The First Amendment to the Constitution, Associational Freedom, and the Future of the Country: Alabama's Direct Attack on the Existence of the NAACP

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ABSTRACT

Sixty years ago, on Wednesday, April 8, 1964, Professor Harry Kalven, Jr., gave the second of three lectures at The Ohio State University College of Law Forum.[1] These lectures were published two years later in a book entitled *The Negro & the 1st Amendment*.[2] In the second lecture, Kalven distinguished between *direct* and *indirect* threats to the associational freedom of the National Association for the Advancement of

* Research Director, Institute for Free Speech (email: hknowlesgardner@ifs.org); Ph.D. Boston University. I would like to extend a debt of gratitude to numerous individuals, without whose support I would not have been able to undertake the research for this Article. First and foremost, I need to thank my wonderful colleagues at the Institute for Free Speech for giving me the very best post-academia professional place to call home. I could not have asked for a better set of people with which to work. And a special debt of gratitude is owed Brad Smith and David Keating for suggesting that I pursue this specific project, and then giving me the time and the institutional support necessary to undertake it in such depth and detail. That support enabled me to do invaluable extensive archival research. At the Library of Congress Manuscript Division, I am indebted to the staff who worked tirelessly to bring me box after box of requested materials, and I am particularly grateful to Ryan Reft for his suggestions of collections to consult. At the Veterans History Project at the Library of Congress American Folklife Center, I am grateful to the staff (especially Megan Harris) for assisting me with accessing and using the Edmon L. Rinehart Collection. I am immensely grateful to all the wonderful staff at the Alabama Department of Archives and History in Montgomery, whose reading room I called home for two weeks. I also spent quality research time at the Alabama State University Archives where I was grateful for the assistance provided by Jason Trawick. For their help in making valuable connections in the Montgomery area, I thank David Alan Hughes, Marty Olliff, and Keith Krawczynski. I also extend my gratitude to David Terry for sharing with me his research on Ruby Hurley. A very special thanks is owed Christine Rinehart Taft for taking time to share with me insights about her father Edmon Rinehart. I presented an earlier draft of this Article at the Annual Meeting of the New England Political Science Association in Newport, RI, on April 20, 2024. I am very grateful to the discussant, Mark Graber, for his exceptionally useful feedback. I am also grateful to the staff of Seattle University Law Review for their outstanding editorial work on this Article. Finally, I owe everything to my husband John, who enriches my life in immeasurable ways (along with our eight felines and one equine).

1. *Chicago Lawyer Speaks on Negro, First Amendment*, OHIO ST. LANTERN, Apr. 7, 1964; Pam Hollister, *Law Professor Says NAACP Gets Civil Rights Litigated*, OHIO ST. LANTERN, Apr. 9, 1964.

2. HARRY KALVEN, JR., THE NEGRO & THE 1ST AMENDMENT (1966).

Colored People (NAACP).[3] Kalven categorized the 1958 decision in *NAACP v. Alabama ex rel. Patterson*[4] as an *indirect* effort to control the NAACP.

With the benefit of material obtained from numerous archival sources, this Article argues that Kalven's categorization of *Patterson* (and the three other rulings by the Supreme Court of the United States[5] that it ultimately took to ensure Alabama's compliance with the 1958 decision) was mistaken. Instead, the litigation was designed and intended to put the NAACP out of business (which, in Alabama, it did for eight years).

On June 1, 1956, the injunction preventing the NAACP from doing business in the state was secured by Alabama's Attorney General John M. Patterson from Montgomery County Circuit Court Judge Walter B. Jones. This Article is narrowly focused on the two years leading up to, and the first few months following June 1, 1956, and is part of an extensive research project focused on the history of this protracted litigation.

Ultimately, Alabama's injunction led to an effort to compel the NAACP to turn over its Alabama membership lists to the Attorney General. To borrow and only slightly change Jason Robards's famous line in *All the President's Men*,[6] nothing was riding on this litigation except the First Amendment, which guarantees the right to peaceably assemble, and the future of the country.

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3. *Id*. at 65–121.

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INTRODUCTION

On Monday, June 1, 1964, the Supreme Court of the United States issued its unanimous decision in *National Association for the Advancement of Colored People v. Alabama ex rel. Flowers*.[7] Justice John Marshall Harlan, II brought his opinion to a close with a paragraph that signaled the Court's utter frustration with Alabama.[8] The litigation, which focused on the state's insistence that the NAACP refrain from doing business within its borders until disclosing its membership lists, had reached the Supreme Court on *three* prior occasions.

In 1958, when the justices issued their first ruling on this matter (in *National Association for the Advancement of Colored People v. Alabama ex rel. Patterson*[9]), the Court issued a landmark associational freedom ruling, holding that the compelled disclosure of the membership information was prohibited by the First Amendment.[10] But Alabama simply would not comply. It brazenly defied the Court's decision in *Patterson* and two subsequent 1959 and 1961 rulings.[11] It used every procedural delaying tactic it could think of. As the venerable *New York Times* correspondent Anthony Lewis astutely observed, "corruption of the processes of law" was "a particularly disturbing aspect of southern resistance to change in race relations,"[12] and Alabama's Supreme Court, which played a crucial role in prolonging the *Patterson* litigation, had "a particularly notable record for cynical disregard of federal law."[13]

By 1964, the justices were more than a little irritated at this behavior. Wrote Harlan in *Flowers*:

> The judgment below *must* be reversed. In view of the history of this case, we are asked to formulate a decree for entry in the state courts which will assure the Association's right to conduct activities in Alabama without further delay. While such a course undoubtedly lies within this Court's power, we prefer to follow our usual practice and remand the case to the Supreme Court of Alabama for further proceedings not inconsistent with this opinion. Such proceedings should include the prompt entry of a decree, in accordance with state procedures, vacating in all respects the permanent injunction order issued by the Circuit Court of Montgomery County, Alabama, and

7. 377 U.S. at 288.

8. *See id*. at 310.

9. 357 U.S. at 449.

10. *Id.* at 462–63.

11. Nat'l Ass'n for the Advancement of Colored People v. Alabama, 360 U.S. 240 (1959); Nat'l Ass'n for the Advancement of Colored People v. Gallion, 368 U.S. 16 (1961).

12. ANTHONY LEWIS & NEW YORK TIMES, PORTRAIT OF A DECADE: THE SECOND AMERICAN REVOLUTION 242 (1965).

13. *Id.* at 248 (Lewis cites the *Patterson* litigation as a specific example).

> permitting the Association to take all steps necessary to qualify it to do business in Alabama. *Should we unhappily be mistaken in our belief that the Supreme Court of Alabama will promptly implement this disposition, leave is given the Association to apply to this Court for further appropriate relief.*[14]

The paragraph echoed points made by NAACP General Counsel Robert L. Carter at the beginning of the oral arguments in *Flowers*, when he urged the Court to rule in favor of the Association in such a way as to prevent the case from making a fifth appearance at the nation's highest court.[15] Although the case did not reach its final conclusion within the state court system until October, 1964, the Supreme Court's June ruling did ultimately achieve the result Carter had advocated for. After an over eight-year absence, the NAACP was back in business in the Heart of Dixie.[16]

Two months before the decision in *Flowers*, University of Chicago law professor Harry Kalven, Jr. gave a series of lectures at The Ohio State University College of Law Forum.[17] These lectures were published two years later in a book entitled *The Negro & the 1st Amendment*.[18] In the second lecture, Kalven, a noted authority on freedom of speech, distinguished between *direct* and *indirect* threats to the freedom of the

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14. Nat'l Ass'n for the Advancement of Colored People v. Alabama *ex rel.* Flowers, 377 U.S. 288, 310 (1964) (emphasis added) (citation omitted). The significance of the date of the *Flowers* decision was not lost on anyone who knew the history of the litigation. The June 1, 1964, decision came eight years to the day that the lawsuit formally began.

15. The very first thing Carter said was: "If the Court please. This cause is here for the fourth time and what petitioner hopes is the final time." National Association for the Advancement of Colored People v. Alabama *ex rel.* Flowers, *Oral Argument—Mar. 24, 1964 (Part 1)*, OYEZ, https://www.oyez.org/cases/1963/169 [https://perma.cc/JK5P-BUFZ] (last visited Jan. 5, 2024).

16. The nation's highest court issued its official mandate to the Alabama Supreme Court on June 29. On August 27, the state court issued a terse *per curiam* opinion, continuing to refuse to become involved in the merits of the case, and simply fulfilling its duty of notifying the lower courts that its ruling had been reversed by the nation's highest court. *Nat'l Ass'n for the Advancement of Colored People v. Alabama*, Appeal from Montgomery Circuit Court, 3 Div. 996 A, Special Term, 1964. See the documents in Office of the Attorney General, Civil Rights Case Files, SG20669 [hereafter SG20669] – Untitled Folder No. 2, Alabama Department of Archives and History, Montgomery, Ala. [hereafter ADAH]. On September 11, 1964, Montgomery Circuit Court Judge Richard P. Emmet issued the final order dissolving the injunction which, for the first time since 1956, enabled the NAACP to do business in Alabama. Order, September 1964, *State of Alabama ex rel. Richmond M. Flowers, Attorney General of the State of Alabama v. National Association for the Advancement of Colored People*, Circuit Court of Montgomery County Alabama, No. 30468; and Letter from Fred D. Gray to Gordon Madison, Sept. 8, 1964, both in SG20669 – Untitled folder #4. The NAACP's ultimate cause was undoubtedly aided by the fact that Walter B. Jones, the Montgomery Circuit Court who issued the original injunction and presided over many of the obstructionist Alabama court moves during the court of this litigation, died on August 1, 1963. Judith Helms, *Judge Walter B. Jones is Dead at Age 74*, ALA. J., Aug. 1, 1963.

17. *Chicago Lawyer*, *supra* note 1; Hollister, *supra* note 1.

18. KALVEN, *supra* note 2.

NAACP.[19] Kalven categorized the *Patterson* series of cases as an "*indirect*" effort to limit the activities of the NAACP. With the benefit of hindsight and archival materials, this Article argues that Kalven's categorization of *Patterson* was wrong. The litigation, initiated by Alabama's Attorney General on June 1, 1956, was very much an effort to "*directly* control"[20] the NAACP.

I. HARRY KALVEN'S ARGUMENT

Harry Kalven, Jr.'s "'boyhood dream' . . . was to play center field for the . . . Cubs."[21] Although that dream went unrealized, Kalven still left his mark on his native Chicago, teaching at his alma mater University of Chicago Law School for almost three decades, from 1945 until his untimely death (at the age of sixty) in 1974.[22] He was widely considered an expert on two aspects of the law: expressive freedom and the jury system.[23] And, one important element of his First Amendment scholarly legacy—the 1967 "Kalven Committee Report on the University's [University of Chicago] Role in Political and Social Action"[24]—has enjoyed a resurgence of interest in recent years as colleges and universities wrestle with the topic of academic freedom and the freedom to express views on campuses.[25] In 2021, Kalven's name still appeared on Fred Shapiro's highly respected list of the top fifty most-cited legal scholars of all time. With 8,267 citations,

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19. *Id.* at 65–121.

20. *Id.* at 69–70.

21. Owen M. Fiss, *Kalven's Way*, 43 U. CHI. L. REV. 4, 5 (1975).

22. David Schultz, *Harry Kalven Jr.*, FREE SPEECH CTR., https://firstamendment.mtsu.edu/article/harry-kalven-jr/ [https://perma.cc/FB6H-SA2S?type=image] (last visited Aug. 1, 2024); Edward H. Levi, *Harry Kalven, Jr.*, 43 U. CHI. L. REV. 1, 1–2 (1975); Tom Goldstein, *Harry Kalven Jr. Is Dead at 60; Jury Expert Taught at Chicago*, N.Y. TIMES (Oct. 30, 1974), https://www.nytimes.com/1974/10/30/archives/harry-kalven-jr-is-dead-at-60-jury-expert-taught-at-chicago.html.

23. Interestingly, both the headline and most of the content of the *New York Times* obituary of Kalven focused on his jury system work; the professor's First Amendment writings received minimal coverage in the article. *Goldstein*, *supra* note 22.

24. THE UNIV. OF CHICAGO OFF. OF THE PROVOST, KALVEN COMMITTEE: REPORT ON THE UNIVERSITY'S ROLE IN POLITICAL AND SOCIAL ACTION (1967), https://provost.uchicago.edu/sites/default/files/documents/reports/KalvenRprt_0.pdf [https://perma.cc/752Q-2DGU].

25. *See, e.g.*, Michael T. Nietzel, *The Kalven Report and the Limits of University Neutrality*, FORBES (Dec. 26, 2023), https://www.forbes.com/sites/michaeltnietzel/2023/12/26/the-kalven-report-and-the-limits-of-university-neutrality/?sh=45b595f13bf0. Although, it is important to remember that

> the Kalven Report itself 'is a discussion, not a law.' 'The university [of Chicago] has used the Kalven Report as a kind of shield,' says James Kalven, the son of Harry Kalven . . . . 'If it's an absolute,' Kalven continues, 'people just sort of apply it reflexively, thoughtlessly, and don't really grapple, generation to generation, with the nature of the principle.'

Jennifer Ruth, *The Uses and Abuses of the Kalven Report: Do Current Events Really Affirm the Wisdom of Administrative Neutrality?*, CHRON. HIGHER EDUC., Oct. 24, 2023, https://www.chronicle.com/article/the-uses-and-abuses-of-the-kalven-report [https://perma.cc/W4QX-3NNN].

Kalven was listed at number forty-one.[26] This is testament to the longevity of his influence.

On Wednesday, April 8, 1964, Kalven gave the second of three lectures at The Ohio State University College of Law Forum, in which he discussed threats to the associational freedom of the NAACP.[27] These lectures were published two years later in a book entitled *The Negro & the 1st Amendment*.[28] In the second lecture, Kalven distinguished between what, "as far as . . . [he could] tell from reading cases," were litigious efforts to "*directly* control" the organization, and those that instead used "*indirect*" tactics "centering chiefly on compelling disclosure of membership lists."[29]

To illustrate this dichotomy, Kalven analyzed five recent associational freedom decisions. He described *Shelton v. Tucker*,[30] *Louisiana ex rel. Gremillion v. NAACP*,[31] and *NAACP v. Button*[32] as a trio of cases involving "direct control issues,"[33] distinguishable from *Patterson* and *Bates v. Little Rock*,[34] in which the Court was confronted with constitutional challenges to "less direct measures."[35]

A. Kalven's "Direct Control" Cases

1. *Shelton v. Tucker*

In *Shelton*,[36] a five-justice majority struck down an Arkansas law that compelled any public school teacher to submit to the state, on an annual basis,

> an affidavit listing all organizations to which he at the time belongs and to which he has belonged during the past five years, and . . . all organizations to which he at the time is paying regular dues or is making regular contributions, or to which within the past five years he has paid such dues or made such contributions.[37]

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26. Fred R. Shapiro, *The Most-Cited Legal Scholars Revisited*, 88 U. CHI. L. REV. 1595, 1602 (2021).

27. *Chicago Lawyer*, *supra* note 1; Hollister, *supra* note 1.

28. KALVEN, *supra* note 2.

29. *Id.* at 69–70.

30. 364 U.S. 479 (1960).

31. 366 U.S. 293 (1961).

32. 371 U.S. 415 (1963).

33. KALVEN, *supra* note 2, at 70–90.

34. 361 U.S. 516 (1960).

35. KALVEN, *supra* note 2, at 90.

36. 364 U.S. 479 (1960).

37. *Id.* at 481 (quoting Shelton v. McKinley, 174 F. Supp. 351, 353 (E.D. Ark. 1959), *rev'd sub nom.* Shelton v. Tucker, 364 U.S. 479 (1960)).

This was a condition of employment. Writing for the Court in *Shelton*, Justice Potter Stewart distinguished the case from *Patterson* and *Bates*.[38] As Justice Stewart explained, in those cases, the Court found "no substantially relevant correlation between the governmental interest asserted" and the intrusion upon First Amendment freedoms (in the form of compelled disclosure).[39] By contrast, in *Shelton*, Arkansas had a governmental right "to investigate the competence and fitness of those whom it hires to teach in its schools," including considering their associational memberships. Consequently:

> The question to be decided here is not whether the State of Arkansas can ask certain of its teachers about all their organizational relationships. It is not whether the State can ask all of its teachers about certain of their associational ties. It is not whether teachers can be asked how many organizations they belong to, or how much time they spend in organizational activity.[40]

Instead, the question was "whether the State can ask every one of its teachers to disclose every single organization with which he has been associated over a five-year period."[41] The Court concluded that it could not. It was "[t]he unlimited and indiscriminate sweep"[42] that doomed the statute, taking its "comprehensive interference with associational freedom . . . far beyond what might be justified in the exercise of the State's legitimate inquiry into the fitness and competency of its teachers."[43]

2. *Louisiana ex rel. Gremillion v. NAACP*

The Court unanimously decided *Louisiana ex rel. Gremillion v. NAACP* the following year.[44] Like *Patterson* three years earlier, it involved a state effort to put the NAACP out of business by enforcing, against the organization, a statute requiring "each fraternal, patriotic, charitable, benevolent, literary, scientific, athletic, military, or social organization, or organization created for similar purposes"[45] to disclose to the state "a full, complete and true list of the names and addresses of all of the members and officers" residing in Louisiana.[46] Again, as in *Patterson*, the law had

38. *See infra* Part I.B.1–2.
39. *Shelton*, 364 U.S. at 485.
40. *Id.* at 485, 487.
41. *Id.* at 487.
42. *Id.* at 490.
43. *Id.*
44. 366 U.S. 293 (1961).
45. *Id.* at 295 (quoting LA. STAT. ANN. §§ 12:401–409 (1950)).
46. *Id*. (quoting LA. STAT. ANN. §§ 12:401–409 (1950)).

lain dormant, originally enacted in 1924 to put the Ku Klux Klan out of business, and only ever previously enforced against the Klan.[47]

In a short (four-page) opinion, Justice William O. Douglas explained, just as in *Shelton*, that "any regulation must be highly selective in order to survive challenge under the First Amendment."[48] As he eloquently observed:

> [a]t one extreme is criminal conduct which cannot have shelter in the First Amendment. At the other extreme are regulatory measures which, no matter how sophisticated, cannot be employed in purpose or in effect to stifle, penalize, or curb the exercise of First Amendment rights. These lines mark the area in which the present controversy lies . . . .[49]

Even though "the case is in a preliminary stage and we do not know what facts further hearings before the injunction becomes final may disclose,"[50] the Court still affirmed the preliminary injunction barring enforcement of the law, on the same First Amendment grounds as in *Patterson* and *Shelton*.

3. *NAACP v. Button*

Kalven's final example of a "direct control" case is *NAACP v. Button*,[51] which he described as "the major case dealing with the direct attack."[52] Once again, as in both *Gremillion* and *Patterson*, the Supreme Court was confronted with a constitutional challenge to a 1956 state action designed to seriously restrict the activities of the NAACP. This time, it was an amendment to a Virginia statute regulating the ethical and professional conduct of lawyers, an amendment enacted in direct response to the post-*Brown* efforts of the NAACP to initiate lawsuits pushing for the desegregation of schools in Virginia. Specifically at issue was Chapter 33 of the newly amended law, which banned "the improper solicitation of any legal or professional business."[53] The Virginia Supreme Court of Appeals read the provision as including the litigation activities of the NAACP because the law's definition of those engaging in "improper solicitation" was extended to include "an agent for an individual or organization which

47. *Gremillion*, 366 U.S. at 295.
48. *Id*. at 296.
49. *Id.* at 297.
50. *Id.* at 296.
51. 371 U.S. 415 (1963).
52. KALVEN, *supra* note 2, at 75.
53. *Button*, 371 U.S. at 419.

retains a lawyer in connection with an action to which it is not a party and in which it has no pecuniary right or liability."[54] The law made it:

> unlawful for any person, corporation, partnership or association to act as a runner or capper . . . to solicit any business for *an attorney at law or such person, partnership, corporation, organization or association* . . . in any public institution or in any public place or upon any public street or highway or in and about private hospitals, sanitariums, or in and about any private institution or upon private property of any character whatsoever.[55]

It defined a "'runner' or 'capper'" as,

> any person, corporation, partnership or association acting in any manner or in any capacity as an agent for an attorney at law within this State *or for any person, partnership, corporation, organization or association which employs, retains or compensates any attorney at law in connection with any judicial proceeding in which such person, partnership, corporation, organization or association is not a party and in which it has no pecuniary right or liability*, in the solicitation or procurement of business for such attorney at law *or for such person, partnership, corporation, organization or association in connection with any judicial proceedings for which such attorney or such person, partnership, corporation, organization or association is employed, retained or compensated.*[56]

The Court deemed Chapter 33 unconstitutional; the law posed a fundamental threat to public-interest litigation by "infring[ing] . . . the right of the NAACP and its members and lawyers to associate for the purpose of assisting persons who seek legal redress for infringements of their constitutionally guaranteed and other rights."[57] In an opinion that made powerful statements about the importance of protecting speech (especially political speech) and associational freedom, Justice William J. Brennan, Jr. rejected Virginia's argument that the "solicitation" of clients for such litigation was not speech:

> In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. *It is thus a form of political expression*. Groups which find

54. *Id.* at 423.

55. *Id.* at 423 n.7 (quoting VA. CODE ANN. § 54-79 (1950) (codified as amended in scatter sections of VA. CODE ANN. § 54.1)).

56. *Id.* (quoting VA. CODE ANN. § 54-79 (1950) (codified as amended in scatter sections of VA. CODE ANN. § 54.1)).

57. *Id.* at 428.

> themselves unable to achieve their objectives through the ballot frequently turn to the courts.[58]

Reiterating the importance of litigation for the NAACP, Justice Brennan explained that although

> [t]he NAACP is not a conventional political party . . . the litigation it assists, while serving to vindicate the legal rights of members of the American Negro community, at the same time and perhaps more importantly, *makes possible the distinctive contribution of a minority group to the ideas and beliefs of our society*.[59]

He emphasized that "[f]or such a group, association for litigation may be the most effective form of *political association*."[60]

After determining that the NAACP's public-interest litigation involved constitutionally protected speech and association, Justice Brennan's next task was to determine "whether the activities of the petitioner *deemed unlawful by the Supreme Court of Appeals*"[61] should be afforded such constitutional protection. His—and thus the Court's—answer to this inquiry laid bare the constitutional shortcomings of the state court's construction and interpretation of Chapter 33:

> We read the decree of the Virginia Supreme Court of Appeals in the instant case as proscribing *any* arrangement by which prospective litigants are advised to seek the assistance of particular attorneys. *No narrower reading is plausible*. We cannot accept the reading suggested on behalf of the Attorney General of Virginia on the second oral argument that the Supreme Court of Appeals construed Chapter 33 as proscribing control only of the actual litigation by the NAACP after it is instituted . . . . [*U*]*pon a record devoid of any evidence of interference by the NAACP in the actual conduct of litigation, or neglect or harassment of clients, the court nevertheless held that petitioner, its members, agents and staff attorneys had practiced criminal solicitation*. Thus, simple referral to or recommendation of a lawyer may be solicitation within the meaning of Chapter 33.[62]

The chilling effect was obvious:

> There thus inheres in the statute the gravest *danger of smothering all discussion* looking to the eventual institution of litigation on behalf of the rights of members of an unpopular minority. Lawyers on the legal staff or even mere NAACP members or sympathizers would

58. *Id.* at 429 (emphasis added).
59. *Id.* at 431 (emphasis added).
60. *Id.* (emphasis added).
61. *Id.* at 432 (emphasis added).
62. *Id.* at 433 (emphasis added).

> understandably hesitate, at an NAACP meeting or on any other occasion, to do what the decree purports to allow, namely, acquaint 'persons with what they believe to be their legal rights and . . . [advise] them to assert their rights by commencing or further prosecuting a suit . . . .'[63]

In an important respect, of course, *Button* is like *Shelton* (and *Gremillion*) because the case involved a law involving something "fall[ing] within the traditional purview of state regulation"[64]—namely professional conduct (in this case, the legal profession). Again, as in *Shelton*, the Court concluded that when such a law intrudes upon First Amendment freedoms, it must serve a "compelling state interest,"[65] which Chapter 33 did not. "However valid may be Virginia's interest in regulating the traditionally illegal practices of barratry, maintenance and champerty,"[66] wrote Justice Brennan, "that interest does not justify the prohibition of the NAACP activities disclosed by this record. Malicious intent was of the essence of the common-law offenses of fomenting or stirring up litigation. And whatever may be or may have been true of suits against government in other countries,"[67] this was America, home of the First Amendment. And "the exercise . . . of First Amendment rights to enforce constitutional rights through litigation, as a matter of law, cannot be deemed malicious."[68]

B. Kalven's "Less Direct Measures"

We now come to the two cases labeled by Kalven as involving "less direct measures." Since *Patterson* is the focus of this Article, here it is only necessary to provide a summary of the Court's 1958 decision.

1. *NAACP v. Alabama ex rel. Patterson*

In 1956, Alabama obtained a temporary injunction preventing the NAACP from conducting further business within the state. It subsequently sought to compel the organization to disclose the names and addresses of its Alabama members, claiming that such information was necessary to determine whether the NAACP was in fact "doing business"[69] within the state, in violation of the Alabama foreign corporation registration statute.[70] Alabama wanted to know "whether [a] the character of petitioner and its

63. *Id.* at 434 (emphasis added) (alterations in original).
64. *Id.* at 438.
65. *Id.*
66. *Id.* at 439.
67. *Id.* at 439–40 (footnote omitted).
68. *Id.* at 440.
69. Nat'l Ass'n for the Advancement of Colored People v. Alabama *ex rel.* Patterson, 357 U.S. 449, 451 (1958).
70. *Id.* at 464.

activities in Alabama had been such as to make petitioner subject to the registration statute, and [b] whether the extent of petitioner's activities without qualifying suggested its permanent ouster from the State."[71] Writing for the unanimous Court, Justice Harlan concluded that the disclosure of the membership lists did not have a "substantial bearing on either" of these issues.[72] In a landmark ruling, Justice Harlan emphasized that "[i]t is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as"[73] more "direct action to restrict the right of . . . members to associate freely."[74]

Continuing, Justice Harlan concluded that governmental actions that had the "effect of curtailing the freedom to associate" were "subject to the closest scrutiny."[75] Drawing on some of the language in Justice Felix Frankfurter's concurrence in *Sweezy v. New Hampshire*,[76] a separate opinion that he joined, Justice Harlan concluded that such scrutiny required the government to demonstrate that its actions were in pursuance of a "compelling" state interest,[77] and that "Alabama ha[d] fallen short" of identifying such an interest.[78]

2. *Bates v. Little Rock*

Two years later, in *Bates v. Little Rock*,[79] the Court struck down a 1957 amendment to Little Rock's occupation licensing tax ordinance. Amongst other things, "any person, firm, individual, or corporation engaging in any 'trade, business, profession, vocation or calling'"[80] in the city was now required to provide a "financial statement of such organization, including dues, fees, assessments and/or contributions paid, by whom paid, and the date thereof, together with the statement reflecting the disposition of such sums, to whom and when paid, together with the total net income of such organization."[81] Although the language of this amendment did not explicitly compel disclosure of membership information, evidence was presented that made it clear that the local authorities would not accept

71. *Id.*
72. *Id*.
73. *Id.* at 462.
74. *Id.* at 461 (citation omitted).
75. *Id.*
76. 354 U.S. 234 (1957).
77. *Patterson*, 357 U.S. at 463 (quoting *Sweezy*, 354 U.S. at 265 (Frankfurter, J., concurring)).
78. *Id.* at 466.
79. 361 U.S. 516 (1960).
80. *Id.* at 517 (quoting ARK. CODE ANN. 19-4601 (1947) (codified as amended at ARK. CODE ANN. § 26-77-102 (2017))).
81. *Id.* at 518 n.3 (quoting LITTLE ROCK, ARK. Ordinance 7444 (1960); NORTH LITTLE ROCK, ARK. Ordinance 1786 (1960)).

the required information unless it included the names and addresses of members (and the language was so construed by the Arkansas Supreme Court).[82] The North Little Rock branch of the NAACP complied with the requirements of the licensing law and its amendments but refused to hand over its membership lists because of the "anti-NAACP climate in this state," and its "good faith and belief that the public disclosure of the names of our members and contributors might lead to their harassment, economic reprisals, and even bodily harm."[83]

Just as he did ten months later in *Shelton*, Justice Stewart wrote the opinion for the Court. He agreed with the NAACP's counsel (Carter argued the case,[84] just as he had done in *Patterson*[85]), "that the city has no right under the Constitution and laws of the United States . . . to demand the names and addresses of our members and contributors."[86] Unlike in the splintered decision in *Shelton*, but just as in *Patterson*, the ruling in *Bates* was unanimous. Quoting extensively from *Patterson*, Justice Stewart concluded that the Arkansas ordinance was not a "heavy-handed frontal attack"[87] on constitutionally-protected rights; rather, it represented "more subtle governmental interference."[88] Using the same "compelling" governmental interest language that Justice Harlan employed (via *Sweezy*) in *Patterson*,[89] Justice Stewart concluded that there was "no relevant correlation between the power of the municipalities to impose occupational license taxes and the compulsory disclosure and publication of the membership lists of the local branches of the National Association for the Advancement of Colored People."[90]

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82. *Id.* at 521 n.4, 522 n.8.

83. *Id.* at 520. Useful here are the five motivations, for preserving one's anonymity, that Jeff Kosseff identifies: (1) "the Legal Motivation . . . Exposure of his [or her] identity [which] could lead to substantial criminal or civil liability"; (2) "the Safety Motivation . . . [an individual] may have faced personal retaliation, such as being physically attacked . . . "; (3) "the Economic Motivation . . . [an individual] may have lost his job if his name had been publicly associated . . . [or] faced a decline in revenues due to the controversy"; (4) "the Privacy Motivation . . . avoid[ing] public attention"; and (5) "the Speech Motivation . . . identity may . . . distract . . . readers from the content" of one's message. JEFF KOSSEFF, THE UNITED STATES OF ANONYMOUS: HOW THE FIRST AMENDMENT SHAPED ONLINE SPEECH 13–15 (2022).

84. Bates v. City of Little Rock, OYEZ, https://www.oyez.org/cases/1959/41 [https://perma.cc/VKX4-QB6J] (last visited May 29, 2024).

85. Nat'l Ass'n for the Advancement of Colored People v. Patterson, OYEZ, https://www.oyez.org/cases/1957/91 [https://perma.cc/6FV2-5LRZ] (last visited May 29, 2024) [hereinafter *Patterson*].

86. *Bates*, 361 U.S. at 520.

87. *Id.* at 523.

88. *Id.*

89. *Id.* at 524.

90. *Id.* at 525.

C. Kalven's Argument—A Rebuttal Overview

If we take a step back and look at the four fully developed (discarding *Gremillion* here) decisions that Professor Kalven divided into "direct control" and "less direct" categories, what we find is that all of them involved regulations "fall[ing] within the traditional purview of state [power]"[91]:

- *Shelton*: criteria for state employment
- *Button*: regulating professional conduct of lawyers
- *Patterson*: requiring foreign corporations to register
- *Bates*: imposing a licensing tax

In *Shelton* and *Button*, Kalven's two "direct control" cases, the regulation—as applied to the NAACP—went too far and thus encroached upon the First Amendment rights of the organization. By contrast, in the two "less direct" cases, the laws ran afoul of the Constitution because the Court found no correlation between the asserted government interest and limiting the work of the NAACP.

If this sounds like a legal splitting of hairs, it is. Professor Kalven wrongly categorized *Patterson* as an "indirect" effort to regulate the activities of the NAACP. In all five of the cases he surveyed, regulations that "fall within the traditional purview of state [power]"[92] were abused by southern states with the *direct* and *obvious* goal of suppressing the work of the NAACP.

Regarding *Patterson*—to which our attention now turns—perhaps this should not be read as a criticism of Kalven's work. For, by his own admission, his identified dichotomy of "Southern efforts to tame the NAACP" was arrived at by "as far as one can tell from reading cases" alone.[93] Even if one supplements the opinions of the Supreme Court of the United States with some of the lower court decisions in *Patterson*, a complete picture of the nature of the litigation does not emerge. Instead, to understand exactly *what* Alabama was doing, *why* it was doing it, and *how* it was seeking to achieve its legal and political goals, one needs to look at the complete legislative and judicial record (in particular, detailing Alabama's relentless procedural shenanigans) and archival materials—many of which were not available to Kalven sixty years ago. It is to the story that those archival materials reveal that this Article now turns.

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91. Nat'l Ass'n for the Advancement of Colored People v. Button, 371 U.S. 415, 438 (1963).
92. *Id.*
93. KALVEN, *supra* note 2, at 69.

II. SIXTY-ONE DAYS IN THE SUMMER OF 1956

Friday, June 1, 1956, was another hot and humid day in Montgomery, Alabama. Temperatures were expected to climb into the high eighties, and afternoon thunderstorms were in the forecast.[94] In the third-floor offices of the old Pythian Temple building on Dexter Avenue, the temporary home of the Circuit Court of the Fifteenth Judicial Circuit of Alabama, Montgomery County,[95] three men had important business to attend to at the start of the workday. After ensuring that a newspaper reporter and photographer were present to capture and document the moment, George Hurxthel Jones, Jr. prepared to receive a set of court filings from Attorney General John M. Patterson. Jones had worked in the Montgomery County Office of Registry in Chancery of the Circuit Court since 1935.[96] Upon receipt of the filings at 9:20 a.m.,[97] George walked the papers over to the desk of his distant cousin Walter Burgwyn Jones, the court's presiding judge (an office he also assumed in 1935).[98]

Meanwhile, Patterson issued the following press statement:

> I have today asked the Circuit Court of Montgomery County to grant a temporary restraining order against the National Assn. for the Advancement of Colored People, preventing the organization from continuing further to circumvent the laws of the State of Alabama.
>
> After diligent investigation I am convinced that the acts of the NAACP in Alabama are against the best interests of the people of this state, both Negro and white.
>
> The NAACP has never qualified under the laws of this state to do business in Alabama as a foreign corporation. The failure of the NAACP to conform to the statutes of this state poses a threat to our citizens who have no recourse at law for injury done by the corporation to them.
>
> Our laws require that every foreign corporation doing business within this state file with the secretary of state a copy of its charter

94. *The Weather*, ALA. J., June 1, 1956, 1; *Cloudy, Cooler Weather Seen*, ALA. J., June 1, 1956, 2.

95. Walter B. Jones, *Off the Bench: The Old County Court House Is Gone*, MONTGOMERY ADVERTISER, June 11, 1956; *County Revenue Board Faced with Problems of Courthouse Move to Temporary Quarters*, MONTGOMERY ADVERTISER, Jan. 24, 1956.

96. *Jones, George Hurxthel, Jr.*, MONTGOMERY ADVERTISER, Dec. 12, 2003.

97. Edwin Strickland, *Temporary Writ Is Issued Against NAACP in Alabama*, BIRMINGHAM NEWS, June 1, 1956.

98. Helms, *supra* note 16. The two Jones's were distant cousins, only having the last name by virtue of the fact that, two generations apart, unrelated men with the last name Jones married into the same family tree. Email to the author from Darlene Spargo, October 19, 2023. I am grateful to Darlene for her invaluable genealogical skills.

> and designate an officer or agent of the corporation within the state for the service of process.
>
> The NAACP has failed to meet these statutory requirements.
>
> As alleged in the state's petition for a temporary injunction, the NAACP has engaged actively within this state in acts which tend to breach state statutes and local ordinances. These acts have resulted in violations of our laws and tend in many instances to create a breach of the peace.
>
> As attorney general of Alabama I conceive it to be my duty to protect all our citizens against such actions by a foreign corporation. We cannot stand idly by and raise no hand to stay these forces of confusion who are trying to capitalize upon racial factors for private gain or advancement.
>
> The petition filed today asks that upon a final hearing of the petition, a permanent injunction be issued against the NAACP, restraining it from further doing business in the State of Alabama.
>
> I have refrained from filing this petition until after the recent Democratic Primary election, so that there could be no possible injury or embarrassment to any candidate or group. The good relations that have traditionally existed in our state between the White and Negro races have been jeopardized by acts of irresponsible groups and individuals.
>
> We face grave problems today in Alabama and the South and I believe that right-thinking people of whatever race and color, feel that these problems can best be met without disrupting outside forces, such as the NAACP, seeking to further widen the breach.[99]

By 9:50 a.m., the requested injunction had been issued and signed by Judge Jones.[100] Thus began State of Alabama on the Relation of John Patterson, Attorney General of the State of Alabama, Complainant, vs. National Association for the Advancement of Colored People, a Corporation, Respondent.

The NAACP filed its Articles of Incorporation on May 25, 1911, in New York.[101] As stated in those Articles, the "principal objects" of this nonprofit membership corporation:

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99. The statement was printed in its entirety in Strickland, *supra* note 97.

100. *Id.*

101. *National Association for the Advancement of Colored People. NAACP Articles of Incorporation, May 25, 1911. W. E. B. Du Bois Papers (MS 312)*, SPECIAL COLLECTIONS & UNIV. ARCHIVES, UNIV. OF MASS. AMHERST LIBRS., https://credo.library.umass.edu/cgi-bin/pdf.cgi?id=scua:mums312-b007-i027 (last visited Mar. 5, 2024).

> are voluntarily to promote equality of rights and eradicate caste or race prejudice among the citizens of the United States; to advance the interest of colored citizens; to secure for them impartial suffrage; and to increase their opportunities for securing justice in the courts, education for their children, employment according to their ability, and complete equality before the law.[102]

It was considered to be a foreign corporation in any state (other than New York) in which it did business and was subsequently (in accordance with the laws of the various states) required to register as such. From the time that it began functioning in Alabama in 1918, the NAACP operated under a good faith belief that it was exempt from the state's foreign corporation registration laws;[103] and Alabama never gave it any official reason to believe that this was not the case.

And then came the June 1 temporary injunction issued by Judge Jones. Obtained in ex parte proceedings ("without notice [to] or opportunity for hearing" from the NAACP),[104] it prevented the Association from doing five things:

1. Conducting any further business of any description or kind or respondent within the State of Alabama; organizing further chapters of respondent within the State of Alabama; maintaining any offices of respondent within the State of Alabama.
2. Soliciting membership in respondent corporation or any local chapters or subdivisions or wholly controlled subsidiaries thereof within the State of Alabama.
3. Soliciting contributions for respondent or local chapters or subdivisions or wholly controlled subsidiaries thereof within the State of Alabama.
4. Collecting membership dues or contributions for respondent or local chapters or subdivisions or wholly controlled subsidiaries thereof within the State of Alabama.
5. Filing with the Department of Revenue and the Secretary of State of the State of Alabama any application, paper or document for the purpose of qualifying to do business within the State of Alabama.[105]

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102. *Id.*

103. Brief for Petitioner at 7–8, Nat'l Ass'n for the Advancement of Colored People v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958) (No. 57-91).

104. Petition for Writ of Certiorari at 5, Nat'l Ass'n for the Advancement of Colored People v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958) (No. 57-91).

105. Decree for Temporary Restraining Order and Injunction, reprinted in Petition for Writ of Certiorari, *supra* note 104, at app. B, 10a–11a.

It is important not to overlook the fifth of these points, because it was not requested by Patterson's office.[106] Instead, it was inserted by Jones on his own initiative. It made a very strong statement to the effect that the judge wanted to ensure that the NAACP's absence from Alabama was far more than a *temporary* arrangement. The attorney general sought to oust the NAACP because of its failure to register as a foreign corporation. The judge sought to make the ouster permanent by preventing the NAACP from remedying that situation by registering.

Three days after the NAACP filed its July 2 motion to dissolve the temporary injunction (the hearing for the motion was duly scheduled for July 17), the state upped the legal ante, and in doing so it brought the U.S. Constitution into the equation.[107] On July 5, Patterson's office filed a motion requiring the NAACP to produce a long list of documents, which can be divided into two categories.[108] First, materials that would prove that the NAACP was a foreign corporation doing business in Alabama. Second, materials disclosing the identity (and place of residence) of any individual in Alabama who was affiliated with or belonged to the NAACP. Into the first (doing business) category fell the following requested items:

1. Copies of all charters of branches or chapters of the National Association for the Advancement of Colored People in the State of Alabama.
2. All deeds, bills of sale and any written evidence of ownership of real or personal property by the National Association for the Advancement of Colored People, Inc., in the State of Alabama.
3. All cancelled checks, bank statements, books, payrolls, and copies of leases and agreements, dated or occurring within the last twelve months next preceding the date of filing the petition for injunction, pertaining to transactions between the National Association for the Advancement of Colored People, Inc., and persons, chapters, groups, associations, corporations and partnerships in the State of Alabama.[109]

The second (membership/affiliation) category included the following requested materials:

4. All lists, documents, books and papers showing the names, addresses and dues paid of all present members in the State of

106. *See* Petition for Writ of Certiorari, *supra* note 104, at 6.

107. *Id.* at 24

108. *Id.*; Interlocutory Decree on Motion of the State to Require Respondent to Produce Certain Books, Papers and Documents, reprinted in Petition for Writ of Certiorari, *supra* note 104, at app. B 12a [hereinafter Interlocutory Decree].

109. Petition for Writ of Certiorari, *supra* note 104, at 6–8.

Alabama of the National Association for the Advancement of Colored People, Inc.

5. All lists, documents, books and papers showing the names, addresses and official position in respondent corporation of all persons in the State of Alabama authorized to solicit memberships in and contributions to the National Association for the Advancement of Colored People, Inc.
6. All files, letters, copies of letters, telegrams and other correspondence, dated or occurring within the last twelve months next preceding the date of filing the petition for injunction, pertaining to or between the National Association for the Advancement of Colored People, Inc., and persons, corporations, associations, groups, chapters and *partnerships* within the State of Alabama.
7. All lists, books and papers showing the names and addresses of all officers, agents, servants and employees in the State of Alabama of the National Association for the Advancement of Colored People, Inc.[110]

On July 11, Jones ruled in favor of the state, and imposed a July 16 deadline for all the requested documents to be handed over; this was subsequently extended by eight days.[111] The materials were now due the day before the July 25 hearing on the ex parte injunction.[112]

The NAACP responded on July 23:

1. it said that it did not believe that Alabama law required it to register as a foreign corporation, but it was nevertheless ready to submit the necessary registration paperwork;[113]
2. it said that it was ready to submit that paperwork *if* Judge Jones dissolved the fifth part of the June 1 temporary injunction that prevented the Association from taking this step;[114]
3. it requested that the motion ordering the production of the aforementioned materials be set aside;[115]

Two days later, Judge Jones refused to dissolve the June 1 injunction and denied the NAACP's motion to set aside the production order.[116] When the Association proceeded to invoke the Constitution in defense of

110. *Id.*

111. *Id.* at 8; Interlocutory Decree, *supra* note 108, at 11a–13a.

112. Petition for Writ of Certiorari, *supra* note 104, at 8.

113. *Id.* at 8 n.4.

114. *Id.*

115. *Id.*

116. Decree Adjudging Respondent in Contempt and Fixing Punishment Therefor, reprinted in Petition for Writ of Certiorari, *supra* note 104, at app. B 13a–17a.

its refusal to disclose its membership lists,[117] Jones responded by finding the Association to be in "'brazen contempt' of court,"[118] for which he imposed a $10,000 fine as punishment (approximately $110,000 in 2024 dollars). Failure to comply by midnight on July 31 would result in a tenfold increase in the fine ($100,000 in 2024 would be approximately $1,120,000).[119]

On July 30, the Alabama Supreme Court refused to hold an emergency hearing on the NAACP's last-ditch effort to prevent the contempt order from taking effect. Ironically, in a case that began with an ex parte ruling, the justices ruled against the Association on the grounds that the other party—Attorney General Patterson—had not been notified about the hearing (which would have made it an ex parte hearing).[120] The *Montgomery Advertiser* described this "refusal of immediate action" as leaving "a haze of confusion."[121] Yet, there did not appear to be any "haze" or "confusion" in the minds of the members of the Alabama Supreme Court. A legally crucial move laid bare the extent to which the state court system was determined to see the NAACP permanently gone from Alabama. When the tribunal did hold a hearing the following day (by which time the contempt order had gone into effect), it ruled against the NAACP on the ground that the Association had failed to follow proper judicial procedures. Namely, it had failed to submit its petition in the form of a petition for a writ of certiorari (the issuance of which would have automatically stayed Jones's order).[122] Although the Supreme Court of the United States would ultimately decide that the state supreme court had been wrong to make that ruling, that resolution of the case would not come until June 1, 1964, in *Flowers*. In the intervening years, the $100,000 fine—and the

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117. It is an interesting footnote in history, that the NAACP refused to disclose the identity *of all but one* of its Alabama members.

> Arthur Shores informed the court that one of the attorney general's relatives was a member of the association. A stunned John Patterson listened as Shores revealed that former congressman Lafayette Patterson, who had served in the U.S. Congress as a Democrat from 1928 to 1933, was a member of the Alabama NAACP. Embarrassed by the revelation, Patterson called his uncle to ask about Shore's claim. Lafayette, a pre-New Deal liberal, admitted that he had been a member of the NAACP for many years.

GENE L. HOWARD, PATTERSON FOR ALABAMA: THE LIFE AND CAREER OF JOHN PATTERSON 141 (2008) (Howard is drawing on information from one of his many interviews with John Patterson).

118. *N.A.A.C.P. Balked in Alabama in Moves to Halt $100,000 Fine*, N.Y. TIMES, July 31, 1956 [hereinafter *N.A.A.C.P. Balked*].

119. Decree Adjudging Respondent in Further Contempt and Fixing Punishment Therefor, reprinted in Petition for Writ of Certiorari, *supra* note 104, at app. B 17a–18a.

120. George Whittington, *Judge Denies Plea to Cut $10,000 Levy*, MONTGOMERY ADVERTISER, July 31, 1956. *See also N.A.A.C.P. Balked*, *supra* note 118; Petition for Writ of Certiorari, *supra* note 104, at 9–11.

121. Whittington, *supra* note 120.

122. George Whittington, *NAACP Plans to File Higher Appeal on Fine*, MONTGOMERY ADVERTISER, Aug. 1, 1956; Petition for Writ of Certiorari, *supra* note 104, at 11.

inability to do business in Alabama—would continue to hang over the heads of the NAACP.

A. Ruby Hurley

The morning of June 1, 1956, word of the injunction issued by Judge Jones reached the southeastern regional headquarters of the NAACP when the telephone rang in the Birmingham home of Ruby Hurley, one hundred miles north of Montgomery.[123] Shortly thereafter, Hurley's doorbell also rang.[124] Both callers brought the same news, news that foretold a long legal battle ahead.

The forty-six-year-old Hurley had been involved with the NAACP since 1939.[125] Robert Carter considered her "very smart, and one of the most competent and dedicated members on the NAACP staff."[126] She came to the attention of the Association's leadership in New York in part because of her work, earlier that year, with the Marian Anderson Citizens Committee.[127] That work "inspired" her involvement with her hometown NAACP chapter in the nation's capital, where she quickly became a member of the chapter's executive committee.[128] In the Spring of 1943, Walter White, the NAACP's Executive Secretary, encouraged her (through an intermediary, Judge William Hastie) to apply for the position of Youth Secretary. Wrote White:

> Young people today are aggressive, analytical, and even somewhat skeptical to the point of cynicism. They do not want to be treated as children. The wiser ones know that they need guidance, but they want to work in a movement of which they are an integral part rather than

123. HOWELL RAINES, MY SOUL IS RESTED: THE STORY OF THE CIVIL RIGHTS MOVEMENT IN THE DEEP SOUTH 134–35 (1983).

124. *Id.*

125. FRANÇOISE N. HAMLIN, CROSSROADS AT CLARKSDALE: THE BLACK FREEDOM STRUGGLE IN THE MISSISSIPPI DELTA AFTER WORLD WAR II 18–19 (2012).

126. ROBERT L. CARTER, A MATTER OF LAW: A MEMOIR OF STRUGGLE IN THE CAUSE OF EQUAL RIGHTS 149 (2005).

127. David Terry, *Organizing for 'the Beginning of the End': Ruby Hurley and the NAACP in the Postwar South, 1951–1955*, 60 PHYLON 37, 41 (2023). The Committee was a collective response to the decision by the Daughters of the American Revolution to prohibit the singer from performing at their then-white-performers-only, segregated Constitution Hall in Washington, D.C. *Id.* For an excellent detailed treatment of this important episode in American history, see generally RUSSELL FREEDMAN, THE VOICE THAT CHALLENGED A NATION: MARIAN ANDERSON AND THE STRUGGLE FOR EQUAL RIGHTS (2011).

128. Terry, *supra* note 127, at 41. During this period of time, "she maintained a daytime job as a clerk for Industrial Bank (which sat just a few doors west along U Street from the NAACP branch's office), and attended law school classes in the evening." *Id. See also* Letter from Ruby Hurley to Walter White, May 5, 1943, Group II, Box A587, Folder 2, NAACP 1940–55, General Office File, Staff Ruby Hurley, 1943–54, Records of the National Association for the Advancement of Colored People, Manuscript Division, Library of Congress, Washington, D.C. (hereafter NAACP-LOC).

> be treated as mentally inferior persons to whom the law is laid down from above.[129]

He "want[ed] to know how" Hurley "would go about revising, amplifying or otherwise changing the youth work program of the Association."[130] After impressing in her May interview, Hurley was offered and accepted the job the following month.[131] She excelled at her work. "Under her direction . . . youth councils and college chapters swelled from 86 to more than 280, with a total membership of 25,000."[132]

At the beginning of 1951, the NAACP began the process of establishing a southeastern regional headquarters. The original plans for a permanent office were on hold; instead, the goal was to create a temporary (April–June 1951) arrangement that would operate out of the Birmingham Branch office (until early 1952 the regional office shared a single nine by ten foot space with both the Birmingham Branch and the Alabama State Conference of Branches).[133] In March, Hurley accepted the "temporary assignment" of heading up the regional office and traveled to Birmingham to begin the much-needed work of coordinating membership campaigns in five states: Alabama, Georgia, Mississippi, Tennessee, and Florida.[134] As the historian Françoise Hamlin writes, Hurley "was sent to battle a leviathan."[135]

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129. Letter from Walter White to William H. Hastie, Mar. 8, 1943, Group II, Box A587, Folder 2, NAACP 1940-55, General Office File, Staff Ruby Hurley, 1943-54, NAACP-LOC.

130. *Id.*

131. Letters from Walter White to Ruby Hurley, May 10, and June 21, 1943, Group II, Box A587, Folder 2, NAACP 1940-55, General Office File, Staff Ruby Hurley, 1943-54, NAACP-LOC.

132. Steven F. Lawson, *Hurley, Ruby*, *in* NOTABLE AMERICAN WOMEN: A BIOGRAPHICAL DICTIONARY COMPLETING THE TWENTIETH CENTURY 319 (Susan Ware & Stacy Braukman eds., 2004).

133. Letter from Gloster B. Current (Director of Branches) to Thurston Collier (President of the Birmingham Branch), Jan. 29, 1951; Letter from Emory O. Jackson (Birmingham Branch Secretary) to Current, Feb. 12, 1951, in Group II, Box C221, Folder 3, NAACP 1940-55, Branch File, Southeast Regional Office Correspondence 1951 Jan-June, NAACP-LOC. Letter from Hurley to Wilkins, Jan. 22, 1952, Group II, Box C222, Folder 1, NAACP 1940-55, Branch File, Southeast Regional Office Correspondence 1952 Jan-June, NAACP-LOC; Terry, *supra* note 127, at 43.

134. PATRICIA SULLIVAN, LIFT EVERY VOICE: THE NAACP AND THE MAKING OF THE CIVIL RIGHTS MOVEMENT 399 (2009). Originally, Noah Griffin—previously the Regional Secretary of the West Coast Regional Office—was slated to assume the southeastern role, but "a hitch . . . developed," so the association reached out to Hurley. Letter from Gloster B. Current to Emory O. Jackson, Feb. 19, 1951; *see also, e.g.*, Memorandum from Current to Hurley, Mar. 19, 1951; Letter from Current to Utillus Phillips, President, Tennessee State Conference NAACP, Mar. 20, 1951; Letter from Current to Rev. W. A. Bender, President, Mississippi State Conference NAACP, Mar. 20, 1951, all in Group II, Box C221, Folder 3, NAACP 1940-55, Branch File, Southeast Regional Office Correspondence 1951 Jan-June, NAACP-LOC.

135. HAMLIN, *supra* note 125, at 19.

When Hurley arrived in Birmingham, she found an organizational "mess."[136] There was nothing resembling a membership campaign underway in the city.[137] Additionally, the NAACP files are full of letters showing the financial constraints under which Hurley labored in Birmingham, both in terms of a lack of professional resources and personal economic hardships.[138] The NAACP was struggling generally,[139] and budgets were cut back as far as they could feasibly be, across the board.[140] But Hurley's work quickly began to pay dividends; she was praised for the "amazingly fine job"[141] she was doing, and the way she "ha[d] taken hold in the new area in a dramatic fashion."[142] As Emory Jackson, Birmingham Branch Secretary, observed, Hurley had "been able to fire up the leaders and set in motion a type of in-service training for NAACP workers." In short, "Birmingham needs the new know-how and she is coaxing us along the way."[143]

1. "There Was So Much Work to Be Done."

When the opportunity arose for Hurley to become the Southeastern Regional Director of the NAACP in 1951, she accepted the challenge because she saw the importance of the work she would be doing: "We had nobody living in the South working with people on their immediate needs . . . . There was so much work to be done."[144] It meant "a dramatic change

136. Letter from Ruby Hurley to Lucille Black, Apr. 6, 1951, Group II, Box C221, Folder 3, NAACP 1940-55, Branch File, Southeast Regional Office Correspondence 1951 Jan-June, NAACP-LOC.

137. *Id.*

138. *See, e.g.*, the letters from Hurley to Current, Apr. 7 and 14, and May 25, 1951, in Group II, Box C221, Folder 3, NAACP 1940-55, Branch File, Southeast Regional Office Correspondence 1951 Jan-June; and the letter from Hurley to Roy Wilkins, Dec. 1, 1954, in Group II, Box A587, Folder 2, NAACP 1940-55, General Office File, Staff Ruby Hurley, 1943-54. All in NAACP-LOC.

139. Roy Wilkins, the NAACP's Executive Secretary, expressed concern, in an August 1951 letter to Hurley, that the Association might not be able to make payroll that month. Letter from Wilkins to Hurley, Aug. 23, 1951, in NAACP papers, Group II, Box C221, Folder 4, NAACP 1940-55, Branch File, Southeast Regional Office Correspondence 1951 July-Dec, NAACP-LOC.

140. *Id.*; reply from Hurley to Wilkins, Aug. 28, 1951, in NAACP papers, Group II, Box C221, Folder 4, NAACP 1940-55, Branch File, Southeast Regional Office Correspondence 1951 July-Dec, NAACP-LOC.

141. Memo from Current to White, June 7, 1951, in Group II, Box C221, Folder 3, NAACP 1940-55, Branch File, Southeast Regional Office Correspondence 1951 Jan-June, NAACP-LOC.

142. *Id.*

143. Quoted in the letter from Current to Hurley, Aug. 3, 1951, in Group II, Box C221, Folder 4, NAACP 1940-55, Branch File, Southeast Regional Office Correspondence 1951 July-Dec, NAACP-LOC.

144. SULLIVAN, *supra* note 134, at 401 (alteration in original); *see also*, the reply from Hurley to Wilkins, Aug. 28, 1951, in Group II, Box C221, Folder 4, NAACP 1940-55, Branch File, Southeast Regional Office Correspondence 1951 July-Dec, NAACP-LOC. As late as June 5, 1951, Hurley still had no idea what her future status would be—whether or not she would soon be moving back to New

in her life,"[145] but the work was just too important not to accept the position. As Thurgood Marshall (director of the NAACP's Legal Defense and Educational Fund) observed, the work Hurley did "demonstrate[d] the necessity for our people . . . to take advantage of what the law says they are entitled to."[146] Hurley was promoted to Regional Secretary in March 1952.[147]

As Hurley explains, she "had a tremendous personal job to do in getting over the trauma of moving from New York to the South."[148] Her work was very taxing: it was undertaken in a dangerous climate;[149] it ended her third marriage (and she never did remarry—as one potential suitor said, "it would be a bigamist marriage," Ruby and the NAACP);[150] it required a lot of travel—20,000 miles annually by one estimate[151] (Hurley was issued an air travel card in April 1952, not simply for economic reasons, but because of the recognized "problem of a woman"—especially a Black woman—"traveling in the South");[152] and it took its toll on Hurley's health. Indeed, by June 1, 1956, she "was just about sick of civil rights and sick of fighting the white folks and sick of the South."[153] As Hurley recalled with a laugh,

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York. Letter from Hurley to Current, June 5, 1951, in Group II, Box C221, Folder 3, NAACP 1940-55, Branch File, Southeast Regional Office Correspondence 1951 Jan-June, NAACP-LOC.

145. SULLIVAN, *supra* note 134, at 401.

146. *Id.*

147. Telegram from Current to Hurley, Mar. 13, 1952, Group II, Box C222, Folder 1, NAACP 1940-55, Branch File, Southeast Regional Office Correspondence 1952 Jan-June, NAACP-LOC.

148. Raines, *supra* note 123, at 131.

149. Terry, *supra* note 127, at 55, 60 (and more generally the entire article).

150. Ernestine Cofield, *Ruby Hurley Forgoes Love, Home For The NAACP Cause*, CHI. DAILY DEFENDER, July 2, 1963, available online at GLAM CTR. FOR COLLABORATIVE TEACHING & LEARNING, ATLANTA UNIV. CTR. ROBERT W. WOODRUFF LIBR., https://glamportal.auctr.edu/items/show/603 [https://perma.cc/6P26-NQ25]. Hurley's first two marriages ended in divorce "when successive husbands deserted her" (she suffered "three years of . . . mental and physical abuse" at the hands of spouse number two). Terry, *supra* note 127, at 40.

151. *Most Militant Negro Woman in the South*, JET, Oct. 6, 1955, at 14 [hereinafter *Most Militant*].

152. Memo from Wilkins to Current, Apr. 30, 1952, Group II, Box C222, Folder 1, NAACP 1940-55, Branch File, Southeast Regional Office Correspondence 1952 Jan-June, NAACP-LOC. As Hurley says:

> I had to be very defensive, very careful about what I said, what I did, with whom I was seen. Efforts were made to entrap me sexually. All kinds of tricks were used, but I guess maybe, Scorpio that I am, I have an ingrained ability to defend myself against anything that I think is wrong. So I was able to.

RAINES, *supra* note 123, at 136. In 1955 reports, Hurley explained the reality that the Mississippi

> Delta was under the control of the Citizens' Council . . . . Their tactics were 'brazen' and included phone calls and threatening letters, and in one case, involved parking a hearse in front of a signor's house. 'Every effort in and out of the book,' she explained, 'is being used to discredit and demoralize our leadership. And there is no source for help within the State.'

STEPHANIE R. ROLPH, RESISTING EQUALITY: THE CITIZENS' COUNCIL, 1954–1989 64 (2018).

153. RAINES, *supra* note 123, at 135.

her doctor said, "'[t]here isn't a thing wrong with you physically. It isn't a thing, but these'—the way he put it—'niggers and white folks. That's all that's wrong with you.'"[154] It was a constant struggle:

> every time I picked up the telephone it was a threatening call, and when I'd go home, I never knew whether it was going to be a bomb. I had gotten down in weight; with my height I weighed about one hundred fifteen pounds. I couldn't eat, and days I'd go without food because I *just could not eat* in Jim Crow places. The only way I could get to a lot of places to fight for civil rights was by bus, and the bus stops, the places to eat, were all segregated, and I was not going to eat in a segregated place. So if I ran out of Hershey Bars, then I didn't eat until I got someplace where I could be fed.[155]

When Hurley picked up the phone on June 1, 1956, wiping the sleep out of her eyes, what she heard was threatening news of a different kind.

2. "There Was So Much Work to Be Done"—But It Couldn't Be Done in Alabama

That morning, a friend, who was a reporter for the Associated Press (AP), called to inform Ruby about a judicial development in Montgomery. As they were speaking, he explained that Circuit Judge Walter B. Jones was issuing an injunction against the NAACP.[156] Their conversation was interrupted by the ringing of the doorbell of the house Hurley rented in the Titusville neighborhood of Birmingham, "a neat community of middle-class Blacks."[157] That morning, when Hurley told her friend to hold the line while she went to answer the door, she could not have imagined that the visitors she would greet, while still wearing her housecoat and rollers, were there to convey the same news as her friend on the phone. There was one difference—two of the men at the door were deputy sheriffs, and their "news" came in the form of the papers, signed by Judge Jones. The deputies presented her with the court documents in the presence of photographers and reporters, who were conveniently situated on Hurley's doorstep to capture the historic moment.[158]

Later that morning, Hurley made three telephone calls. First, she dialed ALpin 4-3887, and reached her secretary at the NAACP's Southeast Regional Office. Next, she placed a call to offices in the same building,

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154. *Id.* at 136.

155. *Id.* at 135. In its 1955 portrait of her, *Jet* magazine reported that: "For an entire month this year, an anonymous caller broke her sleep by telephoning at 4 a.m. and then hanging up. Other calls threaten to 'bomb her out' and 'sprinkle her with gunshot.'" *Most Militant*, *supra* note 151, at 15.

156. RAINES, *supra* note 123, at 134–35.

157. Terry, *supra* note 127, at 43.

158. RAINES, *supra* note 123, at 134–35.

this time dialing ALpin 1-1376 to reach W.C. Patton (the state field secretary) in the offices of the NAACP's Birmingham chapter. She explained the state's injunction (incidentally, Patton was one of several NAACP leaders who were, like Hurley, served with copies of the legal papers that day), and then told them the same thing—close up the Birmingham offices and leave.[159] Those 1630 4th Ave N. offices were housed in the Colored Masonic Temple, the seven-floor "Black Skyscraper" that played a major role in making Birmingham's "4th Avenue business district . . . a booming hub" for the city's Black residents.[160] On June 1, 1956, the actions of Attorney General Patterson and Judge Jones ensured that the building, and the district, would lose the important tenancy of the NAACP.

Hurley hurriedly made a third call, this time long-distance to New York City—to offices in the Freedom House at 20 West 40th Street in Manhattan. Constructed in 1906 under the commissioning of the New York Club, the ornate nine-story building, "in a row of grey, almost indistinct office buildings,"[161] was:

> a confection of deep red brick, white limestone, and terra cotta. The first three floors were highly influenced by the Beaux Arts movement. The centered entrance at sidewalk level was overshadowed by the three two-story arches, fronted by bowed and balustraded balconies directly above. French gave way to Dutch on the upper floors, where Flemish Renaissance Revival referenced the city's early history. It all culminated in a two-story, tile covered mansard with stepped gables, a prominent pediment, spiky finials and a massive terra cotta roundel.[162]

When Freedom House acquired the building in 1945, the NAACP took up residence in offices across the fourth and fifth floors for the next two decades.[163] Hurley's first call, that Friday morning, was to Wilkins. At the same time as Wilkins was placing his follow-up call to Carter, Hurley made plans not only to vacate the Masonic Temple offices, but to leave Birmingham and, indeed, the entire state of Alabama. "In a dramatic

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159. *See* George R. Osborne, *Freedom of Association: The NAACP in Alabama*, *in* THE THIRD BRANCH OF GOVERNMENT: 8 CASES IN CONSTITUTIONAL POLITICS 156 (C. Herman Pritchett & Alan F. Westin eds., 1963).

160. *The Masonic Temple Building*, NAT'L PARK SERV., https://www.nps.gov/places/masonic-temple-building.htm [https://perma.cc/H8X4-L3JM] (last visited Mar. 5, 2024).

161. Osborne, *supra* note 159, at 155.

162. Tom Miller, *The Lost New York Club—20 West 40th Street*, DAYTONIAN IN MANHATTAN (Dec. 11, 2017), http://daytoninmanhattan.blogspot.com/2017/12/the-lost-new-york-club-20-west-40th.html [https://perma.cc/A7WC-KQTP].

163. *Id.* The organization moved uptown to Columbus Circle in 1967, and then later out to Brooklyn. In 1985 the decision was made to relocate to Baltimore, the first time in the NAACP's history that its headquarters would be outside of New York City. Angus Phillips, *NAACP Plans Move to Baltimore*, WASH. POST, Feb. 21, 1985.

flight,"[164] the Southeastern Regional Office relocated to Atlanta, Georgia; one more moment in Alabama, and Hurley worried "that her mere presence would be construed as doing business in violation of the injunction order."[165]

B. Not a Completely Unexpected Development

Neither Wilkins nor Carter could have been entirely surprised about the June 1 injunction. In his book chapter about the litigation, George R. Osborne states that "[i]t cannot be said at precisely what point in 1956 Wilkins and the organization's other officers became concerned about their corporate legal status in Alabama."[166] In fact, the NAACP's leadership had been concerned about such a situation arising for several years. In May 1953, in response to a "problem" that had developed, Jack Greenberg—one of the NAACP's lawyers—produced a detailed memo for Thurgood Marshall, analyzing "the legal relationship between the Branches of the NAACP and the NAACP," a study necessitated by concerns about the relevance to the organization of the foreign corporation registration acts of various states.[167] His careful study of relevant court decisions in various states led to one inescapable, syllogistic conclusion:

1. Outside of New York, the NAACP met the definition of a "foreign corporation" that was "doing business" in whatever state was home to a state branch of the organization.
2. Typically, a state foreign registration act required any "foreign corporation" that was "doing business" in that state to register, etc.
3. Ergo, the NAACP's failure to register under a state's foreign corporation act put it in violation of that state's laws.

Indeed, as Greenberg explained, this was not even a "close question."[168] And "I should think that even if it were a close question, we would not expect a favorable interpretation of the statute from, let us say, the

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164. *Civil Rights Queen, Ruby Hurley Dies at 70*, AFRO AM., Aug. 23, 1980, at 1. This news agency article is the same as the one that ran in the *New York Times*. *See Ruby Hurley, at 70; Civil Rights Leader*, N.Y. TIMES, Aug. 15, 1980. The articles dramatically say that Hurley was "spirited out of Birmingham in the middle of the night with little besides the clothes she was wearing." *Id.* However, George Osborne's book chapter about the *NAACP v. Alabama* litigation, for which he interviewed Hurley, gives a much more measured account: "Mrs. Hurley never returned to her office [after the June 1 injunction was imposed] and left Alabama a few days later." Osborne, *supra* note 159, at 157.

165. Osborne, *supra* note 159, at 157.

166. *Id.* at 155.

167. "Relationship Between NAACP Branches and NAACP," memo from Jack Greenberg to Thurgood Marshall, 1, May 15, 1953, Group III, Box J1 NAACP 1956-65, NAACP LDF, Administrative File, Branch constitution problems, 1953-55, NAACP-LOC.

168. *Id.* at 6.

Supreme Court of Mississippi"—or Alabama.[169] But what to do? Greenberg answered rhetorically: would it "be worse to re-define the relationship between the National Office and the Branches at this time or to await the development of possible difficulties with some of the southern states[?]"[170]

The memo's conclusions make it clear that a full three years before Alabama initiated legal proceedings against the organization, the NAACP knew (a) that it was failing to comply with state foreign corporation laws, and (b) that whatever choice it made to remedy this situation would jeopardize the existence of the organization, especially in the South. The NAACP was also fully aware that the choice it ultimately made in Alabama would lead, inexorably, to complex litigation and unfavorable rulings from that state's courts.

And so, it is to that which this Article now turns its attention, and in so doing, it shines the analytical spotlight on three key players: John M. Patterson, Edmon L. Rinehart, and Walter B. Jones.

III. THREE MEN AND A LAWSUIT

As the NAACP observed in its Brief for Petitioner in *Patterson* after the Supreme Court of the United States agreed to hear the organization's appeal during its October 1957 Term, the June 1, 1956 injunction order, and all the legal proceedings that followed, "cannot be properly considered without being viewed against the background and setting in which it arose."[171] There were two different, but inextricably intertwined elements of that "background and setting": (a) crucial defining *events*, and (b) crucial defining *individuals*. What emerges from the study of that history is one important thing—while there was no one *event* that led inextricably to the filing of the June 1 injunction paperwork, it is doubtful that the litigation would have been initiated without the leadership of one *individual*—Attorney General Patterson (supported, but in very different ways, by Assistant Attorney General Edmon L. Rinehart, and Montgomery County Circuit Court Judge Walter B. Jones).

A. John M. Patterson

On June 18, 1954, shortly after winning the Democratic Party's nomination for Alabama Attorney General (at a time when the Democratic nomination all but guaranteed victory in the general election), Albert

169. *Id.*
170. *Id.*
171. Brief for Petitioner, *supra* note 103, at 12.

Patterson was assassinated.[172] It is neither an exaggeration, nor a disparagement of John Patterson, to say that when he replaced his father on that fall's ballot, he was easily elected Attorney General because of the tragedy that befell his family. "The Albert Patterson assassination and his son's ascension to his place as the top law enforcement officer in the state was the top news story in Alabama for 1954."[173] In short, John Patterson became "attorney general not through serving the state's political system . . . but because a family tragedy had thrust him into the center of Alabama politics."[174]

Prior to his father's murder, John Patterson had neither anticipated nor expressed enthusiasm for a career in politics; quite the opposite. Yes, he was a naturally gifted, "consummate storyteller."[175] As his brother Jack recalled, "[t]hat first dinner after John got home [from WWII], he started sharing his war stories . . . . He was a good storyteller. Still is . . . ."[176] He was, however, "reluctant to enter politics."[177] His father's politicking did not sit well with John, who "was shocked and angered at how political considerations preempted the family legal business."[178] The two men "were in constant disagreement over politics."[179] The assassination thus changed John Patterson's career path.

Yet, despite his lack of experience in (and previous disinterest in) Alabama politics,

> [John] Patterson was a natural campaigner and a well-schooled public administrator. He had developed poise and self-confidence trying cases with the Army JAG in Europe and practicing law in Phenix City, and had polished his oratorical skills stumping for his father around the state. Having worked all his life, he could relate to the needs and the aspirations of working families throughout Alabama,

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172. *See* WARREN TREST, NOBODY BUT THE PEOPLE: THE LIFE AND TIMES OF ALABAMA'S YOUNGEST GOVERNOR 130–33 (2008).

173. HOWARD, *supra* note 117, at 90. It played an exceptionally important role in the future of Alabama politics. For example, in his excellent study of the period, Numan V. Bartley observes,

> [o]utside of Georgia and South Carolina there were no major statewide political contests in the Deep South during the period immediately following the *Brown* decision. James Folsom had been nominated for the governorship in Alabama prior to May 17, 1954. Louisiana would choose state officials in 1956, while Mississippi candidates staked out positions for the primary to be held in the summer of 1955.

NUMAN V. BARTLEY, THE RISE OF MASSIVE RESISTANCE: RACE AND POLITICS IN THE SOUTH DURING THE 1950'S 72 (1997). While this is true, it is crucial to remember that Albert Patterson's assassination, and thus his son's ascension to the office of Attorney General, and then Governor, came post-*Brown*.

174. HOWARD, *supra* note 117, at 125.

175. TREST, *supra* note 172, at 181.

176. *Id.* at 93.

177. *Id.* at 181.

178. HOWARD, *supra* note 117, at 26.

179. *Id.* at 40.

> and he spoke their language. A consummate storyteller with a warm, down-home sense of humor and a genuine interest in people, the youthful attorney general was bright, articulate, and much in demand as a public speaker after he entered the political arena.[180]

Crucially, he knew a useful political foe when he saw one and, as we will see in the next section, he knew the importance of political timing.

1. Gubernatorial Aspirations

Patterson made mountains of political hay from his full-frontal attack on the NAACP. Through his targeting of the organization, he "fanned the flame of defiance," a trend that continued throughout his campaign for, and then tenure as Governor of Alabama (1959–1963).[181] Indeed, his boasting "that he had 'run the NAACP out of the state'" was a central component of his 1958 gubernatorial campaign.[182] It "had made him a champion to Alabama's white voters."[183]

No sooner had the sounds of the marching bands finished reverberating off the walls of the Montgomery buildings that lined the January 1955 route of the parade for the new Governor James E. Folsom, than Alabama newspapers began serious speculation that the new attorney general would run to succeed Folsom in 1958.[184] Later in the year, the talk of "Patterson for Governor" only intensified.[185] "[P]eople turned out in impressive numbers to see this living link to the martyred Albert Patterson. And they began encouraging him to run for governor."[186] Yet, as AP correspondent Rex Thomas reported in an October 1955 article that ran in newspapers across the state, any such "talk" came mainly "from friends of the attorney general"; Patterson himself was saying nothing.[187] He was seriously considering running for the higher office, "but that information was closely held until he announced for governor in early 1958."[188]

The sense of martyrdom helped propel Patterson into the governorship, after prevailing against George Wallace in the 1958 primary. During the campaign,

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180. TREST, *supra* note 172, at 181.

181. WILLIAM A. NUNNELLEY, BULL CONNOR 86 (1991).

182. *Id.*

183. TREST, *supra* note 172, at 210.

184. *See* Hugh Sparrow, *Capitol Hill Ponders Why Gov. Folsom Left Atty. Gen. Patterson Off Road Corporation*, BIRMINGHAM NEWS, Jan. 30, 1955.

185. Rex Thomas, *Persons and Patterson May Vie for Governor in Next Campaign*, TALLADEGA DAILY HOME & OUR MOUNTAIN HOME, Oct. 2, 1955 [hereinafter *Persons and Patterson*]; Rex Thomas, *Hardwick and Wallace Put Forth in Governor's Race*, DOTHAN EAGLE, Oct. 2, 1955.

186. HOWARD, *supra* note 117, at 112.

187. *Persons and Patterson*, *supra* note 185.

188. TREST, *supra* note 172, at 181.

> Wallace would sometimes arrive in a town just after a Patterson rally, and as one of Wallace's aides recalls, "There'd be people standing around with tears in their eyes. He finally turned to us once and said, 'I'm runnin' against a man whose father was assassinated. How'm I suppose [sic] to follow an act like that?'"[189]

As Marshall Frady observes in his biography of Wallace, in the late 1950s the nature of Alabama's "central preoccupation" with the Black community changed.[190] During the decade, "racial issues" infected and influenced politics in the South to a far greater extent than they had over the first half of the twentieth century.[191] In Alabama, the political atmosphere went from one that was "for the most part . . . tacit and sometimes modestly charitable" to one that consisted of a "volatile, unabashed, brutal irascibility."[192] The elected official who served as the political catalyst for this change was *not* Wallace, but rather Patterson, who immediately preceded Wallace as the state's governor.[193] Even if ultimately "the distinction between Patterson and Wallace was one of degree," it is important to understand that Patterson was "a new departure" for Alabamians who had "always prided" themselves "on being at least a little more polite and civil . . . and even enlightened" than residents of neighboring states.[194] As John Hayman writes, "John Patterson was Alabama's governor at a very critical period, and decades later, it seems clear that he was the wrong man at the wrong time."[195] Continuing, Hayman observes that "[w]hat Alabama needed at this critical time was . . . a gifted, insightful leader. What it got, instead, was a man too young and inexperienced to understand the long-range implications of the situation."[196] To put it another way, what Alabama got was a Governor "[l]ong on ambition but short on political experience."[197]

It is crucial to understand, however, that while Patterson's *political* leadership was instrumental, his *legal* leadership—especially against the NAACP—required a cast consisting of two other significant actors.

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189. MARSHALL FRADY, WALLACE: THE CLASSIC PORTRAIT OF ALABAMA GOVERNOR GEORGE WALLACE 128–29 (1996).

190. *Id.* at 129.

191. *See generally* BARTLEY, *supra* note 173.

192. FRADY, *supra* note 189, at 129.

193. *Id.* at 129.

194. *Id.*

195. JOHN HAYMAN, BITTER HARVEST: RICHMOND FLOWERS AND THE CIVIL RIGHTS MOVEMENT 148 (1996).

196. *Id.* at 149.

197. *Id.* at 131 (citing James S. Taylor, *John M. Patterson and the 1958 Alabama Gubernatorial Race*, 23 ALA. REV. 226 (1970)).

B. Edmon L. Rinehart

In his memoir, Robert Carter writes that he is "sure" that "[t]he brains behind the state's maneuvers"[198] against the NAACP starting in 1956 were the brains of Assistant Attorney General Edmon L. Rinehart. Rinehart took the legal lead representing Alabama in the litigation from 1956 until January 1959. He wrote the lion's share of the briefs and ultimately argued *Patterson* at the Supreme Court of the United States in January 1958.[199] However, Rinehart's involvement in the case was grounded in fundamentally different reasoning than Patterson's.[200]

Edmon (Ted) Loftin Rinehart was born in New York City in 1920 and educated at Princeton and then at Harvard Law School.[201] When he enrolled at Princeton in 1938, his father encouraged him to join the Reserve Officers' Training Corps program (ROTC). Rinehart recalls his father's advice: "there's a war coming, and you'd be better off as an officer than just getting drafted."[202] Indeed, Rinehart had just returned from Europe that summer and could see war on the horizon.[203] And so, in 1942, upon the conclusion of the commencement ceremonies at Princeton, Rinehart took off his cap and gown to reveal his Army uniform, walked across a grassy area of campus to the awaiting military personnel, raised his right hand, and was sworn in as a second lieutenant.[204]

Between receiving his undergraduate degree (majoring in English) in 1942 and attending Harvard, Rinehart served as an officer with the 10th Field Artillery Battalion, 3rd Infantry Division in North Africa and Europe during World War Two. He was held as a German prisoner of war from January 1944 (after the Battle of Cisterna) until the end of the conflict (in Stalag VII A in Mossburg, and then in Oflag 64, in Szubin, Poland).[205] His military reactivation during the Korean War saw him stationed in Frankfurt, Germany (as part of the JAG corps), where he met fellow officer John M. Patterson.[206] The two men were essential legal personnel in an Army short of JAG officers and became good friends; after the war, they

198. CARTER, *supra* note 126, at 152.

199. *Patterson*, *supra* note 85.

200. For this section I am deeply indebted to Rinehart's daughter, Christine Rinehart Taft, for taking the time to share invaluable family history with me.

201. *Memorial: Edmon L. Rinehart '42*, PRINCETON ALUMNI WKLY. (Nov. 13, 2013), https://paw.princeton.edu/memorial/edmon-l-rinehart-'42 [https://perma.cc/P6MC-269B]; Telephone Interview with Christine Rinehart Taft (Jan. 25, 2024) [hereinafter Telephone Interview].

202. *Edmon L. Rinehart Collection*, VETERANS HIST. PROJECT, AM. FOLKLIFE CTR., LIBR. OF CONG., https://www.loc.gov/item/afc2001001.04647/ [https://perma.cc/54YZ-TJBS] (last visited May 31, 2024) (Collection number AFC/2001/001/4647).

203. *Id.*

204. *Id.*

205. *Id.*

206. *Rinehart, Edmon*, MONTGOMERY ADVERTISER, June 14, 2013.

remained in contact.[207] Indeed, today the Patterson and Rinehart families are still very close.[208]

After the assassination of his father, John Patterson reached out to Rinehart, asking him to come to Alabama, ostensibly to help with the legal fight against corruption in Phenix City.[209] Not until much later in their lives did Rinehart, and his children, learn that Patterson had actually recruited his friend because he knew that he needed an experienced lawyer—with the caliber of training that came with a Harvard Law School education—to help him confront the civil rights litigation he knew the attorney general's office would soon become embroiled in.[210]

As the Attorney General's letterhead from January 1956 indicates, Rinehart was initially hired as a Legal Research Aide, listed quite distinctly and separately from the assistant attorneys general (of which at the time there were eleven).[211] At some point, Rinehart went from research aide to assistant attorney general and took the legal lead representing Alabama in the NAACP litigation from its official inception on June 1, 1956, until early 1959 (when Patterson became Governor of Alabama in January 1959, and Rinehart became his Commissioner of Insurance).[212]

In the story told in this Article, Rinehart plays a relatively minor role, but it is important to mention him, to emphasize that Rinehart was one of only three outsiders that Patterson brought into the Attorney General's office.[213] Rinehart was very much an outsider, neither a Southerner nor a segregationist. The same could in no shape or form be said of the other individual who played a crucial role in the *Patterson* litigation.

C. Judge Jones: Speaking for the White Race

On Monday, January 19, 1959, when Patterson took the oath of office to become the forty-fourth (and youngest ever elected) Governor of Alabama, his first official act was to sign the new Montgomery County Circuit Court judicial commission for his friend Walter B. Jones, who had served on that bench since November 1920.[214] Jones was victorious every time he

207. TREST, *supra* note 172, at 111–12.

208. Telephone Interview, *supra* note 201.

209. *Id.*

210. *Id.*

211. Letter from John Patterson to the NAACP, Jan. 30, 1956, Part V, Box 23, Folder 3: NAACP Legal Department Case Files, Background Information, Alabama, *NAACP v. Alabama*, Related Cases, *State ex rel. Patterson v. NAACP*, 1956 Jan-June., NAACP-LOC.

212. HISTORY OF THE ALABAMA DEPARTMENT OF INSURANCE 1897–2022, ALA. DEP'T OF INS. (2022), https://www.aldoi.gov/PDF/Misc/ALDOIHistory.pdf [https://perma.cc/J7XF-2C8N].

213. The other two were MacDonald Gallion, to whom John Patterson "kept his father's promise to . . . make him senior assistant attorney general," and "Noel Baker, a friend of his father's from Opelika." TREST, *supra* note 172, at 182.

214. *Walter B. Jones Begins 8th Term*, TROY MESSENGER, Jan. 22, 1959.

came up for re-election and held his seat on the bench until his death in August 1963, serving as Presiding Judge from 1935 onwards.[215] By the time he issued the 1956 injunction against the NAACP, Judge Jones was the third most senior circuit court judge in Alabama (only two of the other fifty-five judges had served longer than him).[216] Jones was an immensely popular figure,[217] accurately described as "something of an institution in Montgomery . . . being as well-known there as the state capitol or Jefferson Davis' home."[218] One glowing biographical sketch that appeared in a Columbus, Georgia, newspaper in 1954 likened him to "the Biblical prophets of old" because "he has joined the fight against massive evil, and his words are like mountain thunder rolling across the sinful plain."[219]

Jones did not shy away from publicly expressing his racist and segregationist views. He "consciously wielded influence over the bar and the public,"[220] and

> [f]or newsmen, Jones is a dream come true. He smiles at practically everyone, but in the presence of reporters the judge is particularly hearty. In his pockets he is apt to be carrying several dozen copies of whatever public statement he happens to be making, and this is a heaven-sent blessing . . . .[221]

He fully appreciated the way in which his "position [gave] him a certain amount of prestige in the community," making it so that he was able to "easily reach the public ear."[222] He conveyed his opposition to numerous "massive evil[s]," not the least of which being efforts at desegregation. Yes, he played important positive roles in helping Arthur Shores and Fred D. Gray to become trailblazing Black civil rights lawyers in Alabama.[223] Yet, as Gray observes, Jones's behavior just "show[ed] one of the many

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215. Mary Ellen Maatman, *Speaking Truth to Memory: Lawyers and Resistance to the End of White Supremacy*, 50 HOW. L.J., 1, 29 (2006).

216. "Alabama's 56 Circuit Judges, July,1959, Listed According to Seniority," in Box 5, Folder 30, John Patterson Papers, Montgomery Co. – Jones, Walter B., 1954-1958, ADAH.

217. One individual, William F. Turner, went as far as to express his support for Jones's segregationist views by casting his Electoral College vote for Jones in December 1956. *See Pledged to Adlai; Votes for Another*, GREENVILLE NEWS, Dec. 18, 1956. This action, which Turner says "fulfilled my obligations to the people of Alabama . . . I'm talking about the White people," made Turner a so-called faithless elector because he "had signed a pledge" to support the Democratic ticket of Stevenson and Kefauver. *Id.*

218. Tom Sellers, *Judge Jones Heaps 'Fire and Brimstone' on Vice Elements in PC*, LEDGER-ENQUIRER, Aug. 15, 1954.

219. *Id.*

220. Maatman, *supra* note 215, at 29.

221. Sellers, *supra* note 218.

222. Walter B. Jones, *Lights and Shadows of the Bench*, 5 ALA. L.J. 21, 23 (1929).

223. Shores "became the dean of African American lawyers." FRED D. GRAY, BUS RIDE TO JUSTICE: CHANGING THE SYSTEM BY THE SYSTEM, THE LIFE AND WORKS OF FRED D. GRAY 21 (rev. ed. 2021).

paradoxes of how individuals who, under ordinary circumstances, would be very interest[ed] in helping an individual, but on the other hand, when it came down to separation of the races, it was altogether a different situation."[224]

Jones's regular "Off the Bench" column in the *Montgomery Advertiser*, which appeared on March 4, 1957, made this clear. It was entitled "I Speak for the White Race."[225] His point of departure, and inspiration for the title of the piece, was a short speech given over a half-century earlier by Representative (and later Senator) Edward Carmack (D-TN),[226] well-known for his defense of lynching.[227] The following are Carmack's words:

> I speak, sir, for my native state, for my native South. It is a land that has broken the ashen crust and moistened it with her tears; a land scarred and riven by the plowshare of war and billowed with the graves of her dead; but a land of legend, a land of song, a land of hallowed and heroic memories. To that land every drop of my blood, every fiber of my being, every pulsation of my heart, is consecrated forever. I was born of her womb, I was nursed at her breast, and when my last hour shall come I pray God that I may be pillowed upon her bosom and rocked to sleep within her tender and encircling arms.[228]

"Today I paraphrase the senator's words," wrote Jones in his column, "by saying: 'I speak for the White Race, my race.'"[229] While one had to read (albeit not with great difficulty) between the lines of Carmack's

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224. *Id*. at 21; *see also id.* at 20–22.

225. Walter B. Jones, *Off the Bench: I Speak for the White Race*, MONTGOMERY ADVERTISER, Mar. 4, 1957.

226. Jones erroneously stated, at the beginning of his column, that the speech was given by Senator Carmack in 1925 (Carmack served in the House from 1897 to 1901—and then the Senate from 1901 to 1907; he died in 1908). *Id.*; *Carmack, Edward Ward (1858–1908)*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONG., https://bioguideretro.congress.gov/Home/MemberDetails?memIndex=C000157 [https://perma.cc/Z6VA-QCWH] (last visited June 24, 2024).

227. Incidentally, after Carmack left the Senate he resumed his career as a newspaperman, becoming the editor of the *Nashville Tennessean*. Timothy P. Ezzell, *Edward Ward Carmack*, TENN. ENCYCLOPEDIA (Mar. 1, 2018), http://tennesseeencyclopedia.net/entries/edward-ward-carmack/ [https://perma.cc/486D-U7TG]. In 1908 he was shot and killed by one of the many individuals that he attacked using newspaper columns. *Id.*; *see generally* JAMES SUMMERVILLE, THE CARMACK-COOPER SHOOTING: TENNESSEE POLITICS TURN VIOLENT, NOVEMBER 9, 1908 (1994); *Woman Tells How Carmack Was Slain*, N.Y. TIMES, Feb. 17, 1909. A statue of Carmack was subsequently erected on the grounds of the State Capitol; individuals protesting the death of George Floyd knocked the statue to the ground in May 2020. Stephanie Toone, *Nashville Police Arrest City Hall Arson Suspect*, ATLANTA J. CONST. (May 31, 2020), https://www.ajc.com/news/breaking-nashville-city-hall-set-ablaze-amid-george-floyd-protest/tK8HBHVjukQBhSfsGiw2fJ/ [https://perma.cc/4EJE-FGPT]; *How Statues Are Falling Around the World*, N.Y. TIMES (June 24, 2020), https://www.nytimes.com/2020/06/24/us/confederate-statues-photos.html.

228. Representative Edward Carmack, Speech in the House of Representatives, *reprinted in* PROCEEDINGS OF THE THIRTEENTH ANNUAL CONVENTION OF THE TEXAS DIVISION OF THE UNITED DAUGHTERS OF THE CONFEDERACY, HELD IN TERRELL, DECEMBER 1–4, 1908 69 (1909).

229. Jones, *supra* note 225.

speech to discern his white supremacist views, Jones laid *his* opinions bare for the entire world to see, and it was one of the exhibits that accompanied Gray's congressional subcommittee statement during hearings about what would become the Civil Rights Act of 1957.[230] Jones felt compelled to speak out because of the way in which his race, the "White Race," was "being unjustly assailed all over the world. It is being subjected to assaults here by radical newspapers and magazines, communists and the federal judiciary."[231] These were typical southern refrains; and as a longstanding, revered jurist in the Cradle of the Confederacy, Jones was simply preaching to his choir. Southerners frequently put the NAACP into the same condemnable category as communists. Stephanie R. Rolph observes in her engaging book about the history of the Citizens' Council—a white supremacist organization founded in July 1954, in Indianola, Mississippi[232]—that the Council considered the NAACP to be "the most threatening enemy to white supremacy."[233]

Using language that would be echoed in Jones's writings and statements, the Council redefined "the organization's acronym as the 'National Association for the Agitation of Colored People.'"[234] Indeed, one "pamphlet assured its readers that the NAACP enjoyed the support of 'alien influences, bloc vote seeking politicians and left-wing do gooders.'"[235] Or, as Mississippi circuit court Judge Tom P. Brady (a jurist described—unflatteringly—by *TIME* magazine as the "philosopher of Mississippi's" Citizens' Councils)[236] explained in a June 1955 Citizens' Council speech in Alabama, the NAACP was "a willing and ready tool in the hands of Communist front organizations."[237] It was "pledged to the 'mongrelization of the South.'"[238] Consequently, "an organization" was needed "as a

230. *Hearings on "Civil Rights—1957" Before the Subcomm. on Const. Rts. of the Sen. Judiciary Comm.*, 85th Cong. (1957), 857–58 [hereinafter *Hearings*].

231. Jones, *supra* note 225.

232. ROLPH, *supra* note 152, at 12.

233. *Id.* at 56–57 (quoting from a pamphlet of the Association of Citizens' Councils of Mississippi).

234. *Id.*

235. *Id.*

236. The article provided a Brady quote that amply summarized the Judge's white supremacist views:

> Said he: 'The loveliest and the purest of God's creatures, the nearest thing to an angelic being that treads this terrestrial ball is a well-bred, cultured Southern white woman, or her blue-eyed, golden-haired little girl.' By contrast, he added: 'The social, political, economic and religious preferences of the Negro remain close to the caterpillar and the cockroach . . . proper food for a chimpanzee.'

Judges: The Education of Tom Brady, TIME (Oct. 22, 1965), https://time.com/archive/6874514/judges-the-education-of-tom-brady/ [https://perma.cc/5TQ3-JA99].

237. *Alabama Senate Unanimously Votes School Assignment Bill*, S. SCH. NEWS, July 6, 1955, at 2.

238. *Id.*

slingshot to 'hit between the eyes of that giant monster.'"[239] This is why Fred Gray recommended that the leaders of the Montgomery bus boycott not involve the organization.[240] It may have been one of "the most conservative of all the civil rights organizations, utterly committed to seeking black advancement through the courts rather than through direct action,"[241] but to its opponents, this did not matter. The end, not the means, is what they cared about. And so, quite simply, it came to pass that "[t]he very name NAACP provoked hatred and overreaction."[242] "[O]bsessed with the Confederacy,"[243] Jones was convinced the radical northern press was misleading its readers with "untrue and slanted tales about the South."[244] It was engaged in "a massive campaign of super-brainwashing propaganda . . . directed against the white race."[245] Why did Jones think this campaign was happening?

The answer to that question was simple and became the focus of the rest of his column. The campaign was being waged "particularly by those who envy" the "glory and greatness" of the white race,"[246] and Jones felt compelled to explain—in unabashedly racist language—just how obvious, and justified, that "glory and greatness" was. "[I]mpartial history" tells us of the "technical and political supremacy" of the "white race," supremacy that has reigned "through the centuries."[247] Jones took readers on a tour of great and famous explorers, sculptors, composers, poets, artists, authors, philosophers, legal minds, historians, medical doctors, religious leaders, astronomers, scientists, all the signers of the Declaration of Independence and the U.S. Constitution, and the inventors of "[p]ractically all useful" things.[248] The one thing they all (conveniently) had in common was that they were all white. So, in conclusion, wrote Jones, "when you call the roll

239. *Id.*

240. *See infra* Part IV.A.1.

241. J. MILLS THORNTON III, DIVIDING LINES: MUNICIPAL POLITICS AND THE STRUGGLE FOR CIVIL RIGHTS IN MONTGOMERY, BIRMINGHAM, AND SELMA 108 (2002).

242. GRAY, *supra* note 223, at 105. The article that appeared in the *Alabama Journal* the day after the Supreme Court's ruling in *Patterson* was typical. With no small sense of irony, the newspaper compared the "clandestine gang" NAACP to "the Ku Klux Klan, Clan-na-Gael, the Mafia, Al Capone's gangsters," and "the slimy and slinky Communist cells"—all of which it considered to be "[u]nderground organizations operating in secrecy . . . [as] a menace to American institutions." *High Court Upholds Secrecy; Approves Clandestine Gang*, ALA. J., July 1, 1958. The Montgomery-based publication did not hold back in expressing its contempt for the Court's ruling: "Perhaps it is really lawful in the eyes of the Supreme Court for men to hide their faces with bed sheets to commit unlawful acts. But it is not manly; it is not respectable; it is not truly American." *Id.*

243. SAMANTHA BARBAS, ACTUAL MALICE: CIVIL RIGHTS AND FREEDOM OF THE PRESS IN *NEW YORK TIMES V. SULLIVAN* 103 (2023).

244. Jones, *supra* note 225.

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.*

of the world's noble and useful spirits, the men and women of the white race stand up in honor and glory with a just pride in the race's achievements."[249] As if to underscore Gray's observations about the sometimes paradoxical nature of human behavior, Jones's next statement—"We have all kindly feelings for the world's other races"[250]—was swiftly followed by an important qualifier—"*but we will maintain at any and all sacrifices the purity of our blood strain and race*. We shall never submit to the demands of integrationists. The white race shall forever remain white."[251]

Jones also played a major judicial role in *New York Times v. Sullivan*, another major First Amendment case that originated in Montgomery and that the Supreme Court of the United States ultimately resolved with a landmark ruling that reshaped American libel law.[252] The Court struck down Alabama's per se libel law, which did not require someone to show that an individual's speech had harmed them (damaged their reputation). As Professor Kalven observed in his famous article about *Sullivan*, "[p]olitical freedom ends when government can use its powers and its courts to silence its critics."[253] *Sullivan* made such governmental action far more difficult to undertake without running afoul of the Constitution. The Court unanimously ruled that such a public individual now had to prove that someone's statement about them was "made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[254] The case first saw the inside of a courtroom for trial on November 1, 1960, and as Samantha Barbas writes in her instructive history of the litigation, "[f]rom Montgomery's perspective, no one was better suited to hear" the case than Judge Jones.[255] Exactly the same could be said of the *Patterson* litigation.

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249. *Id.*

250. *Id.*

251. *Id.* (emphasis added).

252. 376 U.S. 254 (1964).

253. Harry Kalven, Jr., *The* New York Times *Case: A Note on the Central Meaning of the First Amendment*, 1964 SUP. CT. REV. 191, 205.

254. *Sullivan*, 376 U.S. at 279–80 (Goldberg, J., concurring).

255. BARBAS, *supra* note 243, at 103. Barbas uncovers some deeply troubling and unseemly details about Jones's life and his involvement with the *Sullivan* case:

> A lifelong bachelor, Jones lived with his sister in an inherited mansion in downtown Montgomery. At his 680-acre summer estate called Jonesboro, he ran a camp for boys he had purportedly 'rescued' from the juvenile courts. The walls of his study were said to be covered from ceiling to floor with photographs of these young men, many of them nude. The gavel he used in his courtroom had small inset photographs on its end depicting an angelic-looking boy, upon which he gazed during court proceedings. Jones had once been arrested for molesting a boy in the YMCA. He fired the director, and L.B. Sullivan hid the arrest report so it wouldn't be mentioned in the local press.

Id. at 105. This is the same Montgomery city commissioner Sullivan who brought the libel suit against the *New York Times* in the 1960 *Sullivan* case. *Id.* at 43–49, 65, 68–69.

D. Preparing to Petition for Certiorari

On Friday March 1, 1957, three days before Jones's "White Race" column was published, Thurgood Marshall sent a series of telegrams canceling various scheduled engagements in New York City. He was needed in the nation's capital for "emergency" "preparing and briefing" in the *Patterson* case. It was a situation that "takes precedence over everything else."[256] After the Alabama Supreme Court once again refused to review the $100,000 fine in a ruling issued on December 6, 1956, the certiorari clock started ticking. If the NAACP wanted to appeal the decision to the Supreme Court of the United States, it had three months to file its petition for certiorari. It became increasingly clear that meeting the March 6 filing deadline with the strongest possible brief would be exceptionally difficult. "Attorneys for petitioner," wrote Marshall, "have been engaged in similar litigation and legislative hearings and executive hearings in several states throughout the South. Consequently," he continued, "they have been unable to give sufficient time for preparation of a petition for certiorari worthy of the vital constitutional issues" presented in the *Patterson* case.[257] This language appeared in the March 4 application that Marshall filed with the chambers of Justice Black, where Marshall asked for a two-week extension on the certiorari petition filing deadline. It was submitted to the chambers of Justice Black because he was the member of the Court responsible for such filings that came from cases within the Fifth Circuit. Justice Black granted the request for an extension the same day that he received it.[258]

The delay was fortuitous because the later filing date enabled the NAACP to reference Jones's column in its cert petition (it reprinted the

256. Telegram from Thurgood Marshall to Haris [sic] L. Present, Mar. 1, 1957, in Group III, Box J4: NAACP 1956-65, Inc Fund, Administrative File, Folder: NAACP Prevention from doing business in states 1956-1958, NAACP-LOC.

257. Application for Extension of Time to File a Petition for Writ of Certiorari to the Supreme Court of Alabama, *NAACP v. Patterson*, October Term 1957, Mar. 4, 1957, in Part V, Box 23, Folder 7: NAACP Legal Department Case Files, Background Information, Alabama, *NAACP v. Alabama*, Related Cases, *State ex rel. Patterson v. NAACP*, 1957 Jan.-Mar., NAACP-LOC.

258. Order Extending Time to File Petition for Writ of Certiorari, *NAACP v. Patterson*, Mar. 4, 1957; Part V, Box 23, Folder 7: NAACP Legal Department Case Files, Background Information, Alabama, *NAACP v. Alabama*, Related Cases, *State ex rel. Patterson v. NAACP*, 1957 Jan.-Mar., NAACP-LOC. The following day, Marshall informed Patterson of this development. Unsurprisingly, Patterson subsequently requested that the deadline for filing the Respondent's brief opposing the cert petition be similarly extended, a request to which both Patterson and the Court agreed. Letter from Thurgood Marshall to John Patterson, Mar. 5, 1957; Telegram from Edmon Rinehart to Thurgood Marshall, Mar. 29, 1957, both in Part V, Box 23, Folder 7: NAACP Legal Department Case Files, Background Information, Alabama, *NAACP v. Alabama*, Related Cases, *State ex rel. Patterson v. NAACP*, 1957 Jan.-Mar., NAACP-LOC. Brief and Argument in Opposition to Petition for Writ of Certiorari, National Association for the Advancement of Colored People v. State of Alabama, ex rel. John Patterson, Attorney General, 357 U.S. 449 (1958) (No. 57-91).

column in Appendix C of the petition).[259] The NAACP aptly described it as exemplifying the ongoing "[h]ostility against all who seek compliance with the decisions of this Court on the question of the illegality of state-imposed racial segregation."[260]

On May 5, 1958, while on the Democratic primary re-election trail, Jones gave a televised campaign speech (aired on WSFA-TV) which included the following statement: "I intent [sic] to deal the NAACP . . . a blow from which they shall never recover."[261] It was a statement which, during sworn testimony, he admitted making.[262] Shortly thereafter (and before the Supreme Court ruled in *Patterson*), the NAACP failed in its attempt to force Jones to recuse himself from further involvement in the litigation. The column was just one of many exhibits put forward by the Association as evidence of Jones's bias.

IV. "BY 1956, THE LIGHTS OF REASON, TOLERATION, AND MODERATION WERE ALL BUT OUT"

Alabama's effort to oust the NAACP was one example of the way in which, "[b]y 1956, the lights of reason, toleration, and moderation were all but out"[263] in that state—as Jones's (and increasingly Patterson's) political rhetoric laid bare. The *Patterson* litigation did not suddenly spring forth, Athena-like, from the Attorney General's office in Montgomery in the summer of 1956; instead, it emerged from a climate wherein "attitudes . . . hardened, bitter reaction was well on its way toward controlling events in the state, and race had become the overriding political issue."[264] As journalist William A. Nunnelley wrote in his biography of Eugene "Bull" Connor,[265] Patterson took this political temperature and, as a result, chose to "fan[] the flame of defiance with his attacks on the NAACP."[266] To understand how Patterson—and Alabama—got to June 1, 1956, it is necessary to look back at events of the preceding months. To reiterate a point made above, while it is doubtful that the initiation of Alabama's legal attack on the NAACP would have happened without the actions of *one person*

259. Petition for Writ of Certiorari, *supra* note 104, app. C 19a–22a.

260. *Id.* at 22.

261. *See* Letter from Fred D. Gray to Robert Carter, May 17, 1958, Part V, Box 24, Folder 2: NAACP Legal Department Case Files, Alabama, *NAACP v. Alabama*, Related Cases, *State ex rel. Patterson v. NAACP*, 1958, NAACP-LOC.

262. *Threats Against NAACP Admitted by Judge Jones*, SELMA TIMES-JOURNAL, June 20, 1958, at 12.

263. HAYMAN, *supra* note 195, at 121.

264. *Id.* at 118.

265. Connor was the infamous white supremacist Birmingham Commissioner of Public Safety from 1957 through until 1963. *Eugene 'Bull' Connor Dies at 75; Police Head Fought Integration*, N.Y. TIMES, Mar. 11, 1973.

266. NUNNELLEY, *supra* note 181, at 86.

(Patterson), it cannot be said that there was one solitary correlative or causal *event*.

So, where is it most profitable for us to start our timeline of analysis? Perhaps with the Supreme Court's landmark May 17, 1954 decision in *Brown v. Board of Education of Topeka, Kansas*?[267] As the historian David Terry aptly describes it, "[i]n fall 1954, the Jim Crow South vibrated with the energy let loose by *Brown* earlier that year."[268] However, as the data confirm, not every state moved to the same rhythmic vibrations, and the energy unleashed by the decision was not uniform across the South in either its nature or its origins.[269] Ten years after *Brown*, there were wide disparities in the percentages of Black children attending integrated schools. In West Virginia and Kentucky, the percentages were 58.2 and 54.4 respectively. Contrast that with 1.63% in Virginia and 0.52% in Georgia, and with Alabama and South Carolina who were barely registering on the scale with 0.007% and 0.004% of their Black children being educated in desegregated schools.[270] And then there was Mississippi, which in April 1964 could proudly claim that none of its Black students were attending integrated schools.[271] Mississippi, at whose "borders," as Anthony Lewis wrote, "[t]he revolution that so profoundly changed American race relations between 1954 and 1964 stopped."[272] Additionally, although integration came very slowly to Alabama, just as it did to all the states in the Deep South, it was not as easy for "segregationists . . . to rouse the people" of Alabama "to all-out resistance"[273] as it was in somewhere like Mississippi.

A. 1955

Even if the impact of *Brown* in Alabama was more muted than in, say, Mississippi, one cannot ignore the fact that the 1954 decision "focused race politics in the South."[274] Enter 1955. Reflecting upon the landmark 1964 decision in *Sullivan*, Gray, the civil rights lawyer who played a pivotal role in the *Patterson* litigation by overseeing the local filings, (among other things),[275] observed that "the case must be understood as a

267. 347 U.S. 483 (1954).

268. Terry, *supra* note 127, at 50.

269. For very good overviews of the diverse southern reaction to *Brown*, see LEWIS & N.Y. TIMES, *supra* note 12, at 29–59.

270. *Id.* at 257.

271. *Id.*

272. *Id.* at 177.

273. HAYMAN, *supra* note 195, at 118.

274. BARTLEY, *supra* note 173, at 67.

275. Gray first met Carter in the spring of 1956 when he went to New York City to discuss *Browder v. Gayle.* This meeting, writes Gray, "was the beginning of a long professional relationship with" Carter and Marshall. GRAY, *supra* note 223, at 72–73. *Browder* involved a challenge to the

culmination of events beginning with the origin of the civil rights movement on December 1, 1955."[276] He also observed that "[t]he legal principles propounded by the Supreme Court made possible many of the accomplishments of the civil rights movement. These principles would also serve as a substantial part of the foundation of First Amendment law for the next three decades."[277] Exactly the same can be said of *Patterson*.

At some point early in 1955, a group of political leaders (including Patterson and his Georgia counterpart J. Lindsay Almond) gathered in Birmingham for a secret meeting.[278] Conversations between the two state attorneys general generated plans for one manifestation of the South's "bitter reaction" to Black civil rights activism and post-*Brown* integrationist demands. After deciding that the "drift of the courts was now unmistakable,"[279] and realizing "that the Constitution was the enemy of segregation, at least in the case of public institutions,"[280] the leaders arrived at a "'consensus . . . ,' Patterson later explained, '. . . that we could never win this fight. But we wanted to delay the inevitable as long as we could.'"[281] As at least two scholars have reported, it was Attorney General Almond who originally suggested that a delaying tactic should come out of Patterson's office in the form of a lawsuit targeting the foreign corporation status of the NAACP.[282]

1. December 1, 1955

Exactly when Rinehart presented Patterson with specific plans for undertaking the foreign corporation fight against the NAACP is unclear.

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constitutionality of the racially segregated buses in Montgomery. In November 1956, the Supreme Court of the United States summarily affirmed the June ruling, by the U.S. District Court for the Middle District of Alabama, holding that the segregated buses were indeed unconstitutional. Browder v. Gayle, 142 F. Supp. 707, 717, *aff'd*, 352 U.S. 903 (1956). The NAACP retained Gray as local counsel in the summer of 1956 after Jones issued the June 1 injunction. GRAY, *supra* note 223, at 73.

276. Fred D. Gray, *The Sullivan Case: A Direct Product of the Civil Rights Movement*, 42 CASE W. RSRV. L. REV., 1223, 1225 (1992).

277. *Id*.

278. There are only three pieces of correspondence between Patterson and Almond in the Almond papers, and all are from 1959–1961, and involve matters unrelated to the *Patterson* litigation. E-mail from Matthew Guillen, Res. Coordinator, Va. Museum of Hist. & Culture, to Helen Knowles-Gardner, Author (Feb. 29, 2024) (on file with journal). There is also an absence of correspondence between J.P. Coleman and Patterson in the 1955 files of Coleman (Coleman was elected Governor of Mississippi in the fall of 1955). Memorandum from the Miss. Dep't of Archives & Hist. to Helen Knowles-Gardner, Author (Mar. 13, 2024) (on file with journal). Patterson biographer Gene Howard says the meeting was early 1956, not 1955, but considering the Patterson–NAACP January 1956 correspondence, this seems very unlikely. *See* HOWARD, *supra* note 117, at 136–38.

279. FRYE GAILLARD, CRADLE OF FREEDOM: ALABAMA AND THE MOVEMENT THAT CHANGED AMERICA 52 (2004).

280. *Id.*

281. *Id.*

282. *Id.* at 52–53; TREST, *supra* note 172, at 202.

However, things were likely put on an accelerated timetable on December 1, 1955, when Rosa Parks refused to move from her seat in the whites-only section of a Montgomery city bus.[283] The Montgomery bus boycott that followed, beginning on December 5 and lasting over a year (until December 20, 1956),[284] "removed any lingering doubts about the seriousness which most blacks felt about civil rights. It focused world attention on the issue, and it accelerated the impact on public opinion and on national resolve to seek a solution."[285] It also accelerated the timetable for the litigation that would become *Patterson*. In short, after December 5, 1955, and as the calendar in Alabama turned from a year that was "critical"[286] to one where "the lights of reason, toleration, and moderation" largely ceased to exist,[287] it became clear to all—Black and white—that "Montgomery was bracing for a fight."[288] The "white community's response to the bus boycott"[289] had the effect of "plung[ing]" Montgomery into a "nightmare of extremist domination."[290] And in 1956, that "fight" would manifest itself in many different forms, including the *Patterson* litigation.

B. 1956

In the NAACP's 1955 yearend statement, Roy Wilkins wrote of "people . . . asserting the right of one set of people to rule, exploit, degrade, terrorize and murder another set of people,"[291] specifically referring to the Citizens' Councils.[292] However, as Wilkins and his colleagues were aware, the widespread southern efforts to "rule, exploit, degrade, terrorize and

283. *An Act of Courage, The Arrest Records of Rosa Parks*, NAT'L ARCHIVES, https://www.archives.gov/education/lessons/rosa-parks [https://perma.cc/5WUD-A6NJ] (last visited May 30, 2024).

284. J. Mills Thornton, III, *Challenge and Response in the Montgomery Bus Boycott of 1955–1956*, 67 ALA. REV. 40, 73–74 (2014); *Montgomery Bus Boycott December 5, 1955 to December 20, 1956*, STANFORD UNIV., THE MARTIN LUTHER KING, JR. RSCH. & EDUC. INST., https://kinginstitute.stanford.edu/montgomery-bus-boycott [https://perma.cc/Y98K-PGLH] (last visited Aug. 5, 2024); *Statement on Ending the Bus Boycott*, STANFORD UNIV., THE MARTIN LUTHER KING, JR. RSCH. & EDUC. INST., https://kinginstitute.stanford.edu/king-papers/documents/statement-ending-bus-boycott [https://perma.cc/NF96-PCW4] (last visited June 24, 2024).

285. HAYMAN, *supra* note 195, at 110.

286. *Id.* at 118.

287. *Id.* at 121.

288. GAILLARD, *supra* note 279, at 15.

289. THORNTON, *supra* note 241, at 123.

290. *Id.*

291. *Segregation: Problem Brings New Year in Tight Attitude—Of Tension*, TALLADEGA DAILY HOME & OUR MOUNTAIN HOME, Jan. 2, 1956, at 3.

292. At the beginning of 1956, Dallas County—whose county seat is Selma—had the largest Citizens' Council chapter in Alabama. THORNTON, *supra* note 241, at 404. By the end of January, the membership of the Montgomery chapter had swelled to approximately 6,000; by the end of February that figure had doubled. GAILLARD, *supra* note 279, at 25.

murder"[293] people—principally Blacks—would by no means be confined to Citizens' Council members.

1. January

As discussed above, as early as 1953 internal discussions were taking place at the NAACP regarding potential southern strikes against the organization—strikes grounded in state foreign registration laws.[294] On January 30, 1956, the *potential* took an important step towards becoming a *reality* when Patterson wrote a letter to the NAACP that "requested" that the organization "send us [the Alabama Attorney General and his staff] a copy of your certificate of incorporation and by-laws, for our information and files."[295] Although on its face the letter seemed innocuous, the NAACP leadership knew exactly what it really meant and what it portended. Evidence of this is the fact that someone underlined, in pencil, the words "and by-laws," and a question mark accompanied the underlining.[296] The request for a copy of the by-laws clearly meant a request for a copy of the by-laws of one (or more) of the NAACP's units in Alabama. This was the official opening salvo in *Patterson*.

2. February

In February, events in Montgomery continued to heighten the sense of urgency with which Patterson and his staff felt it necessary to get the NAACP out of Alabama. On January 31, Judge Frank M. Johnson received word that the U.S. Senate had confirmed him to a seat on the United States District Court for the Middle District of Alabama.[297] He had been serving as an Eisenhower recess appointment on that Montgomery-based bench since November 7, 1955.[298] He was subsequently nominated to the lifetime position by the President on January 12, 1956, and swiftly confirmed.[299] On February 1, the same day that he received his formal commission, the district court received the filings in *Browder v. Gayle*,[300] which challenged the constitutionality of Montgomery's racially segregated buses. Johnson was part of the three-judge panel to whom the case

293. *Segregation*, *supra* note 291.

294. "Relationship Between NAACP Branches and NAACP," memo, *supra* note 167.

295. Patterson to the NAACP, Jan. 30, 1956, *supra* note 211.

296. *Id.*

297. JACK BASS, TAMING THE STORM: THE LIFE AND TIMES OF JUDGE FRANK M. JOHNSON, JR. AND THE SOUTH'S FIGHT OVER CIVIL RIGHTS 104 (1993).

298. *Id.* at 88.

299. *Johnson, Frank Minis, Jr.*, FED. JUD. CTR., https://www.fjc.gov/node/1382831 [https://perma.cc/2NTR-V33Q] (last visited Mar. 7, 2024).

300. 142 F. Supp. 707, *aff'd* 352 U.S. 903 (1956).

was assigned by the chief judge of the Fifth Circuit Court of Appeals.[301] It was a momentous, but also turbulent, week in Alabama history as, one hundred miles to the northwest of Montgomery, in Tuscaloosa, Autherine Lucy registered as the first Black student at the University of Alabama on February 3.[302] In the days that followed, the campus was engulfed in violent protests and rioting.[303]

The evening of Friday, February 10, four days after the University expelled Lucy for her own protection,[304] a crowd of between 11,000 and 12,000 (or possibly as many as 15,000)[305] people packed into Montgomery's Alabama Coliseum for a Citizens' Council rally—the largest of its kind. To put this into perspective, these figures exceeded the number of people who attended the first major event held at the venue—the July 1951 homecoming concert by local music hero Hank Williams.[306]

At the 1956 rally, the main attraction was Senator James O. Eastland (D-MS). Undoubtedly "[t]he most aggressive advocate of a [post-*Brown*] southern informational offensive,"[307] two weeks after the Court's decision Eastland took to the floor of the Senate to condemn the Court and *Brown*. Amongst other things, he said: "Our Court has been indoctrinated and brainwashed by left-wing pressure groups. The Court is out of step with the American people."[308] If the crowds came expecting fiery, unabashedly white supremacist language, they did not leave disappointed. As the *Montgomery Advertiser* reported in extensive coverage, the crowds "came from everywhere."[309] It was "the largest political crowd in the recent history of the state."[310] They arrived "in shiny new Cadillacs, pickup trucks, rattletrap old Fords and atomic age Jaguars," ready "to 'rededicate themselves to the Southern way of life.'"[311]

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301. FRANK SIKORA, THE JUDGE: THE LIFE & OPINIONS OF ALABAMA'S FRANK M. JOHNSON, JR. 25–26 (2007).

302. *Alabama U. Rally Protests a Negro*, N.Y. TIMES, Feb. 5, 1956.

303. *Id.*; Peter Kihss, *Negro Co-ed Is Suspended To Curb Alabama Clashes*, N.Y. TIMES, Feb. 7, 1956.

304. Kihss, *supra* note 303.

305. Bob Ingram, *Throngs Pack Coliseum for Eastland's Address*, MONTGOMERY ADVERTISER, Feb. 11, 1956, at 1.

306. *Thousands Attend Homecoming for Hank Williams Here*, MONTGOMERY ADVERTISER, July 16, 1951, at 2; *10,000 People Expected for Hank Williams Homecoming*, MONTGOMERY ADVERTISER, July 13, 1951, at 9.

307. BARTLEY, *supra* note 173, at 171.

308. 83 CONG. REC. 7254 (1954) (statement of Sen. Eastland).

309. Joe Azbell, *Coliseum Crowd Overflows to Hear 'Dixie Defender'*, MONTGOMERY ADVERTISER, Feb. 11, 1956, at 1.

310. *Id.*

311. *Id.*

One of the newspaper's article subheadings spoke volumes about what Eastland came to say: "Senator Hits NAACP Move at Rally Here."[312] The timing was perfect, as was the target. Using fiery rhetoric designed to rile up the choir to whom he was preaching, Eastland said: "I am sure you are not going to permit the NAACP to control your state, and you are not going to permit that organization to use your little children as pawns in a game of racial politics."[313] How should this objective best be achieved? "There is only one course open for the South to take, and that is stern resistance . . . . We must fight them with every legal weapon at every step of the way. Southern people are right both legally and morally."[314] On February 22, one "legal weapon" was wielded when Martin Luther King, Jr., and eighty-nine other individuals were indicted for violating Alabama's anti-boycott law.[315] For his role in the Montgomery bus boycott, King was convicted one month later.[316]

3. Onwards to June 1

For thirteen days, from mid-February to early March 1957, the Senate Judiciary Committee's Subcommittee on Constitutional Rights held hearings on legislative "Proposals to Secure, Protect, and Strengthen Civil Rights of Persons Under the Constitution and Laws of the United States."[317] These proposals helped shape the content of the Civil Rights Act that President Eisenhower signed into law later that year. Tellingly, in March 1957, Patterson said that if the pending legislation became law, it "would be the first step towards creation of a police state."[318]

Fred Gray was one of the many individuals who submitted a sworn statement to the Subcommittee.[319] Gray's statement summarized the climate of fear in Montgomery and detailed numerous incidents that had occurred since the December 1, 1955, arrest of Parks and the start of the Montgomery bus boycott. As Gray's extensive statement (accompanied by twenty-three Exhibits) explained, there was "an organized conspiracy to harass and intimidate" the city's Black residents, "with the police

312. Ingram, *supra* note 305.

313. *Id.*

314. *Id.*

315. *State of Alabama v. M. L. King, Jr., Nos. 7399 and 9593*, STAN. U. MARTIN LUTHER KING, JR. RSCH. & EDUC. INST., https://kinginstitute.stanford.edu/state-alabama-v-m-l-king-jr-nos-7399-and-9593 (last visited May 30, 2024) [https://perma.cc/L83B-4AJA].

316. Wayne Phillips, *Negro Minister Convicted of Directing Bus Boycott*, N.Y. TIMES, Mar. 23, 1956, at 1.

317. *Hearings*, *supra* note 230.

318. Gene Wood, *Segregation Regarded Top State Problem by Patterson*, SELMA TIMES-JOURNAL, Mar. 29, 1957, at 1.

319. *Hearings*, *supra* note 230, at 825–70 (Statement of Fred D. Gray, Counsel, Montgomery Improvement Association).

department leading the attack."[320] While most of the occurrences he discussed were acts directed at specific individuals (for myriad reasons), he also described an event that directly targeted the NAACP.[321]

The event, which had been in the planning since early July,[322] took place in Montgomery's Court Square on Saturday, August 4, 1956, the first weekend day after the imposition of the $100,000 contempt fine. August 4 was a very hot and humid day in Montgomery; the forecast anticipated that temperatures would climb into the mid-nineties, and there was only a slight chance that the afternoon would bring thunderstorms to break some of the heat.[323] That morning, a dozen men from the Montgomery Committee on the Preservation of Segregation (C.O.P.S.)—including local members of the Citizens' Council—set out "to stir the racial cauldron" by driving two vehicles to an area in front of the Court Square Foundation on Dexter Avenue[324] (Dexter Avenue runs gently uphill from there to the prominently visible Alabama State Capitol building) and setting up gallows scaffolding featuring two effigies. While the *Montgomery Advertiser* (which featured a picture of the effigy on its front page the next day) emphasized, under a heading "WRECKED BY POLICE," that "police tore down the macabre gallows scene"[325] about an hour later, the *Alabama Journal* observed (as did Gray in his statement) that the "[p]olice paved the way for the truck and station wagon" to proceed to Court Square, "stopping traffic" for the vehicles.[326]

To the sounds of the Confederate Rebel Yell ("Woh-who-ey!") and the playing of both Reveille and Taps,[327] the group hoisted up two effigies onto gallows topped with two flags (the Stars and Stripes and the Star and Bars) and two dead crows. One effigy was a black dummy wearing a sash that read "N.A.A.C.P"; the other white dummy read "I talked intergration [*sic*]." "Jim Crow" was painted on the lower part of the wooden structure, and a sign on the front read "*Built By* UNION LABOR." As the *Advertiser* reported, that sign "was in defiance of 'Northern labor leaders who preach integration.'"[328]

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320. *Id.* at 827.

321. *Id.* at 829.

322. *Wrecked by Police: Integration Opponents Hang 2 Effigies in Court Square*, MONTGOMERY ADVERTISER, Aug. 5, 1956, at 1A [hereinafter *Wrecked by Police*].

323. *Partly Cloudy, Hot Predicted*, ALA. J., Aug. 4, 1956.

324. *Wrecked by Police*, *supra* note 322.

325. *Id.*

326. Joel Vance, *Protest on Integration Brings Effigy Hangings*, ALA. J., Aug. 4, 1956; *Hearings*, *supra* note 230, at 829 (statement of Att'y Fred D. Gray).

327. *Wrecked by Police*, *supra* note 322.

328. *Id.* at 2A (quoting an "informed source").

Although the actions of the twelve men generated little more than mild interest from the passersby and shoppers,[329] their message was not lost on anyone. Bystanders' comments demonstrated widespread support for the segregationist and white supremacist principles that the display exuded. As State Senator Sam Engelhardt (who was also the executive secretary of the Alabama Association of Citizens' Councils) observed, "Any way you can poke the NAACP is all right with me."[330]

Famously, later in life, his segregationist stance was one of the things about which Patterson publicly expressed regret, but that regret comes with an important qualifier. In a 1984 interview, he lamented the "uncompromising position" on segregation that he adopted while Attorney General and Governor.[331] "But," he emphasized rather disingenuously, "the governor and attorney general are required to uphold the laws as they were written. We had no choice but to uphold the laws that were on the books."[332] For almost four decades the NAACP operated in Alabama without the state contending that it was failing to comply with the foreign corporation "laws that were on the books."[333] By now, it should be clear that Alabama in 1956 was not a place where Patterson could afford to adopt anything other than a strong segregationist stance if he wanted to stay in office or aspire to a higher elected position.

Five days after receiving Patterson's January 30 letter, Wilkins penned an equally brief reply, making it clear that the NAACP knew exactly what the Attorney General was up to.[334] No by-laws were included; instead, accompanying the organization's Constitution was its Certificate of Incorporation.[335] Wilkins heard nothing further about the matter for three months. And then Patterson's follow-up letter landed on Wilkins's desk on May 17.[336] Here it is worth reprinting and analyzing all three paragraphs of that piece of correspondence. Paragraph one reads,

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329. *Id.*; Vance, *supra* note 326.

330. *Wrecked by Police*, *supra* note 322, at 2A.

331. Phillip Rawls, *Patterson Has Three Key Regrets About His Term*, BIRMINGHAM POST-HERALD, Jan. 19, 1984, at C4.

332. *Id.*

333. *Id.*

334. Letter from Roy Wilkins to John Patterson, Feb. 7, 1956, Part V, Box 23, Folder 3: NAACP Legal Department Case Files, Background Information, Alabama, *NAACP v. Alabama*, Related Cases, *State ex rel. Patterson v. NAACP*, 1956 Jan-June., NAACP-LOC.

335. *Id.*

336. Letter from John Patterson to Roy Wilkins, May 14, 1956 [letter is stamped as received by the NAACP on May 17, 1956], Part V, Box 23, Folder 3: NAACP Legal Department Case Files, Background Information, Alabama, *NAACP v. Alabama*, Related Cases, *State ex rel. Patterson v. NAACP*, 1956 Jan-June., NAACP-LOC.

> I wish to thank you for sending me a copy of the Certificate of Incorporation and Constitution of the National Association for the Advancement of Colored People that I requested.[337]

Of course, Patterson only requested the second of these two documents. Patterson was not fazed by Wilkins's failure to furnish a copy of the NAACP's by-laws, and he chose not to bring it to Wilkins's attention. Both actions speak volumes. These two men knew exactly what each other was up to. The next two paragraphs of the letter state, in relevant part:

> I would appreciate it very much if you would furnish me the address and locations of the N.A.A.C.P. Chapters and offices in Alabama, and the names of any officers or employees of said association that reside in Alabama.[338]
>
> I need this information to complete my files.[339]

The penciled annotation below these paragraphs tells us all we need to know about the way in which the NAACP viewed this additional request, which the Attorney General was telling them was simply a request for documents to "complete" his "files." The annotation read as follows: "Bob [Carter] skeptical—await TM. [Thurgood Marshall], in Friday."[340]

Two weeks later, Carter and Marshall received word of the June 1 injunction.

V. THE NAACP'S "KEEL"

As John Hope Franklin so astutely observes, Robert Carter was "the savior of the NAACP in the southern states."[341] Or, to put it another way, as one of Carter's associates has done, Carter was the NAACP's legal "keel."[342] Robert Carter first invoked the First Amendment in the *Patterson* litigation at the July 25 hearing when he refused to disclose the NAACP's membership information (to which Jones responded by placing the NAACP in contempt of court).[343] Immediately thereafter, Carter placed a telephone call to Marshall. He was calling to notify Marshall that

337. *Id.*

338. *Id.*

339. *Id.*

340. *Id.*

341. John Hope Franklin, *Foreword* to ROBERT L. CARTER, A MATTER OF LAW: A MEMOIR OF STRUGGLE IN THE CAUSE OF EQUAL RIGHTS, at xii–xiii (2005).

342. RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 271 (2004) (quoting "a knowledgeable associate" of Carter).

343. Petition for Writ of Certiorari, *supra* note 104, at 8–12.

he was about to fly from Montgomery to New York and that it was necessary to have an urgent meeting with Marshall and Wilkins.[344]

According to Carter, in that meeting the next morning, he encountered a leader of the NAACP Legal Defense and Educational Fund who initially did not believe the NAACP should fight the June 1 injunction and the order compelling the disclosure of the membership lists.[345] For myriad reasons, the working relationship between Marshall and Carter was fraught with tension,[346] but it was practical rather than personal considerations that led Marshall to counsel caution regarding the *Patterson* litigation. "Thurgood was adamant at first that we had to obey the court's order because our legal program relied on courts issuing orders in our favor. We insisted that these orders be obeyed by others, and we could not now act as if we were above the law."[347] Yes, in the days following the issuance of the injunction on June 1, the NAACP made it clear that its lawyers were instructed "to make necessary legal steps to obtain a hearing on the merits of the Alabama injunction at the earliest possible time with a view to dissolving the court's restraining order."[348] However, when the state upped the legal ante, Marshall advocated exercising conservative caution.

Had the NAACP taken this path of least resistance against a key component of the southern strategy of massive resistance, the law of associational freedom might look very different today (and not in a good way). It is largely because of Robert Carter that this situation did not materialize.[349]

A. "Fundamental to Our Democracy"

Carter was able to overcome Marshall's initial legal reluctance because of two things. First, unlike Marshall, he could count the First Amendment as one of his areas of legal expertise. For his LL.M. that he received from Columbia Law School in 1941, Carter wrote a thesis entitled

344. CARTER, *supra* note 126, at 150.

345. *Id.* at 150–52.

346. *Id.* at 136–37.

347. *Id.* at 150.

348. *Alabama Court Enjoins NAACP Units from Activity*, S. SCH. NEWS, July 1956, at 10 (quoting Channing H. Tobias, NAACP Chairman, following the organization's June 11, 1956, board meeting).

349. This was by no means the last time Carter advocated in favor of an aggressive litigation strategy while at the NAACP, thereby setting him at odds with many of the association's leaders. Famously, in 1968, Carter abruptly resigned, accompanied by the entirety of the legal and clerical staff of the legal department, in protest at the firing of lawyer Lewis Steel whom they believed had been let go in order to spite the legal department for its decisions to handle some particularly controversial cases. *Civil Rights: Quit-In at the N.A.A.C.P.*, TIME (Nov. 8, 1968), https://time.com/archive/6638588/civil-rights-quit-in-at-the-n-a-a-c-p/ [https://perma.cc/9K87-Q9SD]; CARTER, *supra* note 126, at 200–02.

"The Three Freedoms."[350] Although he subsequently "filed the thesis away and didn't look at it again for some sixteen years,"[351] it proved immensely important as he took control of the *Patterson* litigation. In the thesis, Carter surveyed and analyzed the Supreme Court's jurisprudence (through 1941) regarding freedom of speech, freedom of the press, and freedom of assembly.[352] Although much of that jurisprudence has evolved significantly, the first chapter of Carter's thesis remains profoundly important, especially regarding an understanding of his pivotal role in crafting the NAACP's *Patterson* briefs.

In chapter one, "Background and Function,"[353] Carter includes a section entitled "Function of the Three Freedoms in a Democracy,"[354] in which he makes numerous statements about the importance of the three freedoms, especially freedom of (political) speech—freedoms he describes as "rights and privileges fundamental to our democracy."[355] As much as he is optimistic about the future of the Court's First Amendment jurisprudence, Carter cautions against reliance on that institution because "the Supreme Court's role in the maintenance of these freedoms, at best, can have only a minor effect in their actual and vigorous preservation. We have long taken these liberties for granted. But history teaches that a people's liberty is never preserved without vigilance."[356]

Carter's writings about freedom of assembly give us the greatest window into the arguments he would make in his *Patterson* briefs:

> It is an easy matter to see the importance of freedom of speech and of the press. Freedom of assembly, however, is often considered secondary. Yet it is as necessary and as vital as the other two freedoms. Freedom of assembly is to free speech what freedom of circulation is to the press. If free speech is to be effectively exercised, freedom of assembly must be maintained. For the latter is merely a method of getting one's ideas before the public. Being free to speak would be much less valuable as a guaranty if one were not also free to assemble together a group of people for an open discussion.[357]

350. Robert L. Carter, The Three Freedoms (Aug. 1, 1941) (LL.M. thesis, Columbia University Law School) (on file with journal) [hereinafter Carter Thesis].

351. CARTER, *supra* note 126, at 32.

352. Carter Thesis, *supra* note 350.

353. *Id.* at 1–24.

354. *Id.* at 11–24.

355. *Id.* at Introduction.

356. *Id.*

357. *Id.* at 16.

In short, "if government is to remain the instrument of the people, freedom to speak and write concerning its activities, to assemble peaceably to exchange ideas about its conduct must not be whittled away."[358]

In addition to these well-formulated views on the importance of First Amendment freedoms, Carter also had firsthand experience of Judge Jones, whom he later described as "one of the state's corrupt and incompetent judges in Montgomery, Alabama."[359] Carter told Marshall that "Jones was an ignorant segregationist and his order was arbitrary and capricious. It would not stand up on appeal. To risk the safety of our members by obeying an order issued by that incompetent man was the height of irresponsibility."[360]

Ultimately, Wilkins (to whom Marshall deferred) made the decision to put the matter to the NAACP's Board of Directors; "every nonlawyer voted to defy the court order . . . . On the other hand, and indicating how conservative lawyers are, almost all the lawyers voted to obey the court's order."[361] The exception was Loren Miller, the California-based attorney who successfully argued *Shelley v. Kraemer*[362] and *Barrows v. Jackson*[363]—both involving constitutional challenges to state enforcement of racially restrictive housing covenants. In essence, it was Miller who cast the tie-breaking vote in favor of fighting the Alabama injunction.[364] Miller was only elected to the NAACP's Board of Directors in July 1956 (to fill the unexpired term of the late Joseph A. Berry),[365] and so casting this decisive and historic vote was one of his first official acts as a member of the Board.

On June 30, 1958, as soon as news of the Supreme Court's decision in *Patterson* broke, Clarence Mitchell (Legislative Chairman of the NAACP's Leadership Conference on Civil Rights) dashed off a telegram to Carter: "Congratulations on the legal skill that made the Alabama victory possible. You are blessed with the vision to see ultimate triumph in the midst of the shambles of temporary defeat. May you live long, never weary and move ever forward."[366] Carter did "move ever forward," in part because he knew that *Patterson* was far from an "ultimate triumph." In a

358. *Id.* at 18.

359. CARTER, *supra* note 126, at 149.

360. *Id.* at 151.

361. *Id.* at 152.

362. 334 U.S. 1 (1948).

363. 346 U.S. 249 (1953).

364. CARTER, *supra* note 126, at 151–52.

365. Letter from Roy Wilkins to Loren Miller, July 20, 1956, Part III, Box A26, Folder 2: NAACP Administration 1956-65, Board of Directors, Miller, Loren, 1956-64, NAACP-LOC.

366. Telegram from Clarence Mitchell to Robert Carter, June 30, 1958. Part V, Box 24, Folder 2: NAACP Legal Department Case Files, Alabama, *NAACP v. Alabama*, Related Cases, *State ex rel. Patterson v. NAACP*, 1958, NAACP-LOC.

July 3 letter to Shores, he wrote that he "never thought that I would ever know how it feels to save $100,000. I don't know about you, but I'm afraid I feel as poor as ever." He knew that there was "of course, a long fight ahead in Alabama before we are back in business there."[367] And fight, he did, ultimately "steer[ing] the . . . case through a tangle of 14 state and federal courts and the four Supreme Court appeals."[368] But that is a story for another day.

VI. ONE LINGERING QUESTION

Before bringing this Article to a close, the historical record of *Patterson* compels us to consider one lingering question: Were the initial legal papers in the case filed by Patterson and signed by Judge Jones on Thursday May 31 (the stated date of June 1 notwithstanding) and the June 1 press photo of Patterson handing the filings over to Register Jones simply publicity window dressing? Probably.

It is indeed curious that Fred Gray and Ruby Hurley received signed and dated (June 1) copies of the injunction at the same time in cities 100 miles apart. The *Alabama Journal* reports that "Gray was in the register's [sic] office immediately after the order was signed to see a copy of the injunction . . . ."[369] There is nothing unusual about this; Gray's office was a stone's throw from the old Pythian Temple building and his well-known association with the NAACP would have made him a logical individual for the Registrar's office to notify about the filing.

It is Hurley's receipt of the filings that raises the lingering questions we are concerned with here. Recall, that when Hurley answered the door the morning of June 1, she found herself face to face with two deputy sheriffs who presented her with the injunction signed by Jones.[370] This is why, when she returned to the phone, she said to her friend: "That is not the truth you are telling me. The injunction is not being signed, it is being given to me right now at my door."[371] In other words, if we are to believe the printed record, then at *exactly* the same time as the *Patterson* injunction was being signed in Montgomery, the very same *signed* injunction was being presented to Hurley in Birmingham, one hundred miles away.

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367. Letter from Robert Carter to Arthur Shores, July 3, 1958, Part V, Box 24, Folder 2: NAACP Legal Department Case Files, Alabama, *NAACP v. Alabama*, Related Cases, *State ex rel. Patterson v. NAACP*, 1958, NAACP-LOC.

368. "Supreme Court OK's NAACP Activities in Alabama," NAACP Press Release, June 5, 1964, 1, in Box 12, branch files/voting, folder 9, "NAACP Ban," the Dr. Howard Robinson Collection, Alabama State University Archives, Montgomery, AL.

369. *Court Issues Injunction Against NAACP in State*, ALA. J., June 1, 1956, at 1–2.

370. RAINES, *supra* note 123, at 134–35.

371. *Id.*

This led Hurley to the following conclusion: "They [Patterson's office] had issued to the press that it was being signed, but it had been done the day before. They could not have come a hundred miles from Montgomery to Birmingham in a matter of minutes."[372] If Hurley's conclusion is correct (and I think it is), then it serves to further emphasize the way in which the initiation of these legal proceedings was done to maximize positive political advantage for Patterson's office. This was, in part, achieved by harnessing the power of the press. By the end of the day, the AP story was front-page news in newspapers across the state, with over half the stories mentioning Hurley and indicating that she had declined to comment until such time that she had had an opportunity to read the legal papers she had just been presented with.[373]

CONCLUSION

On July 30, 1956, after Judge Jones imposed the $100,000 fine against the NAACP, he "ended the hearing by stalking off the bench."[374] This was the very rare occasion when Robert Carter lost his lawyerly cool in a courtroom. "As [Jones] was leaving the bench, I called him incompetent and corrupt, among other choice derogatory terms. This could have meant a personal citation for contempt, but he and Edmon L. Rhinehart [sic] were not interested in me. They had achieved their objective . . . ."[375]

As this Article shows, this "objective" was a direct attempt to oust the NAACP from the Heart of Dixie. The archival research laid out in the preceding pages shows that Professor Kalven was wrong, "as far as [he could] tell from reading cases,"[376] to categorize *Patterson* as a case involving tactics "centering chiefly on compelling disclosure of membership lists."[377] Instead, it was very much a litigious effort to "*directly* control" the organization.[378] Yes, the state of Alabama (primarily Attorney General John M. Patterson and Judge Walter B. Jones, but also, to a lesser extent Assistant Attorney General Edmon L. Rinehart) sought to achieve this goal by using an indirect legislative measure—in other words, a measure that

372. *Id.*

373. The following articles made mention of Hurley: *NAACP Will Halt Alabama Activities*, ALA. J. June 2, 1956, at 1; *Restraining Operation: NAACP Says It'll Abide by Injunction*, BIRMINGHAM NEWS, June 2, 1956, at 10; *NAACP Declines Immediate Comment*, DECATUR DAILY, June 1, 1956, at 1; *Birmingham NAACP*, HUNTSVILLE TIMES, June 1, 1956, at 1; *Leaders of NAACP Decline Comment*, SELMA TIMES-JOURNAL, June 1, 1956, at 2; and *No Comment by NAACP Leaders on Action*, TROY MESSENGER June 1, 1956, at 1. She was not mentioned in the June 1 issues of the *Anniston Star*, the *Dothan Eagle*, the *Opelika-Auburn News*, or the *Talladega Daily Home and Our Mountain Home*.

374. CARTER, *supra* note 126, at 152.

375. *Id.*

376. KALVEN, *supra* note 2, at 69.

377. *Id.* at 70.

378. *Id.* (emphasis added).

was not principally designed to put a nonprofit organization out of business for failing to disclose its members.

However, as this Article's historical research demonstrates, our analytical *focus should be on the end, not the means*. When one considers the nature of the *Patterson* litigation—not only the statute involved but also Alabama's litigation tactics and procedural maneuvering—it becomes clear that this was the very model of a major, general, and decidedly *direct* attempt to control the NAACP. And, as subsequent installments of this research will demonstrate, what the state tried to do, how the nonprofit organization responded, and how the courts ruled is as relevant today as it was back in the 1950s and early 1960s. To borrow and only slightly change Jason Robards's famous line in *All The President's Men*, nothing was riding on the *Patterson* litigation except the First Amendment, which guarantees the right to peaceably assemble, and the future of the country.[379]

379. ALL THE PRESIDENT'S MEN, *supra* note 6.