else of life. The school board had shown its hand when it assigned students to Holland and Sunnyside so that each school was totally segregated by race—this in the year after *Brown II* was decided. The governor had shown his hand in Mansfield first by dragging his feet and then by explaining that he was sending the Texas Rangers to Mansfield not to facilitate desegregation but to protect against the outbreak of violence.[26] The *Briggs* dictum—the recognition that the Constitution did not require integration but instead forbade segregation caused by governmental discrimination—was accurate as a matter of constitutional theory, but it was also irrelevant in most of the South. Throughout the southern states, the "government," from lowly clerks in voter registration offices to the governors themselves, was committed to enforcing racial segregation.

Judge Ben Cameron of Mississippi did not see it that way. In a lengthy dissent in the Wichita Falls case, he took Rives and Tuttle to task for not supporting the federal district court judge who had dismissed the lawsuit and who had credited the school district with having made good-faith efforts toward desegregation. Judge Cameron insisted that the court was required to defer to the trial court judge. He wrote learnedly about equity jurisdiction and movingly about the superiority of an approach that relies not on force but on persuasion, not on power but on trust. The fundamental difference between his approach and that of Rives and Tuttle has, in the end, precious little to do with legal analysis. The difference between them is the gulf of perception. Rives had come to understand what Tuttle had always known—that segregation enforced by custom and reinforced by law, that is, the way the South treated its black citizens, was a great and pernicious evil. Rives and Tuttle also understood that in many cases nothing would change unless the federal courts made it change. A deadly silence emanated

from the White House, the Southern Manifesto staked out Congress's position, and state governments and local communities were increasingly held hostage by demagogues. Tuttle and Rives did not, however, foresee that the *Briggs* dictum would become a sword wielded in the service of segregation. Nor did they foresee how intransigent many school boards would prove to be.

Dallas, Texas, was a case in point. The Dallas public schools had been segregated as long as they had existed, some ninety years, when *Brown II* was decided on May 31, 1955. On September 5, 1955, twenty-seven black children applied to white schools. Not one was admitted. They filed suit, and Judge William H. Atwell was assigned to hear the case. Atwell, at eighty-six, was one of the oldest federal judges still sitting. He was also an "avowed segregationist" who apparently thought *Brown v. Board of Education* was simply wrong.[27] Twice the black Dallas schoolchildren's complaint came before him, and twice he summarily dismissed it; the first hearing took only thirty minutes. After Atwell dismissed the complaint for the second time, the Fifth Circuit panel hearing the appeal took no chances. In a brief opinion, Judges Rives, joined by Judges John Brown and Warren Jones, directed that an injunction be entered.[28] The plaintiffs, they pointed out, had been moderate in their request: "They do not pray for any immediate or en masse desegregation." Their prayer was that an order be entered requiring that the district be desegregated "with all deliberate speed." At the next hearing on the matter, Judge Atwell told counsel, "It is difficult, gentlemen, for me to approve this order, but this is a land of the law and it is my duty." He then entered an order that, instead of requiring desegregation with all deliberate speed, required that it be instantaneous. His order restrained the defendants from "requiring or permitting segregation of the races in any school under their supervision, beginning and not before the mid-Winter school term of 1957–58 [which was some four months away]."[29] Even the plaintiffs had not sought the utterly impracticable remedy of immediate desegregation of the entire Dallas school system. The school board appealed. Counsel for the school board conceded that over the two years since the suit had first been filed the school board had done virtually nothing. Not only had no steps toward desegregation been taken, no plan to manage desegregation of the huge Dallas school system was in place. The Fifth Circuit, which had been pushing Judge Atwell to move the matter forward, now found itself applying the brakes. "In our

opinion on the last appeal," Judge Rives wrote, "we noted that the then appellants prayed for no more stringent order than one requiring appellees to desegregate the schools under their jurisdiction 'with all deliberate speed.'"[30] The district court should give the school authorities "a reasonable further opportunity to meet their primary responsibility," and if the plaintiffs claimed that they failed to perform their duty, they should be accorded "a full and fair hearing."[31] If the judges harbored the hope that their forbearance would generate cooperation, they were quickly disabused. Over the next two years, the only thing the Dallas Independent School District did was file a frivolous lawsuit, apparently for purposes of delay.[32]

Among the major cities in the Fifth Circuit, during the mid-1950s New Orleans, "the Big Easy," was relatively "easy" about race. New Orleans had black policemen and integrated buses, and it had opened to all races its public libraries and public recreation facilities—but not its schools.[33] The public schools had been segregated since their inception in 1877, and the schools for black children were "grossly inferior." By 1950 the black community had had enough. The NAACP Legal Defense Fund, Inc., the "Inc. Fund," was ready to support them. At a meeting at the Macarty School, an overcrowded, dilapidated frame building, the president of the PTA stepped forward. Oliver Bush, a salesman for a black-owned insurance company, had thirteen children; his son Earl Benjamin Bush became the lead plaintiff in the New Orleans school desegregation cases. *Bush v. Orleans Parish School Board* was filed on September 5, 1952.[34] In negotiations with the attorney for the school board, the plaintiffs agreed not to move forward with the lawsuit until the segregation cases, as *Brown* and its companion cases were called, were decided by the Supreme Court. After *Brown I* was decided, Louisiana amended its constitution to require segregation by race in the public schools, and the legislature passed a statute requiring pupil assignment by race. Still the Bush plaintiffs did not press forward; the NAACP was simply stretched too thin. In 1955, after *Brown II* was decided, the NAACP attorneys representing the Bush plaintiffs again petitioned the school board for relief, but they did not go back to court. The school board did, however, moving for dismissal of the lawsuit. In response, the plaintiffs asked for a declaratory judgment that the constitutional provision and the statute were invalid and an injunction ending segregation.

When it was filed, the Bush case had been assigned to Judge Skelly Wright. Now the school board asked that it be reassigned to a three-judge

district court because the constitutionality of a state statute and a state constitutional provision were in question. Although the Louisiana provisions were so patently unconstitutional after *Brown I* that a three-judge court was not required, in an abundance of caution Judge Wright referred the request to Chief Judge Hutcheson, and Judge Hutcheson appointed Judges Wright, Wayne Borah, and Herbert Christenberry to a three-judge panel. On February 15, 1956, in just three paragraphs, they noted that insofar "as the provisions of the Louisiana Constitution and subordinate statutes . . . require or permit segregation of the races in public schools, they are invalid under . . . *Brown*."[35] The panel sent the case back to Judge Wright, who ruled for the plaintiffs. The school board appealed.

On appeal, Judge Tuttle wrote for the panel, joined in his opinion by Judges Rives and Brown. He affirmed Judge Wright on every ground. Tuttle addressed head-on the twin theories that segregationists promulgated in defiance of *Brown I*. Both arguments—one factual, one theoretical—were embodied in the Louisiana constitutional provision, which required mandatory segregation of the public schools "in the exercise of the state police power to promote and protect public health, morals, better education and the peace and good order of the State, and not because of race." Louisiana had introduced affidavits reciting statistics that allegedly showed blacks were inferior to whites "as to intelligence ratings, school progress, incidence of certain diseases, and percentage of illegitimate births." The state was not really discriminating on the basis of race, attorneys for the state argued; it was using race as a proxy in order to appropriately classify students with undesirable traits. Tuttle was furious. "Strangely enough," he observed, Louisiana had not tried to classify students by these traits before. A reasonable classification on the basis of the traits themselves might be legitimate, he wrote, but "*it is unthinkable* that an arbitrary classification by race because of a more frequent identification of one race than another with certain undesirable qualities would be such reasonable classification."[36]

In Louisiana's view it did not matter what Tuttle or any other federal judge thought about the constitutionality of what it was doing. In the exercise of its police power, to protect the health and welfare of its citizens, it was sovereign. This argument articulated the doctrines of interposition and nullification, the battle cries of the states' rights movement. Proponents asserted that a state can interpose itself between its citizens and the federal government and declare federal law null and void within

its boundaries. As political theory, this is at odds with the central tenets of our system of government. As political rhetoric, it had considerable appeal, and demagogues who knew better did not hesitate to trumpet its legitimacy. It became important enough that Martin Luther King Jr. addressed these theories directly in his "I Have a Dream" speech: "I have a dream that one day, down in Alabama, with its vicious racists, with its governor having his lips dripping with the words of interposition and nullification, that one day right there in Alabama, little black boys and black girls will be able to join hands with little white boys and white girls as sisters and brothers."[37] In *Bush* Tuttle made short shrift of these theories. "The use of the term police power works no magic in itself. Undeniably, the States retain an extremely broad police power. This power, however, as everyone knows, is itself limited by the protective shield of the Federal Constitution." "As everyone knows": Tuttle took aim, with that phrase, at the multitude of educated people who aggressively touted this indefensible position. He cited a Supreme Court opinion that held that police power could not justify a law that conflicted with the United States Constitution, and he noted that "that principle has been so frequently affirmed in this court that we need not stop to cite the cases."[38]

Tuttle concluded the opinion with a passage that provides insight into his steely determination throughout the civil rights era: "The vindication of rights guaranteed by the Constitution cannot be conditioned on the absence of practical difficulties . . . [The adoption of the Fourteenth Amendment] implies that there are matters of fundamental justice that the citizens of the United States consider so essentially an ingredient of human rights as to require a restraint on action on behalf of any state that appears to ignore them."[39] At that point, in 1958, the *Bush* litigation should have been all but over. It wasn't. By 1962 forty-one judicial decisions had issued, forty-four statutes enacted by the Louisiana legislature had been invalidated, two state officials had been convicted of contempt, and injunctions had been issued against a state court, all state executives, and the entire Louisiana legislature.[40] Through it all, the Supreme Court never issued a full written opinion; it never had to. Judge Skelly Wright and his colleague on the federal district court for the Eastern District of Louisiana, Judge Herbert Christenberry, backed up by the judges of the Fifth Circuit, had invariably gotten it right. The federal court had stood virtually alone, but it had held its ground. Without support from the city government, the school

board, the local police, or even the local bar, the court could not control the screaming mobs who came to symbolize New Orleans. Judge Skelly Wright, to whom most of the litigation fell because he sat in New Orleans, could and did insist on implementation of the mandate of *Brown*. He did it at considerable personal cost—from the loss of old friends to threats that at one time forced him out of his home. Judge Wright was one of two district court judges assigned to the Eastern District of Louisiana. His colleague Herbert Christenberry sat in Baton Rouge. When called upon, Judge Christenberry, like Judge Wright, was stalwart in his fair-handed adherence to the mandate of *Brown*. At one rally a marshal asked a protester holding a placard reading SOC what it meant. "It's supposed to mean Save our Children," she replied, "but it really means Shit on Christenberry."[41]

In 1954 there were forty-eight federal district court judges in eleven southern states: the six states in the Fifth Circuit (Alabama, Georgia, Florida, Louisiana, Mississippi, and Texas) and the five in the Fourth Circuit (Maryland, North Carolina, South Carolina, Virginia, and West Virginia). Those forty-eight men were the front lines of the federal judicial system. Along with the ten judges who sat on the Fourth and Fifth Circuit courts of appeals, they are the *58 Lonely Men* of Jack W. Pelatson's classic study of southern federal judges and school desegregation.[42] Federal judgeships traditionally went to successful attorneys with good political connections; the men who held them were leaders in their communities, with social prestige that facilitated a gracious lifestyle. Until *Brown*, to be a federal judge was to be highly regarded. In the South, for many federal judges, *Brown* changed all that. For more than a decade after *Brown I* was decided, desegregation litigation was overwhelmingly one-sided on the merits. Most of the time, black Americans were seeking to enforce long-denied basic constitutional rights, and they were entitled to prevail. Even so, when they did prevail, the judge was often castigated, even threatened. All too often, no matter the merits of the claim, they did not prevail. Several federal judges were ardent segregationists and active obstructionists—they disagreed with *Brown*, and they would play no role in implementing it. As Tuttle would come to know too well, in the Fifth Circuit, a troubling number of the federal judges could not be counted on to fulfill their oath of office. Others were nothing short of heroic.